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# **MUHAMMADAN LAW**

PRINCIPLES  
OF  
MUHAMMADAN LAW

AN ESSAY AT  
A COMPLETE STATEMENT OF THE  
PERSONAL LAW APPLICABLE TO MUSLIMS  
IN  
BRITISH INDIA

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*SECOND EDITION*



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## TO MY FATHER

And if the world did know  
The heart he had  
'T would deem the praise it yields him, scantily desit  
—DATE

## PREFACE

---

I HAVE attempted in this volume to state, in the form of a code, the principles of Muhammadan law relating to the subjects on which it is enforced in British India ; to illustrate such principles by reproducing the effect of some of the more important or striking instances in which they have been applied in the texts of authority, or in cases decided by the British Courts ; and where necessary or desirable, to discuss the principles or their application. The language in which the principles are stated could have been made more uniform had it not seemed necessary to adhere somewhat closely to the words used by the authorities on which they are based.

Many years have elapsed since the first portion of what was meant to form a chapter of this work was written. It was written with the object of presenting the law of inheritance as a coherent whole, instead of a series of more or less detached rules. I had then had some experience as a lecturer on law, and had found that while it is an easy task to make the students learn by rote a few rules which suffice for solving most questions relating to inheritance, most students are apt to overlook the fact that there is anything like a scheme underlying the rules of law ; the consequence being that when their memory is at fault they cannot avail themselves of the aid of inference and reasoning as an index or corrective. It need hardly be said that the teaching of any branch of law on a system

which relies mainly on memory, is an injustice to the student no less than to the subjects,—instead of being a training to the mind, it is made to subserve a tendency which it is the object of education to guide and often to counteract. It seemed necessary, in order to safeguard my lectures from this danger, to deal with the law of inheritance in a manner different from that which is usually adopted in existing books on Muhammadan law: the substance of my lectures on the law of inheritance was the first portion of the subject matter of this work which was put on paper with a view to publication. It has since been entirely re-written so as to harmonise with the rest of this work. When I approached the other branches of the law, I found that in a less degree, but in a more insidious form, similar criticism could be applied to their usual presentations: the available texts on Muhammadan law cannot be said to count among their many excellences the merit of giving prominence to the fact that a very few leading principles underlie each subject of the law, and that the whole of that subject is an exemplification of those principles. In regard to the law of inheritance, not much thought is needed to show that the rules must have some common bearing upon, and some relation to, one central fact. Hence, in regard to this branch, efforts are more frequently made to trace out the scheme of the law. But the fate of the other branches of the law is less fortunate. It is forgotten that Muhammadan law started with a few simple rules, the continued expansion of which forms the body of the law now known to us; and that the most important mode of expansion was undertaken not piecemeal, but in the form of comprehensive expositions of the law as a whole: so that whatever other features the rules of Muhammadan law may have, they must have the characteristics of inter-dependence and coherence.

It will be seen, therefore, that though this work is couched in a form to facilitate reference by the busy practitioner, it has been undertaken with the object of elucidating the principles of the law. I have, at the same time, endeavoured to include every rule to be found in the original texts, which has either been applied, or is likely to be applied, to Muslims in British India. Many of the latter class of rules have had to be extracted from books hitherto not translated into English. In addition to the original texts, it is believed that a reference will be found to every reported decision of any importance pronounced by the courts in British India or by the Privy Council in appeal from such courts; the decisions of English Courts have been mentioned where English law may be applicable on the grounds of justice, equity and good conscience; and references to Hindu, Roman, and other systems of law have frequently been made in the hope that they will be of interest, and may sometimes throw light on the subject under discussion.

No one can be more conscious of the possibilities of error in a work of this nature than its author, and I can only say that every effort has been made to avoid error. "Where with intention I have erred,"—where, I mean I have chosen to differ from the views expressed by authorities whose reputation would have been sufficient to give dignity even to erroneous views (assuming them to be capable of error), or where I have strayed into expressing opinions on points uncovered by authority, I trust that I may find justification in the fact that it is beneficial in the interest of the law as a science that authors should venture where judges fear to tread.

From one form of boldness, however, I have studiously refrained. I have never dared consciously to differ from the views expressed in the original texts of Muhammadan law. This forbearance may no doubt itself appear to be

of questionable wisdom, since the exhibition of some contempt for the ancient text writers has, not infrequently, been the main credential of a right to speak with authority on Muhammadan law. My attitude towards the texts is, however, based on the fact that seeming inconsistencies or errors in the texts are, in many cases, only examples of that conciseness which is possible, and even necessary where both the writer and reader carry their law in their heads, and do not keep it stored up in libraries; at other times they exemplify the desire of the old authors to write in such a manner as not to be easily understood by those who do not devote long years of study to the subject, or who seek to be their own teachers instead of sitting at the feet of a master. This frame of mind is well illustrated by such maxims of the Christian theologians as "*Si quis capere potest, capiat*" or "*Qui semetipsum docet, asinum habet discipulum, asinum magistrum.*" When, on the other hand, it is remembered that the texts are printed without any marks of punctuation, without arrangement into paragraphs, without any distinction in the size of the letters, without footnotes, and seldom with any headings, with hardly anything to indicate where one word ends, and another begins—the marvel is that they should be intelligible, in most cases, to those who refer to them only occasionally and piecemeal. Nothing could testify more emphatically to their lucidity.

I have, of course, not considered myself bound by the arrangement or classification of the various subjects usual amongst the Arab text writers. The sequence of topics prevalent among them, though it still preserves traces of logical analysis, has become cumbrous and not seldom confusing, owing to the texts, as they were originally written, having been overlaid by the insertion of details relating to allied topics, which were not present to the minds of the original authors. Thus, for instance, it comes



about that the whole law of maintenance is dealt with in the texts, in the book on divorce. The explanation being, no doubt, that the earliest texts must have contained a casual reference merely to the maintenance of a divorced wife, then as occasion arose, rules about maintaining an undivorced wife were added, and then the rules about maintaining all other relations—each succeeding set of rules being placed by the side of the topic most nearly allied to itself.

My indebtedness to previous writers which has been acknowledged in the course of the book, must be repeated here, and I must add that the debt is frequently greatest where acknowledgment seems out of place—where, for instance, a difficult question has been so elucidated that its obscurity has been for ever dispelled, and all subsequent treatment of it must follow the same method that has been proved to be so successful.

With reference to the help that friends and well-wishers have given to me, I can hardly express myself adequately: in some cases tendering thanks is in itself a privilege, and accepting them not far removed from conferring a fresh obligation. It is owing to the encouragement I received from Sir Basil Scott, Chief Justice of Bombay, that I decided to print my manuscript copy. Mr. Justice Bachelor and Mr. Justice Heaton, have with great kindness read or looked over portions of the book as they have been printed, and have evinced such interest in the book, as even to lighten a task which has ever been in itself a labour of love. Mr. S. E. Kurwa, Barrister-at-Law, has been kind enough to read a great portion of the work, in manuscript and in proofs, and verify most of the authorities cited, and has checked and corrected the table of enactments. Amongst other friends who do not belong to the law I must mention Shaikh Faizullahbhai Sahib, Principal of the Anjuman-i- Islam Schools, where I received

a part of my early education, and thank him for translating texts from the Arabic, which he is eminently qualified to do by his wide and precise knowledge of that language, by his familiarity with books on Muslim law and theology, and by that modesty of temperament which made him ever willing to consider such suggestions as I could make to ensure the accuracy of his renderings. I barely refer to Mr. Hasan Latif, and refrain from mentioning more of such friends as I fear that those who are not lawyers prefer to have little connection with that portion of human activity with which lawyers are concerned.

*January, 1913.*

F. B. T.

## P R E F A C E TO THE SECOND EDITION

IN this edition I have noted the authorities up to date; some new "sections" have been added, and slight changes made in the method of presenting the subject. In the first edition I often included in a single section several rules of law which were intimately connected. But this made some sections unduly complex; and occasionally caused important rules of law to be buried in a sub-clause of a sub-section. I have, therefore, in this edition cut up each such section into several, numbering them independently; and have tried to avoid the danger of the context being overlooked either by a direct reference to the connected sections, or by the elaborate headings, sub-headings and marginal notes, which it is hoped will give a true orientation of the rule in question. I trust that this alteration will meet with the approval of a distinguished critic who was kind enough to commend the arrangement even as it was in the first edition.

I have to thank Mr. S. E. Kurwa of the Bombay Bar for his having altered and added to the index so as to adapt it to the present edition. Several friends have been kind enough to point out clerical or printer's errors, amongst whom I must specially thank Sir Lawrence Jenkins and Mr. J. D. Inverarity.

*June, 1919.*

F. B. T.



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# MUHAMMADAN LAW

## CHAPTER I

### INTRODUCTION

#### *§1.—The Sources of Muhammadan Law.*

IN tracing the history of legal institutions we must distinguish between two classes of forces operating on their development and growth. These forces are either the result of conscious efforts at improvement, made by persons who exercise authority and power, or they are the unseen currents of thought, which effect imperceptible changes, often against the professed ideas of the time. In the earlier stages of society, men are not governed by strict law; its place is taken by custom, which prescribes courses of conduct, that are "semi-consciously followed and enforced rather by instinct and habit than by definite sanctions." Hence customs are flexible, and susceptible of spontaneous variation to keep pace with the development of public opinion. Writers on Muslim law have been too apt to take into consideration only those forces that have been applied consciously, after the spread of Islam,—and to ignore those rudimentary ideas, which, in the words of Sir Henry Maine, "are to the jurist what the primary crusts are to the geologists, and which contain potentially all the forms in which Law has exhibited itself." <sup>1</sup>

It is not surprising indeed that the personality of the Prophet Muhammad should loom so large in the minds of all who approach any matter associated with him or his

<sup>1</sup> "Ancient Law," 3rd Ed., 3.

religion, as to draw them away from the study of any thing not connected with him ; for "more than any man that ever lived Muhammad shaped the destinies of his people."<sup>1</sup> But law has to be traced for its true origin to a period far anterior to its articulate enunciation ; long before an idea can be crystallised into a positive enactment, it must have floated in the minds and hovered over the actions of the people, amongst whom it subsequently takes definite shape. Thus, to take our start from the Quran for finding out the first origins of Muslim institutions, is to leave out of consideration a great portion of the really illuminating history of those institutions ; it is to omit to study that which would often be the only explanation of the varying forms taken by the rules of law, or the interpretations given to them, and of the controversies and disputations that puzzle later generations ; it is to commence our study, not when the phenomena with which we have to deal are few and simple, but when they have become perplexing from their number and diversity.

The Quran not  
a code :

—neither in  
form

Those who have written on the laws of the Mussulmans, and have ignored the customs and usages that prevailed before the Quran was revealed, cannot take refuge under either the form or substance of that book. For, though the Quran resembles a code in this, that it derives all its authority from itself, and came into force from being promulgated, as such, yet it does not, in any portion of it, profess to be a code complete in itself. It was given to the world not as such a code, but in fragments, during a period of 22 years (609 to 632 after Christ) ; and it was never collected and arranged in the life-time of the Prophet. At his death the Quran consisted of the passages taken down on palm-leaves or skins "put promiscuously into a chest observing no order of time."<sup>1</sup> Abu Bakr (who succeeded the Prophet as Khalifa, and died in 634, after a

<sup>1</sup> Nicholson's "Literary History of the Arabs," 179.

rule of two years) had the various passages forming the Quran, collected for the first time. Zaid ibn Thabit, who was entrusted with the work, says: "I sought for the Quran and collected it from the leaves of the date and white stones and the breasts of people who remembered it." "What Abu Bakr did else, being, perhaps, no more than to range the chapters in their present order, which he seems to have done without any regard to time, having generally placed the longest first."<sup>1</sup> Another sixteen years elapsed, and then 'Uthman ordered the second collation of the Quran; and then (in 650 after Christ, *i.e.*, 18 years after the death of the Prophet) it took the textual form in which we have it at the present day. All the transcripts now existing are from 'Uthman's edition: for the varying copies then existing were committed to the flames. Since then there has been no alteration. There is, says Sir William Muir, in his "Life of Mahomet," "probably no other work in the world which has remained twelve centuries with so pure a text."

The Quran differs from a code in regard to its <sup>matter in</sup> substance, contents no less than in regard to its form. A very small portion of it has any reference to law. The following verse may throw some light on its object and purpose—

"That is the Book<sup>1</sup> There is no doubt therein a guide to the persons who believe in the unseen, and are steadfast in prayer, and of what we have given them, expend in alms, who believe in what is revealed to them, and what was revealed before them, and of the hereafter they are sure."

Quran, II, 1

It will thus be seen that the main purpose of the Quran <sup>Islam itself a</sup> is not that of a code. It, indeed, gives expression to <sup>confirmation,</sup> Islam as a religion, but this it does most often, unconsciously, if the expression may be permitted, and spontaneously, rather than categorically, in the form of reflections on

<sup>1</sup> See Sale's "Quran" Preliminary Discourse, section J.

life, and about the future, rather than of dogmas; and "religion" in this connection must be understood in a sense much broader than that which we give to that term at the present time: it must be understood as a "divine influence underlying and supporting every relation of life and every social institution."<sup>1</sup> And still the Quran is one of the shortest of the great religious books of the world—being less lengthy than the New Testament, taken by itself. Again, Islam itself is not promulgated in the Quran as a new doctrine, but as a continuation of the old religions that were brought by the Prophets before Muhammad, to their tribes—

"Say ye . . . we believe in God, and that which hath been sent down to us, and that which hath been sent down to Abraham and Ismail and Isaac and Jacob and the tribes, and that which hath been given to Moses and to Jesus and that which was given to the Prophet from their Lord. No difference do we make between them . . . and to God are we resigned."

Quran, II, 130.

Illustration  
from law of  
inheritance.

Nor is this so only with the purely religious part of Islam. Even the law of inheritance, a subject which is distinguished in the language of the Arabic lawyers by the term '*farā'id*,' i.e., the "ordinances of God,"—because the Quran is fuller and more explicit on this branch of the law than on any other, . . . is not completely stated in the Quran. We find, for instance, that the Quran is silent as to those rules of succession that were already established by usage, and which did not require alteration; and therefore nothing is said in it about the rights of sons, and other males, to inherit, except in so far as the customary law relating to them was modified in favour of females and others.

The legal portion of the Quran must therefore be compared, if at all, to an amending Act, rather than to a



Code. Had it been otherwise, it would have lost much of its force and conciseness; for the Arabs who were tenacious of their own customs, were well acquainted with them and wanted no repetition of them.<sup>1</sup>

Thus the very circumstance that their old usages and customs were so familiar to the Arabs as not to require repetition, was a cause why they came to be unduly neglected in the first days of Islam, and why the Quran is always taken as the starting point for the study of the Law. But the course that may have been natural and convenient in countries in which, and at a time when, the Pre-Islamic customs of Arabia were familiar to all, is followed, 'cessante ratione,' at the present day in India,—and writers on the law of inheritance commence the subject, by treating of what is laid down in the Quran without referring to what preceded it. The result is that the scheme underlying the law is buried in a number of disconnected details, which become bewildering, as the reader has no means of discerning their relation to the parent theory.

But there is another, and more lasting, cause for the neglect of all that preceded the Prophet. There soon arose, on the one hand an enthusiastic admiration and love for his character, and on the other, a contempt for the period before Islam, and all connected with it. It is difficult for non-Muslims, and for men who are not acquainted with the character of Muhammad, to have any conception of the feelings with which he came to be regarded,—“with his mighty powers of imagination, elevation of mind, delicacy, and refinement of feeling.”<sup>2</sup> Instances may be easily multiplied to show how eager the Mussulmans were from the earliest times to see the Prophet, or to be able

1 The Arabic word *muḥarrar*, means monuments recording the customs and usages of the people. It is allied to *raḥ* which originally meant a mark, and then acquired the meaning of custom and law. *Ruḥm* is the plural of *raḥ*, and is a well known term in revenue matters.

2 “ ‘Ten years,’ said Anas, his servant, ‘was I about the Prophet, and he never said as much as “in” to me.’ . . . The worst expression he ever made use of in conversation was, ‘What has come to him? May his forehead be darkened with mud!’ When asked to curse some one,

Causes why Pre-Islamic customs not studied: (1) known to Arabs.

(2) Admiration for the Prophet, and contempt for the days before him.

to claim the least connection with him.<sup>1</sup> How strongly the personality of the Prophet, as a guide in the smallest concerns of life, dominated the minds of men of the greatest intellect and learning, may be exemplified by the fact that the Imam Ibn Hanbal<sup>2</sup> would not eat water-melons, because, though he knew that the Prophet ate them, he could not discover in what manner he did so.<sup>3</sup>

4 The reforms  
of Islam  
transformed  
Arab society.

Nor did the desire to refer to the Prophet as the great exemplar of life, and to leave the Pre-Islamic customs and usages unnoticed, save in a casual manner, arise merely from a personal admiration for the Prophet: the reforms introduced by Islam were such as to bring about a complete transformation of the society of the Arabs. So conscious were the Arabs themselves of this change, that they began to refer to the period before Muhammad as the 'ayyam-il-jahiliyya, i.e., "the period of ignorance or rather wildness or savagery, in antithesis to the moral reasonableness of a

he replied, 'I have not been sent to cure, but to be a mercy, to mankind.' He visited the sick, followed any one he met, accepted the invitation of a slave to dinner, mended his own clothes, matted the goats, and waited upon himself." "He never first withdrew his hand out of another man's palms, and turned not before the other had turned." "He was the most faithful protector of those he protected, the sweetest and most agreeable in conversation. Those who saw him were suddenly filled with reverence, those who came near him loved him. They who describe him would say, 'I have never seen his like, either before or after.'" Lane-Poole's "Muhammad," p. xxiv. See Tirmidhi's *Jami*, 410.

1 E. g. "Is it possible, father of Abdullah, that thou hast been with Muhammad?"—was the question addressed by a pious Muslim to Hudzila in the Mosque of Kuta. "Diest thou really see the Prophet, and wert thou on familiar terms with him?"—"Son of my father, it is indeed as thou sayest."—"And how wert thou wont to behave towards the Prophet?"—"Verily we used to labour hard to please him."—"Well, by the Lord!" exclaimed the ardent listener, "had I but been alive in his time I would not have allowed him to put his blessed foot upon the earth, but would have borne him on my shoulders wherever he listed."—Ishma'il bin Muhammad al-Kalbi (died 201 A. H.)

*Sirat-un-Nabi* (ed. by F. Wustenfeld), 265. "Upon another occasion the youth Hudzila listened to a companion who was reciting before an assembly how the Prophet's head was shaved at the Pilgrimage, and the hair distributed amongst his followers. The eyes of the young man glistened as the speaker proceeded. He interrupted him with the impatient exclamation:—'Would that I had even a single one of those blessed hairs! I would cherish it for ever and prize it beyond all the gold and silver in the world.'"—Al-Waqidi (d. 208 A. H.), *Kutub-ul-Mughazi*, 279.

2 The leader of one of the four schools of the Sunnis. His reputation for learning was so great that 80,000 men and 60,000 women are said to have attended his funeral.

3 This was, no doubt, an extreme case, and may go towards justifying the remark with which Abu Ja'far-at-Tahari explained his omission to refer to the opinions of Ibn Hanbal in his great commentary: "Ibn Hanbal is not a theologian," Tahari is reported to have said, "but a traditionalist" (Arif bin Sa'ad's *Kamil-ul-Tawarikh* quoted in Prof. Browne's "Literary History of Persia," I, 360). Muhammad Ibn Is'hak in his *Fikr* (6th Discourse, "On Jurisprudence, the Jurists and Traditionalists") does not deal with Ibn Hanbal's teachings, though there are separate sections dealing with Malik, Abu Hanifa and Shafi'i.

civilized man.”<sup>1</sup> For the Mussulmans were taught by their religion,—

“To fear God, by which ye beseech each other and respect women, who have borne you, for God is watching over you.”

Quran, IV, 1.

and that,—

“It is not righteousness that ye turn your face towards the East and to the West, but righteousness is in him who believeth in God . . . and who giveth wealth for the love of God to his kinsfolk, and to orphans, and the needy, and the son of the road, and to them that ask for alms, and for the freeing of slaves, and who is instant in prayer and giveth alms, and those who fulfil their covenant when they covenant, and the patient in adversity and affliction, and in time of violence; these are they who are true, and these are they who fear God.”

Quran, II, 172.

Hence it was natural that they should think with horror of the days of superstition and idolatry, when the widow formed part of the estate of her deceased husband and could be “inherited” like chattels and goods, and when daughters were buried alive. The believers in the one God thus distrusted all the precedents of the days of brutal ignorance, and feared to take anything from the old manners and customs, unless there was some living proof that the Prophet of God did not disapprove of it.<sup>2</sup>

These feelings find no equivocal expression in the law: the Pre-Islamic customs are hardly ever referred to by the

Quran taken  
starting point  
and FIRST  
SOURCE of  
law.

<sup>1</sup> See Nicholson's "Literary History of the Arabs," 80.

<sup>2</sup> Ibn Hisham (d. 213 A. H.) in his recension of Ibn Isahq's Life of the Prophet reports Ja'far Ibn Abu Talib as addressing the Negus of Abyssinia in the following terms, which show how the early Muslims regarded the *Jahiliyya*: "O King! We were a barbarous folk, worshipping idols, eating carrion, committing shameful deeds, violating the ties of consanguinity, and evilly entreating our neighbours, the strong amongst us constraining the weak; and thus we continued until God sent unto us an Apostle from our midst, whose pedigree and integrity and faithfulness and purity of life we knew,

to summon us to God, that we should declare His unity, and worship Him, and put away the stones and idols which we and our fathers used to worship in His stead; and he bade us be truthful in speech, and faithful in the fulfilment of our trusts, and observing of the ties of consanguinity and the duties of neighbours, and to refrain from forbidden things and from blood; and he forbade us from immoral acts and deceitful words, and from consuming the property of orphans and from slandering virtuous women; and he commanded us to worship God, and to associate naught else with Him, and to pray and give alms and fast."

Muslim jurists<sup>1</sup> for the purpose of elucidating the law: the Quran is for them the first source of the law, in point of time, no less than in point of importance: and if the Book is silent, it is supplemented by or interpreted in the light of the practice of the Prophet. Traditions recording the actions and sayings of the Prophet (which are called the 'sunna,' 'hadith' or 'riwayat') thus take their place as the second of the 'asls'<sup>2</sup> or main sources of the laws and institutions of Islam.

Traditions.—  
SECOND SOURCE.

There are frequent references to the authority of the traditions in the sayings of the Prophet himself; e.g. "The Prophet said 'that which the Prophet of God hath made unlawful is like what God hath made so.'"<sup>3</sup> Again Anas reports: "The Prophet of God said to me 'Son, (if you are able,) keep your heart, from morning till night, and from night till morning, free from malice towards anyone.' Then he said 'Oh my son, this is one of my laws, and he who loveth my laws verily loveth me, and he who loveth me will be with me in paradise.'"<sup>4</sup> Muhammad seems to have foreseen the danger that might arise from the zeal of too devoted followers; for, when his advice on a point of horticulture was followed with scrupulous care, he said, "I am no more than man, but when I enjoin anything respecting religion, receive it; and when I order anything about the affairs of the world, then I am nothing more than

<sup>1</sup> The following passages contain references to the customs of Pre-Islamic times. "The Arabs observed some of the prohibitions of the Quran, for they did not marry mothers or daughters or aunts on either side, and the grossest thing they did was that a man took a two sisters in marriage at the same time or that the son succeeded to his father's wife." Shahrastani's *Kitab al-Milal wa'l-Nihal* (ed. by Cureton), p. 110. "The Arabs had their own laws which they followed, and Islam maintained some of them and repealed others. . . Their custom forbade marriage with the mother and the daughter: this was maintained. They used to disapprove of a man marrying the widow of his father and Islam forbade this altogether. The practice of putting the right hand of the thief prevailed

among them, and Islam upheld this." *Sab' al-Lisn al-Jalilah*, p. 102. I am indebted for the last quotation to Mr. Justice Abdur Rahim's articles in the *Columbia Law Times*, see Vol. VII, pp. 101, 136, 255.

<sup>2</sup> *Asl* is usually translated "Source,"—on the ambiguity of which English word, see Austin's "Jurisprudence" Lect. XXVIII (4th Ed.), II, 526-8, and see Holland's "Jurisprudence" (7th Ed.), 49, on its three senses: (1) The quarter from which we obtain our knowledge, (2) the mode in which, or the persons through whom, those rules have been framed, which have the force of law; and (3) the authority which gives them that force.

<sup>3</sup> *Muschat al-Mawathib*, I, 6, 2,

man."<sup>1</sup> And again with respect to the relative authority of the Quran and the 'sunna' he said: "My words are not contrary to the words of God, but the word of God can contradict mine."<sup>2</sup>

But though the Pre-Islamic usages have been ousted from all formal recognition in Islam, and the 'sunna' is made to take their place, yet a good many of the old customs must be lying embedded in the traditions themselves. For, taking the usual classification of the 'sunna,'—into the 'sunnat-ul-f'el' (i.e., the traditions about what the Prophet did himself), the 'sunnat-ul-qawl' (that which he enjoined by words), and thirdly the 'sunnat-ul-taqir' (that which was done in his presence, without his disapproval),—the last must have represented largely the original customs and usages of the Pre-Islamic Arabs. And, again, whenever the standard set by the example and precept of the Prophet was found to be too novel or too high, there was a natural tendency, perhaps unconscious, to revert to the old customs and views of life. This tendency accounts for the rules of divorce, which in practice have fallen from their high estate, and which are recognised by law, though admitted to be sinful,<sup>3</sup> for the stringent way in which the rights of females to inherit are interpreted, though they interfere with logic and principle, and for many similar developments of the law.

The task, however, of investigating the sources from which the ideas and notions underlying the Muhammadan law arise, becomes difficult, owing, in the first place, to the fact that we have seldom any means of distinguishing, in the 'sunna,' what portion of the practice of the Prophet was a departure from the pre-existing usages: even where he is reported to have disapproved of any course of conduct, there is often nothing to show whether the course of conduct

'sunna' now the repository of many old customs (i.e., of such as were not disapproved by the Prophet).

<sup>1</sup> *Mishnat-ul-Muhammadiyah* I., 6, 2.

<sup>2</sup> *Ibid.* I., 6, 3.

<sup>3</sup> See s. 142, below, and comment thereto.

disapproved by him was in accordance with a prevalent Pre-Islamic usage.<sup>1</sup> It must, therefore, be admitted that the traditions can, after all, throw only a fitful and imperfect light on the institutions of the Arabs before Muhammad—too imperfect very often to allow of our putting forward any theory which is not gratuitous and premature. Yet, we have the authority of Sir Henry Maine, for thinking that even theories which may be so characterised, “rescue jurisprudence from that worse and more ignoble condition not unknown to ‘ourselves,’ in which nothing like a generalization is aspired to, and law is regarded as a mere empirical pursuit.”<sup>2</sup>

Having recognized how important and integral a part of Islamic institutions the Pre-Islamic customs are, the reader will gather, from what has just preceded, how, and through what reasons, the second stage in the history of Muhammadan law is reached,—when all avowed dependence upon the aid of those customs is thrown off by the ‘*faqih*s’ (canonical lawyers) of Islam. Henceforth the development of the law has necessarily to be referred only to forces contained within Islam itself, —*viz.*, the Quran and the traditions.<sup>3</sup>

Pre-Islamic  
customs as  
much ousted

<sup>1</sup> Scholars, who have studied the early history of Muslim institutions, have been able to glean information “scanty and uncertain at best” from the following and similar sources. The great lexicons such as the *Lamun-ul-Arab* by Jamaluddin ibn Mukarram (d. 711 A. H.), and the *Qamus* of Fierozbadi, the collections of poems, such as the *Katab-ul-Aghani* of Abul Faraj Isfahani, the *Iqd al-Farid* by Ibn Abi Rabbih (the laureate of Abul Rahman III. of Spain), and the *Hammam* of Habib bin Ayya (d. 245 A. H.). The Arabs themselves have a saying that “poetry is the public register of the Arabs.” Allied to poetry, are the proverbs, of which there are collections by Motazza<sup>3</sup>-ul-Zabbi (cir. 170 A. H.), and Mas'udi (cir. 223 A. H.). Then there are the geographical works of Hasan ibn Ahmad al-Hamadani, named *Juzrat-ul-Arab*, and *Al-Khul*. The seventh book of the latter work treats of the traditions of Pre-Islamic times. The accounts of modern writers such as Lane and Burton, on the customs and manners now prevailing in Muslim countries, are also helpful. Much information is to be obtained from the Commentaries on the Quran by Tabari, Zamakhshari and Baihdawi,

Ac., on those portions of the Quran which altered the pre-existing usage,—notably about infanticide (Quran, VI, 137), orphans, and women (*ib.* IV, 18-20). Mr. Price and M. Caussin de Perceval have made full use of these sources in their books. See also Prot. de Goeje's Article on “*Falaki* and the Early Arab Historians.” In the *Encyclop. Britt.* (9th Ed.) XXXIII—1, et seq. Long after this was written, Mr. Justice Abdur Rahim's Book on “*Muhammadian Jurisprudence*,” made its appearance. Its first pages show that the views expressed here are not opposed to those of persons who are far better qualified to speak on the subject.

<sup>2</sup> “*Ancient Law*,” 3rd Ed., 175.

<sup>3</sup> What has been said above about the Quran, and the *sunna*, may afford some explanation of the fact that writers on the law of Inheritance are guilty of so gross an inversion of the historical order in the treatment of their subject, as to begin their exposition of the subject with a statement of the laws contained in the Quran, instead of dealing first with the general scheme on which the system is based—as though it would be detrimental to the dignity and authority of the Quran if it were considered

So long indeed as the Arabs were confined, in their activities, to a portion of Arabia, the Qur'an and the reports about the practice of the Prophet were ample for all their affairs. But, in the course of the twenty years that the Prophet gave the law, - ten of which were passed in his early struggles, before his influence was of a nature to affect the conduct of the Arabs as a nation, - he could not possibly have met with all the varied cases that would spring up in the later days of Islam, when it spread from Arabia to Persia and Spain. How rapidly the occasion arose for expanding the law, may be more easily stated, than realised. Within twenty-three years of the advent of the Prophet, Damascus was taken. Syria and Mesopotamia were added in the course of four more years. Another four sufficed to carry the armies of the Khalif to Egypt and to Persia. In the 41st year of the Hijra the Muslims were at Herat; in the 56th year, at Samarcand. Carthage fell in the 74th year; Toledo in the 93rd.

Necessity of rapid expansion of the law in the 1st century of the Hijra.

These armies did not go merely for conquest. The dynamic force that roused the Arabs to such unparalleled activity was religion: <sup>1</sup> the Arab armies were always accompanied by theologians and teachers of religion, for giving to the conquered nations the light of Islam.

If, during all these years of conquest, the laws of the new religion had consisted of only the few legal rules, contained in the Quran, and, if there had been nothing else to fall back upon, but scanty reports of the practice of the Prophet, it is plain that the local laws and usages could have been displaced only to a very slight extent, and we should have had independent systems of Islamic law for each country where that religion had spread - each system based on the laws of the particular country, as altered

Pro: local Codification of the law by Muslim 'faqih's.'

In its chronological order, after the Pre-Islamic customs and the portions of the *sunna* which leave the early usages unaltered.

<sup>1</sup> "The Muslims were the army, and their wars were for the faith, and not for the things

of the world;" Ibn-ul-Thiqta's *Al-Fakhr* (ed. by Ahlwardt, 1860, 101). There is a later edition of this history by Prof. Derenburg, 1895. I have quoted from Prof. Browne's rendering.

by a few new principles introduced by Islam. The law relating to land partially exemplifies this process. But that is an exceptional case. As a rule, it may be said, that, though we have many schools of Muhammadan law, these schools have not a territorial, but a sectarian basis. The laws of the Sunnis and Shi'ahs may differ, but the followers of the same sect, whether in Algeria or in India, are governed by the same laws. This unity in the laws of the Mussulmans arises from the fact, that, at the same time that the new faith began to spread, there arose a number of jurists distinguished alike for their zeal for Islam, and for their ability to systematize the science of law,—who wrote treatises that supplied the place of codes for the Mussulmans, transforming Muhammadan law from a few detached rules to a complete system of jurisprudence.<sup>1</sup>

Political  
influences on  
the law.

For the purpose, however, of following the main currents of thought that may be traced in the expansion of Islamic ideas, it must be recalled to memory, that, after the death of the Prophet, his first four successors (called 'al-khulafaur-rashidūn' or "the just Khalifs") carried on the Government of the Muslim empire in much the same manner as the Prophet had done.<sup>2</sup> This course was natural, not only because of their personal characters, but because the memory of the Prophet was so recent that any departure from his practice would have received violent opposition. The earlier Khalifs were, at the same time, actively and avowedly assisted by an advisory Council of the 'as-háb' (companions) of the Prophet, who could well claim to be the repositories of the thoughts and ideals of the Prophet. But this did not last long. The assassination of 'Ali, the fourth Khalif, was followed by the accession of Mu'awiyah

<sup>1</sup> Prof. Muza Kazim Beg of the University of St. Petersburg, in tracing the Progress of Islamic Jurisprudence (*Journ. Asiat. Soc. Quatre*, Tom. XV., 158, et seq.), mentions the names of 27 eminent *faqih*s who died within the first century of the Hira, and, as he says,

the list is by no means exhaustive.

<sup>2</sup> The government of the Prophet and the first Khalifs, is described in the *Al-Fakhr* in an interesting passage, which is set out in Prof. Brown's "Literary History of Persia," I, 188, 189.



(A. H. 40), a shrewd ruler, more of a statesman, than a religious head. The majority of the 'Umayyad dynasty (as the descendants of Mu'awiyah were called) were kings of the same character, if not of the same ability, and their support of Islam was actuated far more by worldly motives than could ever be attributed to the "just Khalifs."<sup>1</sup>

It was during the reign of the 'Umayyads that the full possibilities of the traditions, as a source of the law began to be realized: it was felt to be an enormous power in the hands of the authorities, to be able to rely on accounts of the practice of the Prophet which could be so easily manufactured. The third class of the traditions—the 'sunnat-ul-taqrir,' resting as it does on the tacit approval of the Prophet, lent itself to most easy manipulation for the support of any course of conduct approved by common sentiment, or desired by the legal authority of the time. For, the 'sunna' is authoritative only so far as its contents go, whereas the Quran has its legal force in itself, and its very words constitute the law; and the two differ from each other in the same way as the unwritten law, of the English lawyers, differs from what they call written law:<sup>2</sup> the 'sunna' could, when occasion required, be explained and distinguished, with far greater ease than the Quran. Hence, it is not surprising that the "forging of traditions became a recognised political and religious weapon." "While every impartial student of Islam," says Mr. Nicholson, "will admit the justice of Ibn-Qutayba's<sup>3</sup> claim that 'no religion has such historical attestations as Islam,' he must at the same time cordially assent to the observation made by another Muhammadan, 'In nothing do we see pious men more given to falsehood than in Tradition,'"<sup>4</sup>. To this

Traditions,

Nature of their authority.

Forged traditions.

<sup>1</sup> Walid II. (125-26 A. H.), one of the last of the 'Umayyads, went so far as to suffer his concubines to take his place in public prayer, and to use the Quran as a target for his arrows Chauvin's *Essai Sur l'Histoire de l'Islamisme*, 179; *Al-Fakhr*, 159.

<sup>2</sup> Austin's Jurisprudence I. 195.

<sup>3</sup> Died 276 A. H.; he was for some time Qazi at Dinawur, the author of *Kutub-ul-Ma'arif*, *Shu'ar Wa'l Shu'ara*, *Adab-ul-Katib* and *Uyun-ul-Akhar*.

<sup>4</sup> "Literary History of the Arabs," 145.

statement, the fact that out of the vast store of the 'sunna,' Abu Hanifa (A. H. 80-150) is said to have considered only 18 as trustworthy, affords an authority that needs no comment. The process of forgery might have been stopped, had some such steps been taken for the early collection of the traditions in an authentic and authoritative form, as was done with the Quran. But in the days of the first Khalifs the life of the Prophet was too vividly present before their minds for any such action, and later some of the staunchest friends of Islam were, for various reasons, opposed to the traditions being collected,—one of which was a fear that, if they were put in writing, they might come to compete with the Quran itself.<sup>1</sup>

Collections of traditions.

It was only in the reign of 'Umar II. (99-101 A. H.), and, it is said, at his special request, that Abu ibn Shuhab-az-Zuhri (who died in 120 A. H.) made the first known collection of the traditions. At about the same time, Abdul Malik ibn Juraij made another collection. These collections were, however, arranged, not according to the subjects with which they deal, but according to the names of the companions relating them, and were thus called 'Masnads,' which means "attributed to, or related, or alleged (on the authority of another)." It is not till the appearance of the 'Muwatta' of Malik ibn Anas (who died in 179 A. H.) that we get a 'Musannaf,' i.e., a collection of traditions arranged and classified according to subjects. This book has been called "the first great Corpus of Muhammadan Law."<sup>2</sup> In the meantime, Ibn 'Ali Ajwa (who was executed in 155 A. H.) had

<sup>1</sup> See "Muslim Theology" by Prof. D. B. Macdonald, 76. This feeling is well illustrated by the fact that in the second century of the Hijra the Traditionist Abdu Rabbim ibn Hamala Al-A'ini (d. A. H. 111) had to plead defective memory before he could induce his teacher Sa'id ibn Al-Musayyib to permit his teachings to be reduced to writing. That these fears were not unfounded, is shown by the history of the Jews, who also had a code of traditions and it was a saying with the Pharisee that "the words of the Scribes were lovely above

the words of the Law, and more weighty than the Law and the prophets." This is supposed to be alluded to in Matthew XV, 6: "Thus have ye made the commandment of God of none effect by your traditions." The history of traditions amongst the Christians also affords an interesting parallel on some points: see, e.g., 'Life of Christ' by Dr. Weiss (translated by J. W. Hoopes) I, 17, (1 seq.); and I, 143.

<sup>2</sup> Nicholson, "Literary History of the Arabs," 337.

confessed to having circulated 4,000 false traditions. A century later, when Abu Da'ud as-Sijistani wrote the 'Kitab us-Sunnan,' which is one of the six most authoritative Sunni books on the Traditions, he found 500,000 in circulation, of which he considered only 4,800 to be genuine. Abu Hanifa's opinion has been already mentioned.

The task of distinguishing the genuine from the spurious traditions was undertaken by the collectors of the 'sunna' with that earnestness and sense of duty which characterised the early Mussulman jurists, and, in the result, there have arisen a body of rules that are allied to the principles of forensic evidence.<sup>1</sup>

At about the same time events had happened in the political world of Islam, which were fraught with momentous consequences to its future. In the year 127, A. H. (750 of the Christian era). Marwan the 'Umayyad Khalif was defeated and dethroned, and the empire fell into the hands of 'Abdul 'Abbas as-Saffah, the first of the 'Abbaside Khalifs of Baghdad. This dynasty reigned from 132 to 656, A. H., (i.e., 750 to 1258 of the Christian era). The 'Abbasides traced their descent from the uncle of the Prophet, and, both by this close connection with him, and by their long rivalry with, and hostility to, the 'Umayyads, they came forward as the restorers of Islam after the period when the strict principles of that religion had been relegated

Sorting the traditions

The Renaissance of Islam and the early Abbasides.

<sup>1</sup> The following words of de Goeje well describe the form of recording, and the mode of investigating, the traditions: "Each event is related in the words of eye-witnesses or contemporaries, transmitted to the final narrator, through a chain of intermediate reporters (*genera*), each of whom passed on the original report to his successor. Often the same account is given in two or more slightly divergent forms, which have come down to us through different chains of reporters. Often, too, one event or one important detail is told in several ways, on the basis of several contemporary statements, transmitted to the final narrator through distinct lines of tradition. The writer, therefore, exercises no independent criticism except as regards the choice of authorities; or he rejects accounts of which the first author,

or one of the intermediate links, seems to him unworthy of credit, and sometimes he states which of several accounts seems to him the best."—*Envelop. Brit.*, (9th Ed.), XXIII. 1. De Goeje is speaking of the Arab historians, but his words apply equally to the process followed by the traditionists. They tested the reliability of the traditions purely by their opinion whether or not, the reporters were "worthy" persons. The Shuhs, for instance, reject the traditions in which one of the persons comprising the chain of the *ruwa* is an opponent of 'Al. The books are however full of the law of evidence and proof. Thus besides a book in the *Fatawa-l-'Alamigrid* devoted to evidence generally, the last Chapter of the Book on wills deals with the evidence required to prove wills.

to a secondary position by Mu'awiyah and his successors. "It was," to quote the picturesque language of the author of 'Al-Fakhri,' "a dynasty abounding in good qualities, richly endowed with generous attributes, wherein the wares of Science found a ready sale, the merchandise of Culture was in great demand, the observances of Religion were respected, charitable bequests flowed freely, the world was prosperous, the Holy Shrine was well cared for, and the frontiers were bravely kept." It was also at this period that men like Imams Ja'far-as-Sadiq (A. H. 80-148), Abu Hanifa (A. H. 80-150), Malik ibn Anas (A. H. 95-175), As-Sauri (A. H. 95-161), Ash-Shafi'i (A. H. 150-204), Ibn Hanbal (A. H. 164-241) and Az-Zahiri (A. H. 202-270) flourished—than whose names, we have no greater in the history of Islamic jurisprudence.

The law as a complete code for all future times.

These great lawyers, philosophers and theologians—for they "took all knowledge for their province," and were eminent in every branch of it known in their day—placed before themselves the task of completely stating the law so as to embrace the whole body of jurisprudence, and to deal with all conceivable phases of human activity, not only for their own time, but for all future times. They must have soon found that the system "which had sufficed to guard the rights to a few sheep or camels"<sup>1</sup> had to be transformed, before it could fulfil the function that they assigned to it. It must also have been clear to them that such a transformation could not be brought about, if they had to restrict themselves to the Quran, and such of the traditions as they could accept as authentic.

Historical value of traditions.

Much has been said for minimizing the importance of traditions, and throwing doubt or even discredit, on them as a source of Muhammadan law; but their value in regard to the development of the law, and for the interpretation, no less than for the historical study, of the ordinances of the

<sup>1</sup> Macdonald, "Muslim Theology," 124.

Prophet, must not be overlooked. With this view, the following suggestive observations of an author dealing with a controversial episode of English history, may serve as a useful corrective. Referring to the "question of normal historical beliefs," Dr. Figgis remarks, "How woefully we may go astray if we isolate each document, or fact, and consider them apart from the total picture and from popular tradition. Any sound historical judgment must take into account not only the documents, but also the common tradition, while it must treat not merely of the facts in isolation, but the total picture of which they are elements."<sup>1</sup>

These observations may explain how it was, that, with the closer study of the traditions, a desire arose in the minds of the jurists to create other sources of law. Increase of appetite had grown by what it fed upon. The traditions illuminated the underlying principles of the law, and suggested new modes of elucidating difficulties or broadening the foundations.

The first resource of which the jurists availed themselves after exhausting the 'sunna,' is closely connected with it, and need not be referred to at any great length. Failing both the Quran and all direct precedents of the practice of the Prophet himself, the "consensus of his companions," who were imbued with his spirit, was naturally considered by the jurists as the best guide to the law. This, the third 'asl' or foundation of the law according to Muslim jurists, is called 'ijma,' which "is defined as agreement of the jurists among the followers of Muhammad in a particular age on a question of law."<sup>2</sup>

The minds that were capable of arranging and evolving a whole system from the undigested materials in their

Effect of their systematic study,

THIRD SOURCE of law; 'IJMA'.

<sup>1</sup> "Civilisation at the Cross Roads" by J. N. Figgis. (London 1912), Appa, pp. 238, 239. The author adds: "Further it is not to be doubted that even regard to the most thoroughly 'documented' historical facts, tradition plays a large part in our belief. Creighton said somewhere that

apart from tradition there was not sufficient evidence to prove that Julius Caesar ever lived."

<sup>2</sup> "Principles of Muhammadan Jurisprudence according to the Hanafi, Maliki, Shafi'i and Hanbali Schools" by Mr. Justice Abdur Rahim, (1911), 115-136.

possession, did not leave the 'ijma' in a nebulous state. It may be said of them that nothing that they touched they did not elaborate and refine: we have a carefully compiled set of rules as to the classes of matters on which 'ijma' may be effective, the persons whose opinions are to be authoritative, the course that has to be followed where there is a conflict of authorities, and other cognate subjects.<sup>1</sup>

Insufficiency of  
'ijma' to  
completely  
supply the  
hiatus in the  
law.

It does not require much consideration to see that calling 'ijma' in aid could not furnish all the materials for the construction of a code theoretically complete. For 'ijma', too, could throw light only on the cases that actually arose in the course of a few years, and could hardly keep pace with the speculative powers of keen philosophers, who had their ideas expanded by the great territorial strides that Islam had made in the course of the century. To cope with all the cases conjured up by speculation, no less powerful an agency was necessary than the right of the jurist to apply his own unfettered reason to the problem before him. This was, however, a very great step to take, and amongst the leaders of Muslim thought there was keen controversy on the subject. Some of the Doctors refused to believe that any further knowledge could safely be sought outside the Quran and the precedents approved by the Prophet and his companions; for, they asked, is it not laid down that,—

“With Him are the keys of the unseen. None knows them save He; He knows what is in the land and in the sea; and there falls not a leaf save that He knows it; nor a grain in the darkness of the earth, nor aught that is moist, nor aught that is dry, save that is in His Perspicuous Book.”—Quran, VI., 9.

For these Doctors the “Perspicuous Book” of God was none other than the Quran. The words attributed to

<sup>1</sup> The great HINDU LAW-GIVER, at the end of his code, proceeds in a manner that may be compared with interest to the course followed by the Mussulman lawyers: “If it be asked,” says Manu, “how it should be with respect to (points of) the law which have not been (specially) mentioned?—(the answer is) ‘that which Brahmanas, who are *Shi-shi-bas* (i. e., eminent), propound, shall have legal (force).’”—Manu

XII. L. The place of “eminent Brahmanas” is filled in Islam by those who were the companions of the Prophet in his life-time, and his successors after him. The “roots” of Hindu Law are four: revelation (through inspired seers), traditions from sages; usages; equity as approved by reason (Manu II, 6). In “Doctor and Student,” I. 4, it is stated that the LAW OF ENGLAND is grounded on six principal grounds:

'Umar, with reference to the burning of the Alexandrian Library (whether or not they were ever uttered by him),<sup>1</sup> represent truly the views of this school, the most notable exponent of which was Da'ud Az-Zahir (d. 270 A. H.). The school of Az-Zahir did not have many followers. It could hardly be expected to have many. But it represents in an extreme form one very important direction of activity that learning took in Islam at this period—the study of the Quran, and of its interpretation, which are classed as a separate science.<sup>2</sup> Many volumes are written on this subject: the greatest amount of erudition and ingenuity have been spent upon it: every letter of the Sacred Book has been counted: the words and sentences have been classified, so as to show which have meanings that are obvious, and which recondite: concordances have been prepared, stating under which of the numerous classes each word comes: and each sentence has been definitely and authoritatively characterised, as capable of receiving either only the literal meaning, or of permitting the statement to be expanded. Then again the total kinds of arguments deducible from the Quran are categorically laid down.

The scientific study of the Quran. Principles of interpretation, etc.

Those who are familiar with such facts as that the Twelve Tables are the foundation of the whole fabric of Roman Law, and that Gaius wrote six Books on them,<sup>3</sup> can have little difficulty in understanding that, when the results produced by a long series of interpretations and expositions of a short and simple rule of law, dealing with a large subject, are stated in the form of a number of bald propositions, they are apt, at first sight, to appear far-fetched, and, occasionally, unscientific. The student of Muhammadan law, who on a bare reading of the verses of

Growth of law by interpretation, and exposition of simple rules.

first it is grounded on the law of reason, secondly, on the law of God, thirdly, on diverse general customs of the nation; fourthly on diverse principles that be called maxims, fifthly, on diverse statutes made in Parliament Holland. 'Jurisprudence,' 50. n.

<sup>1</sup> See Encyclopædia Britannica, (9th Ed.) I. 778.

<sup>2</sup> Prof. Browne refers to the Quran as a "theological kernel." "Literary History of Persia," I. 270.

<sup>3</sup> Hunt's "Roman Law" (3rd Ed.) 16

Criticism of  
methods :  
interpretation.

the Quran, or the traditions, both of which together form the basis of that law, considers himself qualified to criticise the interpretations put on them, must be compared to the student of English law, (if such could be found) who would be bold enough to embark on a criticism of the interpretations put on the Statute of Frauds, or of Uses, or, to take a more recent piece of Legislation, the Workmen's Compensation Act, without any knowledge of previous decisions, and without being acquainted with the doctrine of 'etare decisis,' and its exigencies, without a notion of the judgments on which the law of England has been built up. The latter is, no doubt, a rare being : the present writer is conscious that he must have failed in his efforts not to swell the ranks of the former.

" Purpose " and  
" intention " or  
" object " of a  
rule of law.

The words of an English writer, though referring to a very different branch of knowledge, are so suggestive in this connection, that they are quoted without any apology :

" Such words as ' purpose,' ' intention ' have a different sense when used in ordinary parlance, from that which they bear when applied in criticism and science. In ordinary parlance, a man's ' purpose ' means his conscious purpose, of which he is the best judge ; in science the ' purpose ' of a thing is the purpose it actually serves, and is discoverable only by analysis. Thus, science discovers that the ' purpose ' of earth-worms is to break up the soil ; the ' design ' of colouring in flowers, is to attract insects, though the flower is not credited with foresight, nor the worm with disinterestedness . . . This has been well put by Ulrici,

' It would be . . . absurd to think that because a poet cannot say with perfect philosophic certainty, in the form of reflection and pure thought, what it was that he wished and intended to produce, that he never thought at all.'"<sup>1</sup>

This applies, ' mutatis mutandis,' to the first principles of law, laid down by a great legislator or moralist.

' Qiyas ' the  
FOURTH  
SOURCE of  
Muhammadian  
Law.

It has already been said that the rigid school of law which Az-Zahir represents, found favour with few. But though the majority of the doctors were agreed on the



necessity of having recourse to pure reasoning in order to supplement the Quran, 'sunna' and 'ijma' for the development of law, they had great difficulty in fixing upon the exact form in which, and the limitations with which, reason could safely be employed in questions of law and religion. Even the first step forward gave rise to serious controversies: of the leaders of the four great Sunni schools, three were opposed to Abu Hanifa in his wide use of 'qiyas,' or reasoning by analogy from the Quran, 'sunna' and 'ijma','<sup>1</sup> and in his restriction of the two latter within the strictest limits.

The student of Muhammadan law, who approaches it in India, full of ideas taken from the present legal system of England, with its free and bold application of old rules to new circumstances, for introducing new principles of law, may think that an apology is due to him for any justification of so simple a process as 'qiyas,'—which strictly does not even purport to create new principles, but merely to apply old established principles to new circumstances.<sup>2</sup> But, in answer to such an objection, the following words of Sir Henry Maine may be appropriately quoted: "The warning," he says, "cannot be too often repeated that the grand source of mistake in questions of jurisprudence is the impression that those reasons which actuate us at the present moment in the maintenance of an existing institution, have necessarily anything in common with the sentiment in which the institution originated."<sup>3</sup> Together with

Controversies about permissibility of 'qiyas.'

Reasons for doubts as to 'qiyas.'

<sup>1</sup> See *Journ. Asiat.*, Ser. III, Tom. 11, p. 213, on the *Ahl-ul-Qiyas*, and the *Ahl-ul-Sunna*, i.e., those who give prominence to *qiyas* and the *sunna*, respectively, as sources of law.

<sup>2</sup> The following words of the Privy Council illustrate the most modern use of *qiyas* or analogy: "As to gifts by way of will, . . . such a disposition of property to take effect upon the death of the donor, though revocable in his life-time, is, until revocation, a continuous act of gift, up to the moment of death. . . . There is no law, expressly, and, in terms, applicable to persons who so can take. The law of will, has, however, grown up, so to speak, naturally from a law which furnishes no analogy, but

that of gifts, and it is the duty of a tribunal dealing with a case, new in the instance, to be governed by the established principles and the analogies which have heretofore prevailed in like cases": *The Tagore case* (1872) L.R.I.A. Supp. Vol., at pp. 67-8. In another case their lordships applied the analogy of gifts to *waghs* saying: "It is safer to follow this analogy than to draw logical conclusions which may seem to an acute modern dialectician to follow from the words of the old text."—*Baqar Ali Khan v. Anjuman Ara Baqum* (1902) 30 L. A., 91; 25 All. 236, 254.

<sup>3</sup> "Ancient Law," 2d Ed., p. 189.

this warning we must recall to mind the anxiety of Blackstone in the eighteenth century after Christ, to disprove the imputation that Judges made law, and the pains taken by Bentham and Austin in the nineteenth century, to prove and justify the opposite theory,<sup>1</sup> and we must remember that the period with which we are dealing, is not the eighteenth or nineteenth century, but a thousand years anterior to it, and then we may succeed in an endeavour to realise what a great struggle it must have been for the first Muslim jurists, steeped in the theology of Islam, when that religion had but just been given to the world, to proceed on the basis that the system of life as given by the Prophet was not complete in every detail, whether of law or of faith. It must have seemed to them a bold thing to claim that the minds of ordinary men, however learned and profound, could complete anything emanating from the Prophet of God.<sup>2</sup> They had not the perspective of thirteen centuries to see how much, that was never dreamt of in their philosophy, lay in the seemingly simple rules that they feared to study, lest they may be chastised for attempting to rival the Prophet.<sup>3</sup>

Traditional authority for the four sources of law, the Quran, the 'sunna', 'ijma', and 'qiyas.'

The Quran, the 'sunna', 'ijma' and 'qiyas' are therefore recognised at the present day as the foundations of Islamic law. A well-authenticated tradition which is to be found in the 'Kitab-us-Sunnan' of Abu Da'ud Sijistani as well the 'Masnad-i-Darimi,' and the collection of Abu 'Abdullah

<sup>1</sup> Hale, "Common Law," Ch. VI., cited in Austin's "Jurisprudence," Lect. 37. Bentham Works, III, 2, 223-31; V, 218-9, 197-8; VI, 53-57; VII, 111; 261.

<sup>2</sup> This cannot be better illustrated than by a quotation from the *Munqidh Min al-Dalal* of the great philosopher al-Ghazali (d. 505 A. H.). "As to those who, professing, by their lips, the faith of the Prophet, place the ordinances of religion on the same footing as (the rules of) philosophy, — they in reality repudiate belief in prophecy, for, with them the Prophet is, no more than a wise man, who has been placed by a higher authority as a guide for men. Now, this is to ignore the essence of the Prophet's function: true faith in the Prophet implies

belief that there exists a sphere above our intelligence, and that, to those who are within that sphere, are revealed truths that human intelligence cannot compass: just as the ear cannot perceive things that are perceptible by the eye, and as the sense of touch cannot perceive notions of the mind."

<sup>3</sup> "Criticism," It has been said by a modern English writer, speaking of the 19th Century, "proves totally unable to distinguish between what has been essential in the greatness of its idols, and what has been as purely accidental, as, to use Scott's illustration, the shape of the drinking glass, is to the flavour of the wine it contains."

Tirmidhi, invests these four sources with the approval of the Prophet himself. For it is related that when Ma'adh was being sent to Yaman, the Prophet asked him on what he would base his decisions: "I will judge them according to the Book of God," he replied.—"But if that contains nothing to the purpose?" "Then upon the precedents of the Prophet."—"But if that also fails you?" "Then I will make efforts to form my own judgment." And the Prophet raised his hands,<sup>1</sup> and said, "Praise be to God, who guides the messenger of His Prophet in what He pleases."

In addition, however, to the four chief sources of the law to which the Mussulman lawyers consciously referred, we find that law was occasionally supplemented by "Urf" or local usage.<sup>2</sup> The law so obtained would be likely to be best adapted to the varying classes of people who embraced Islam, but it was distinguished in the language of the jurists from the 'shār'a' or religious law which was derived from the four sources that we have been considering and it found little place in the legal treatises written by the earlier theologians. It is true that these works, which in Muhammadan law take the place of codes, occasionally refer to the customs of the country.<sup>3</sup> Yet, there is too little direct reference to the Pre-Islamic customs of the Arabs, which, as has been seen, forms a great part of the foundation of the law, but which—when not rejected altogether—were assimilated or transformed into a purely Islamic emanation.<sup>4</sup>

There were however three other modes of reasoning besides Qiyas, which have not gained equal importance as

OTHER  
SOURCES of  
law.  
1. 'Urf' o  
Custom.

OTHER  
MODES of  
reasoning.

<sup>1</sup> Or, 'as' In the *Mishkat-ul-Masabih*: "The Prophet struck his hands on the breast of Maadh." Book XVI, Ch. II, part 2.

<sup>2</sup> Originally the word 'urf means "known" or public. The English word "tariff" is the same as the Arabic *ta'rif* which is a derivative from 'urf.

<sup>3</sup> See, e. g., the *Hidayat*, Books on *Zakat* *Widda* and *Arist*; and the *Tahrik-ul-Ahkam*, Book on *Qarz*; Sir Wm. Jones' "Digest of

Shiah Laws," I, 180, see also Malcolm's "History of Persia," II, 311-317, 319, 326, 346, 351 which gives an interesting account of 'Urf in Persia.

\* In view of the impotence that custom has in British India, the question is further considered in the comment to s. 10, of this work. The reader is particularly referred to the extract from Mr. Justice Abdur Kalam's "Muhammadan Jurisprudence," there set out.

resources available to lawyers, but which, nevertheless, deserve attention, if only as illustrations of the growth of the concept of law amongst Mussulman jurists.

(a) 'Istihsan.'

The first of these was adopted by Imam Abu Hanifa for relief against absolute dependence on analogical reasoning. "Analogy," says Sir H. Maine, "the most useful of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy."<sup>1</sup> Abu Hanifa adopted as a corrective, 'istihsan,' which means literally "approbation," and may be translated "liberal construction," or "juristic preference." This term was used by the great jurist to express the liberty that he assumed, of laying down such a rule of law, as, in the opinion of the exponent, the special circumstances required, rather than the rule that analogy indicated.<sup>2</sup> This, it need hardly be pointed out, is, under no circumstances, a weapon that can easily be given to any person who does not represent the fountain-head of legislation. But the objection, taken against it was, not only that it left an almost uncontrolled discretion in the exposition of the law, but, what was far more important in the eyes of the Mussulmans, that it applied to the law a test not referable to the Quran and religion, but to external circumstances independent of Islam. Needless to say, the use of 'istihsan' was not acquiesced in by the colleagues of Abu Hanifa.

(b) 'Istihlah' proposed by Malik ibn Anas.

Another great jurist, who was also a great traditionist (differing in this respect from Abu Hanifa), Malik ibn Anas, (94-179 A. H.), also felt the necessity of some surer test for the development of law on right lines, than the use of analogy: for analogy ensures, no doubt, the expansion

<sup>1</sup> "Ancient Law" (3rd Ed.) 19.

<sup>2</sup> See Parke J.'s remarks in *Marchant v. Remond* (1843) 1 Cl. and Fin., 527, 546: "We must apply those rules of law,"—"which we derive from legal principles and judicial precedents,"—"where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all ANALOGY to

them in those cases to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could devise. It appears to us to be of great importance to keep this principle steadily in view . . . for the interests of law as a science."

of the law so as to preserve common features, but through it a formal symmetry is often obtained at the sacrifice of utility, or even good sense. He considered the introduction of ‘istihsan,’ as recommended by Abu Hanifa, to be open to grave objections. With the aim of reconciling these considerations, he proposed the use of ‘istislah,’ i.e., “seeking peace,” or “amending”; and he laid down, that ordinarily analogy was to be the means by which the law should be made to expand, but, if it appears that a rule indicated by analogy is opposed to general utility, then ‘istislah,’ “amendment,” should be resorted to. By this means the jurist could avail himself of the same powers as those that Abu Hanifa desired, but he was restricted in two directions: according to Imam Malik, the rule of law pointed out by analogy could not be set aside either at the option of the individual exponent of the law, or with reference merely to the circumstances of the particular case: it could be disregarded only if it would be harmful to the public in general.<sup>1</sup>

The third mode of reasoning in law, ‘ijtihād,’ has gained (c) ‘Ijtihad,’ almost equal footing with the four first “foundations of the law.” ‘Ijtihad’ means “labouring hard, or studying intensely to arrive at a sound opinion or judgment,” and is allied to the expression (‘ajtahido’) used by Maadh on the occasion above referred to.<sup>2</sup> The authority of the ‘mujtahid’ is based not on his holding any office in the State, but is derived purely from the learning and reputation of the individual. Thus, the qualifications of the ‘mujtahid’ consist of a complete knowledge of the Quran, i.e., he should know the sacred text by heart, and be able to say when and where each verse was revealed, and he should also have a perfect knowledge of all the traditions, and all the branches

The ‘Mujtahids.’

<sup>1</sup> Prof. Mirza Kazim Beg has explained in the *Journal Asiatique*, Ser. Quatr., Vol. 15, p. 168, et seqq., the influence of *istislah* in the growth of Muhammadan Law. Readers of

German will find an article on *Ijtihad* and *Fatawa* by Goldziher in the *Zeitschrift* of the German Oriental Society, LIII, 645, et seqq.

<sup>2</sup> See p. 25, above.

of the science of law. He should besides be a man of austere piety. In short the qualifications required are such, that so far as the Sunni law is concerned, after the death of Ibn Hanbal (241 A. H., 856 after Christ) there have been no recognized Sunni 'mujtahids,' or persons entitled to use 'ijtihad' or private judgment in expounding the four original sources of law, at first hand. There has not been even a 'muqallid' (or 'mujtahid' of the third class) recognised by the Sunnis since Imam Qazi Khan (d. 592 A. H.; 1196 after Christ). The cases of even such great scholars as Tabari and As-Suyuti, who have written valuable commentaries on the Quran, and the former of whom is also known as a great historian, are mentioned<sup>1</sup> as having been denied, by public opinion, their claim to be considered 'mujtahids.'<sup>2</sup>

Administration  
of the law by  
the Qazis—The  
'Fatawa.'

The capacity of growth in Muslim law may seem to be exhausted when the succession of 'mujtahids' comes to a close. But if we refer to the books on the powers of the 'qazis' and 'muftis,' and consider the wide discretion allowed to them in the application of the law to the facts to be adjudicated upon, we find that though progress was arrested in one direction, it was given free scope in another.<sup>3</sup> The extensive use of these discretionary powers by the 'qazis' and 'muftis' is illustrated by the compilations of the 'fatawa' or decisions of great Muslim judges.<sup>4</sup> Many points are settled by these decisions on which the authoritative treatises that preceded them can give no guidance.<sup>5</sup>

Powers of  
Qazis.

It may appear paradoxical to give almost unlimited powers to the Qazi and at the same time place such difficulties in the recognition of any 'mujtahids' for so many centuries. The explanation seems to be that the 'mujtahid' is a representative of religion (exercising, as such, no doubt a great, though indefinite, authority in secular law) whereas the Qazi exercises no voice in matters of religion, and gives orders only about the affairs of the world. The distinction between the two offices should be borne in mind, and will throw some light on the reasons which may have induced Imam Abu Hanifa to suffer imprisonment rather than accept the office of 'Qazi-ul-Quzat.' Nothing shows more emphatically the great weight and authority exercised by the religious heads in an Islamic country, than that the deposition of the late Sultan Abdul Hamid of Turkey was formally based on the 'fatawa' of the Shaikh-ul-Islam.<sup>1</sup> The Mussulmans are, therefore, jealous of giving to the religious head, in addition to his normal authority, the still wider powers of a speculative nature in the domain of religion, which would be his, by right, if he were acknowledged as a 'mujtahid.' The 'fatawa' of the Qazis and Muftis on the other hand, while necessary for the case, and decisive of it "had no ulterior authority except such as was given to it by the professional repute of the magistrate, who happened to be in office at the time."<sup>2</sup> They should be compared in this regard not to the decisions of the English Law Courts, but to the 'responsa prudentium' of Roman law.<sup>3</sup> They would never have filled so important a place in legal literature, had they not been carefully compiled from the decisions of

<sup>1</sup> In giving that *fatawa*, the Shaikh-ul-Islam, consulted, and was assisted by the learning of the Right Honourable Syed Amer Ali—E. F. Knight's "Awakening of Turkey," 317-9. The office of Shaikh-ul-Islam was created at the time of the capture of Constantinople, 857, A. H. Similarly, Shakespeare makes Henry V. consult the Archbishop of Canterbury on the point whether he was legally entitled to the French Crown.

<sup>2</sup> See Bail. I. 208 (par. 2) ; 213 (par. 1, 2,

A. 3), 217 (par. 3), 231 (par. 2), 104, (II. 5-8) ; Bail. II., 109, (II. 4-7), 116 (II. 17-19) ; 211 (II. 8-11), for illustrations of the distinction in the minds of the Muslim authors between the rule of mere overt conduct and the rule of conscience.

<sup>3</sup> Cicero calls them *Res Judicata*. Top. 5, 28. See Hunter's "Roman Law," 60, 119. After some fluctuations, it was laid down by a Constitution of Justinian "Non exemplis sed legibus judicandum est"—Cod. VII., 45, 13

Qazi's run  
distinct fr  
those of  
' Muftah

the most famous Qazis, and by persons who had themselves achieved eminence as exponents of the law.<sup>1</sup>

The practical shape which the development of the Sunni law took, may, therefore, be indicated by saying that, while the power of giving theoretical expositions of the law, so as to bind the conscience of the people (which is legislation in the exalted regions of religion), is denied to any 'mujtahid' or canonical exponent, those who are charged with the practical administration of justice, are given ample liberty to use their discretion, as the facts of each case may require.<sup>2</sup>

There is a difference at this stage between the Shiahs and Sunnis, which must be pointed out. The Shiahs recognised Imams as their heads in all matters both spiritual and secular for a much longer period than the Sunnis.<sup>3</sup> 'mujtahids' consequently come to hold quite a different rank in the Shiah hierarchy; but they continue to be recognised to the present day. Apart from this, however, the principles of thought underlying the two systems are much the same, though they arrived at complete maturity at different periods, and hence the influence of 'ijtihād' is not the same in both. The continued existence of Imams and 'mujtahids' amongst the Shiahs may account for the few collections of the 'fatawa' of Shiah Qazis. There is less room for them in a system where a higher authority is present.

Strictures have sometimes been passed on the inapplicability of portions of Muhamnadan law to modern

'Ijtihād' in  
Shiah Law.

Muhamnadan  
Law and  
modern  
requirements.

<sup>1</sup> The *Fatawa-i-'Alamgiri* is very full in the book on the *Adab-i-Qazi* ("the Duties of the Qazi"), the 19th Chapter of which deals with the use of *Ijtihād* by him; see p. 29, p. 1 below.

<sup>2</sup> The Chancellor in England with his clerks "could frame new writs, but it was for the Common Law judges to decide on their validity."—Holland's *Jurisprudence* 63, citing Spence's *Equity Jurisprudence* "1. 325.

<sup>3</sup> Thus Abū'l Fatah al Shahrastāni says of the beliefs of one of the Shiah sects "Al-

imān," according to them, "in his own person the knowledge of all mysteries, and communicated it to his son Muhammad Ibn-ul-Hanafīyya, who passed it to his son, Abū Hashim, and that the true possessor of this universal knowledge is the true Imam"—*Kitāb-ul-Milal* vol. I, Part I, 169. See also Pococke "Historical Arabism," pp. 23, 257. Sale's *Koran* "Prelim. Discourse," sec. 8. Malcolm's "History of Persia" II, 346, et. seqq.



circumstances in British India. The inapplicability must be ascribed, in part at least, to the fact that the substantive law of Islam, so far as it is applied in India, has been divorced from the adjective law. The two form integral portions of one system, and each suffers by a disregard of the other; hence, though the adjective Muhammadan law is not directly applicable in British India, as such, a reference to it may occasionally explain the real scope and effect of the substantive law and may even be a guide as to how it should operate in particular cases. <sup>1</sup>

Again, the influence of religion in Muhammadan law is referred to as a point in which it differs from the laws of Western nations.<sup>2</sup> But the Greeks spoke of Law "as a discovery and gift of God,"<sup>3</sup> and, it is well known, that the priestly colleges moulded the Roman law.<sup>4</sup> In 1456, Chief Justice Prisot declared, in England, that "Scripture was the Common Law on which all classes of Laws were founded."<sup>5</sup> And it would probably be difficult to produce anything in the books of Muslim law equalling in quaintness the following dialogue:—Argument of Counsel: "There is the law of the land for many things, and many things are tried in Chancery which are not remediable in the common law, and some things are only a matter of conscience between a man and his confessor." The Chancellor answers: "I know that every law is, or ought to be, according to the law of God. And the law of God is, that an executor who is badly disposed shall not waste all the goods, &c.; and I know well, that if he does so, and does not make amends, if he has the power, unless he repents, he shall be damned

Muhammadan  
Law and  
Religion.

<sup>1</sup> See *Khajjah Hidayat v. Rai Jan*, (1844) 3 Moo. I.A. 295, 318. The views expressed as above in the first edition of this work may now be supported by the judgment of the Privy Council in *Hamira Bibi v. Zubaida Bibi* (1916) L. R. 43 I. A. 294, 301, 302; 38 All., 581, 580; "Rules of equity and equitable considerations are not foreign to the Musliman system."

<sup>2</sup> See the comment to s. 50 below and *Index*

s. c. "Conscience."

<sup>3</sup> Demosthenes, *Adv. Aristodem.*, l. 774; Plato (*Gorgias*, 484B, *Chrysippus* apud. D. Laert. VII. 88; Holland's "Jurisprudence" 18, 10, 43, 47.

<sup>4</sup> Cf. "Lex. . . ratio est recta summi Jovis,"

Cicero, *De Leg.*, II., 4.

<sup>5</sup> Year Book; 31 Hen. VI., 40, cited by Holland, *Jurisprudence*,

in hell.”<sup>1</sup> As late as in 1857, Chief Baron Kelly and the Court of Exchequer laid down that “Christianity is part and parcel of the law of the land.”<sup>2</sup> This decision was no doubt overruled in 1917, but not without the dissent of the Lord Chancellor.<sup>3</sup>

Difficulty of  
historical study  
of Muham-  
madian Law.

This preliminary survey of the elements composing the law of Islam, cannot be brought to a conclusion, without a reference to the difficulties of taking into account even the most important of the forces that have moulded it. It is easy, no doubt, to adopt a formal classification and enumeration of them. But we must not be misled into thinking that the Quran, ‘sunna,’ ‘ijma,’ qiyas’ and ‘ijtihad’ represent each of them a single force. A real study of the history of Muslim institutions can no more end with discovering whether a rule of law has been based on one or other of these “foundations,” than the historical study of English law can satisfactorily begin and end when it has been discovered, whether an Act of Parliament originated from the House of Lords, or the House of Commons, whether a particular decision was given by a Chancery, or Common law Judge. To take an example: the history of ‘waqfs’ must take into account not only what is laid down in the books that are cited in our law Courts, and consists not merely in separating (so far as possible) the influence, in the law, of each of the five forces that have been named, but must go back to the earliest records of similar transactions that can be discovered. If this is done, passages may be found in the old Arab poetry throwing light on the dispositions made by the Pre-Islamic Arabs, which were the precursors of the ‘waqfs’ of our day.<sup>4</sup> The history of the Barmaki family

<sup>1</sup> Year Book, 1 Hen. VII., 5. cited Harvard L. Rev., 211, n. 71.

<sup>2</sup> *Cowan v. M'Pherne* (1867) 1. R.2, Ex. 230.

<sup>3</sup> *Bowman v. Secular Society*, [1917] A. C., 107.

<sup>4</sup> *E.g.*, the disposition of ‘asab al-Khatun.

palace-garden, mentioned in the *Kutub-ul-Aghani* II, 160, to which Professor W. Robertson Smith refers in his “Kinship and Marriage in Early Arabia” New Ed. (1907) 117, et seqq.

in the days of the Kalifs of Baghdad, and of the institutions established in Spain, or the schools of Roman law at Beyroot and Cæsarea, may aid us in the endeavour to distinguish the accretions of ideas derived from the theories that prevailed amongst the theologians, and from the legal systems of neighbouring lands with whom the Mussulmans came into contact.

§2.—*The Schools of Muhammadan Law Prevailing in India.*

It is unnecessary here to refer to the religious and political controversies that arose amongst the Mussulmans, and through which Islam became divided into various sects. It will be enough to indicate the origin of the main schools of Muhammadan law that are prevalent in India. "If each sect has its own rule according to Muhammadan law," say their Lordships of the Privy Council,<sup>1</sup> "that rule should be followed with respect to that sect." Every sect does possess its own books, and the books of another sect are generally not recognised as of binding authority.

The followers of Islam are divided into two main sects: <sup>Various Schools of Muhammadan Law</sup> Sunni and Shiah. Both sects are again divided into a number of schools, each of which has its own books of authority. There are four schools of Sunni law, taking their rise from the four great doctors, Abu Hanifa (A. H. 80-150), Malik Ibn Anas (A. H. 95-175), Shafi'i (A. H. 150-204), and Ibn Hanbal (A. H. 164-241), each of whom produced his own exposition of the law without allegiance, but, at the same time, without any antagonism, to the other, and respecting the ability and knowledge of his predecessors or contemporaries. There is, therefore, a kind of comity, so to say, amongst the followers of the Sunni schools; so that the books written by the authors belonging to one school of Sunni law often refer to the opinions of those belonging

<sup>1</sup> (*Rajah*) *Dardar Hossein v. (Ranee) Zuhooroon-Nissa* (1811) 2 Moo I. A. 441-447.

to another school, on matters where the doctors are not unanimous; and the references are frequently made in terms of reverence. But, beyond this, it is recognized that the follower of the Sunni sect may adopt any one of the four great doctors as his guide: only he must follow the teachings of that doctor consistently.

The Schools  
of the Sunni  
Sect.

Of these four Sunni schools, the Hanafi school came into being sufficiently early to permit of two of the disciples of its founder to acquire a reputation and authority nearly equalling that of Imam Abu Hanifa himself. These two are Imam Abu Yusuf and Imam Muhammad.<sup>1</sup>

The majority of the Sunnis in India are followers of the Hanafi school, named after Imam Abu Hanifa. Two very authoritative texts of this school, the 'Fatawa 'Alamgiri,' and the 'Hidaya' were translated fairly early in the last century, and are well known in the British courts. Some other works have also been translated, but the translations have not been sufficiently long before the public to attain the same eminence.

2. Maliki.  
3. Shafi'i.  
4. Hanbali  
schools of  
Sunni Law.

Of the three other schools of Sunni law, *viz.*, those founded by Imam Malik, Shafi'i and Ibn Hanbal, Shafi'i alone has any considerable number of followers in India. It has, therefore, been deemed unnecessary, as a rule, to refer to the law and doctrines of Malik or Hanbal. There are a number of Malikis in Arabia and Algeria. The followers of Hanbal are, it is believed, almost extinct.

II. Shiah  
Schools.

With the Shiahs the different schools arose as the result of dynastic troubles, and of disputes as to the rightful Imam, at a period of time when the general Shiah law had already been settled. The result is, that though the four schools of Sunni law differ from each other perhaps to a greater extent than the Shiah schools, there is very little

hostility between the various Sunni schools, whereas the Shiah schools do not observe the same comity towards each other, owing to their difference on questions of religious succession.

On the Shiah 'Ithna'Ashari' law, which is the system of law followed by the great majority of the Shiahs in India, there are several well-known texts. Amongst such texts is the 'Shara'ya-ul-Islam', a work of great authority which states in very concise terms the whole of the law. This has been accurately rendered by Mr. Neil B. E. Baillie, and published as the second part of that author's "Digest of Moohummudan Law."

Shiah 'Ithna  
'Ashari' School.

The law of the Isma'ili Shiahs is not equally easy to discover. None of their texts have been printed and published, even in the originals, still less translated. For the present edition, however, I have had the advantage of notes supplied to me by Shaikh Faizullahbai Sahib (to whose learning and ability I alluded in the preface to the first edition) made from the Da'ayam ul-Islam, a leading text of 'Isma'ili' law, for the purpose of being incorporated in this edition. I have not been able to verify these notes by a comparison with the original. I have indicated this fact where citations have been made not directly from the 'Da'ayam ul-Islam,' but from Shaikh Faizullahbai Sahib's notes.

Shiah 'Isma'ili'  
School.

A detailed tabular statement referring to the most important texts will be found at the end of the next chapter.

## A. LIST OF THE IMAMS

### A.—THE SUNNI IMAMS.

1. Abu Hanifa Nu'man ibn Thabit al Kufi, A.H., 80—150 (699-767).  
Disciples of Imam Abu Hanifa,—  
(a) Abu Yusuf (Ya'qub ibn Ibrahim al Kufi) 113-182 (731-798)  
(Fatawa-i-Baramika);  
(b) [Abu Abdulla] Muhammad ibn Husain Ash Shaibani  
132-187 (749-802).
2. Abu Abdulla Malik ibn Anas, A. H. 95-175 (713-795).
3. Abu Abdulla Muhammad ibn Idris ash-Shafi'i, A.H. 150-204 (767-819)
4. Abu Abdulla Ahmad Ash-Shaibani al Marwazi, Ibn Hanbal,  
A. H. 164-241 (780-855).
5. Abu Abdulla as Soofian as Sauri, A. H. 95-161 (713-777).
6. Abu Dawood Sulaiman az Zahiri, A. H. 202-270 (817-883).
7. Muhammad ibn Abdul Wahhab, born Najd, 1691, A. C. brought  
up in School of Hanbal.

### B.—THE SHIAH IMAMS.

#### *I.—The six Imams whom all the Shi'ahs recognize :—*

1. 'Ali ibn Abu Talib al Murtaza.
2. Hasan ibn 'Ali al Mu'taba.
3. Husain ibn 'Ali Ash-Shahid.
4. 'Ali ibn Husain Zainal-'Abidin as-Sajjad
5. Muhammad al-Baqir.
6. Ja'far-us-Sadiq A. H. 80-148.

#### *II.—The twelve Imams of the Ithna-'Ashari Shi'ahs.*

These include the six mentioned above and the following six :—

- |                      |                                 |
|----------------------|---------------------------------|
| 7. Musa al Qasim.    | 10. Ali Al-Mahdi.               |
| 8. Ali Ar-Riza.      | 11. Hasan-Al-Askari.            |
| 9. Muhammad Al-Jawad | 12. M-t. Abu Al Qasim Al Mahdi. |

#### *III.—The Imams recognized by the Isma'ili Shi'ahs.*

These include the first six Shiah Imams (mentioned under heading I, above) and the following

- |   |                      |
|---|----------------------|
| 7. Isma'il ibn Ja'far-as Sadiq                                | 14. Mansur Bilah.    |
| 8. Muhammad.  | 15. Mozuuddin Bilah. |
| 9. Abdulla.   | 16. Aziz Bilah.      |
| 10. Ahmad.  | 17. Hakim.           |
| 11. Husain.   | 18. Zahiruddin.      |
| 12. Abdullah al Mahdi (first Banu<br>Fatimide Kalf of Egypt). | 19. Mustanser.       |
| 13. Kayam be Amar Allah.                                      | 20. Musta Ali.       |
|   | 21. 'Amir.           |

## CHAPTER II

### THE OPERATION OF MUHAMMADAN LAW IN BRITISH INDIA

#### § 1.—*Subjects on which Muhammadan Law Prevails.*

1. The Muhammadan law<sup>1</sup> of succession and inheritance is expressly directed by the Legislature to be applied<sup>2</sup> to Mussulmans all over British India, except that so much of the Muhammadan law and usage, as prohibits succession by apostates<sup>3</sup> from Islam, is not enforceable in British India.

SECTION 1.

<sup>2</sup> Succession and inheritance.

The books on Muhammadan law contain the totality of the rules that it is incumbent on a Muslim to follow. They, therefore, contain not only (1) the law that a Muslim is to follow as the subject of a Muslim state, but also (2) the law that should be enforced by a Muslim state, or the policy that a Muslim sovereign ought to adopt towards 'zimmis,' or non-Muslim subjects. The exposition of this policy is, of course, beyond the scope of this work. It may, however, be pointed out that Muhammadan law requires a Muslim state to adopt a policy that, in substance, is the same as that followed in British India. The law is thus alluded to by the author of the 'Hidaya': "We are commanded to leave them (*viz.*, non-Muslim subjects) at liberty in all things which may be deemed by them to be proper according to their own faith."<sup>4</sup>

Policy enjoined on a State.

The various enactments requiring, or permitting, Muhammadan law to be administered by the Courts of British India are tabulated at the beginning of this Chapter. See also s. 10, below, and the comment thereto.

The steps by which Muhammadan law found recognition in British India, and the political reasons that actuated the English rulers to leave undisturbed the personal law of the peoples of India, form an interesting part of the history of this

First recognition of Muhammadan law in British India.

<sup>1</sup> "The Muhammadan and Hindu Laws, being personal laws, are attached to the followers of each religion wherever they may be living." *Budama Rowther v. Fatema Bi*, 26 Mad. L. J. 260 [1914], Mad. W. N. 278; 15 Mad. L. T. 107.

<sup>2</sup> Unless there is anything in the subject or context showing a different intention, Muhammadan law is said to "apply" or "to be applicable," or "to govern" the parties or the

transaction, or "to be enforceable," when any particular issue between the parties before a Court in British India has to be determined in accordance with rules of Muhammadan law.

<sup>4</sup> It has not been possible altogether to avoid the use of this expression; but though it has an offensive association, etymologically, it merely means "one who has withdrawn."

## SECTION 1.

country.<sup>1</sup> It need only be stated here that the first step was taken by Warren Hastings, who, in 1772, framed what was adopted as the Regulation of 17th. April 1780, section 27; which was as follows.—

“ In all suits regarding

succession<sup>2</sup>

inheritance,

marriage and

caste, and

other religious usages or institutions

the laws of the Koran with respect to Mahomedans and those of the Shaster with respect to the Gentoos, shall invariably be adhered to ”

This regulation, as will appear from the enactments that are given in the table at the beginning of this chapter, forms the basis of most of the Acts under which Muhammadan law is administered by the courts in British India.<sup>3</sup>

Caste  
Disabilities  
Removal Act.

The law depriving apostates of certain rights is abrogated by the Caste Disabilities Removal Act,<sup>4</sup> XXI of 1850, which is as follows :—

“ *An Act for extending the principle of section 9. Regulation VII to 1832 of the Bengal Code, throughout the Territories subject to the Government of the East India Company.*

Preamble :  
Bengal  
Regulation VII  
of 1832.

“ Whereas it is enacted by section 9, Regulation VII, 1832, of the Bengal Code, that ‘ whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasions : or when one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it would be beneficial to extend the principle of that

Hindu and  
Muhammadan  
law not to  
deprive parties  
of property.

<sup>1</sup> Cf. the judgment in *The Indus Chief* (1890) 1 Robinson, Adm. Rep. 28, which is considered to be the *locus classicus* on the subject. “ The law of nations applying to the Eastern part of the world,” “ is different from what prevails ordinarily in Europe, and the Western parts of the world, in which men take their present national character from the general character of the country, in which they are resident. And this distinction arises from the nature and habit of the countries. In the Western parts of the world, alien merchants mix in the Society of the natives; access and inter-mixture is permitted, and they become incorporated to almost the full extent. But in the East from the oldest times, an immixable character has been kept up, foreigners are not admitted into

the general body and mass of the Society of the nations, they continue strangers and sojourners as their fathers were. *Doris usque nam non intermixtum undam.* ”

<sup>2</sup> The word “ succession ” was added in 1781.

<sup>3</sup> The statutes relating to the High Courts, viz. 21 Geo. III c. 70 s. 17; 37 Geo. III, c. 142, s. 14, are not affected by the *Charters of the High Courts*. See clauses 19, 20 & 21, and the *Secretary of State's* Despatch accompanying the *First Letters Patent or Charter*, and dated London 19th May 1862. The despatch was printed in the 1901 edition of the *Bombay High Court Rules*, and is reprinted in Mr. Mulla's valuable edition of the *Civil Procedure Code*.

<sup>4</sup> Short Title given by Act XIV of 1897.



enactment<sup>1</sup> throughout the territories subject to the government of SECTION 1 the East India Company; it is enacted as follows:—

“So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights or <sup>of rights or property, nor impairment of right to inheritance by apostasy or loss of caste,</sup> property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from, the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.”<sup>2</sup>

The Caste Disabilities Removal Act does not apply to descendants of persons relieved by the Act. The descendants of a Hindu convert to Christianity have therefore no interest in the property of their unconverted relatives.<sup>3</sup>

It has been held, in construing Bombay Regulation IV of 1827, that the term “caste” is not restricted to Hindus.<sup>4</sup> “It comprises any well-defined native community governed for certain internal purposes by its own rules and regulations.”<sup>5</sup> Act XII of 1887, s. 37 mentions questions regarding “caste” amongst those which have to be decided in accordance with Muhammadan law.

According to Murray's New English Dictionary, the word ‘caste’ is (a) ultimately derived from the Latin ‘castus,’ pure, unpolluted, (b) through the Spanish and Portuguese ‘casta,’ (feminine of ‘casto’), which originally meant, in those languages, “pure or unmixed (stock or breed),” and (c) later came to mean “race, lineage, breed.”—“In its Indian application” the word is stated to be derived from the Portuguese. Its meanings in English are given as: (1) “one of the several hereditary classes into which society in India has from time immemorial been divided; the members of each caste being socially equal, having the same religious rites, and generally following the same occupation or

<sup>1</sup> Peacock C. J. has pointed out the “total irrelevance” of the preamble to the enacting part of the Act: (*Srimati Matangini Debi v. Srimati Jagkuli Debi* (1869) 5 Ben. L. R. (O.C.) 466, 492, 14 W. R. (O.C.) 23. But see *Khums Lal v. Gobind Krishna Narain* (1911) 38 I. A. 87; 33 All. 358.

<sup>2</sup> “Or” is not a misprint for “of.”—So held in *Nowroz Ali v. (Musst.) Aziz Bibi* (1878) 11 P. R. (Civ. Judgt.)—No. 121, p. 255, 264-5. The judgments in this case discuss the effect of the Act, (see pp. 258-263), and compare it with previous enactments (see pp. 257-8).

<sup>3</sup> See case cited in last foot note, and *Kery Kolitany v. Mooneram Kloita* (1873) 13 Ben. L. R. (F. B.) 1; and *Muchoo v. Arzoon Sahoo*

(1866) 5 W. R. 235. See particularly the comment to s. 335, below.

<sup>4</sup> *Vathilinga v. Ayyatharai* (1917) 40 Mad. 1118.

<sup>5</sup> *Abdul Kadir v. Dharma* (1895) 20 Bom. 190 (per Sargent C. J. and Fulton J.) In (*Sayed Hashim Sahab v. Huseinsha* (1888) 13 Bom. 429 N. Harilal and Parsons J.J. did not follow a previous decision holding the contrary which was cited to them: See also *Bai Jina v. Kharsa Jina Kalia* (1907) 31 Bom. 386 (Chandavarkar and Pratt J.J.) Compare *Abraham v. Abraham* (1863) 9 Moo. I. A. 195, 239-40; *Kery Kolitany v. Mooneram Kloita* (1873) 13 Ben. L. R. 1, 75-76 (F. B.); 19, W. R. 367,

## SECTION 1.

profession; those of one class have no social intercourse with those of another." The four leading castes of Brahmans, Kshatriyas, Vaisyas and Sudras are then parenthetically mentioned and its sub-divisions indicated. "This is now the leading sense, which influences all others." The other senses mentioned in Murray's Dictionary include (2) "a hereditary class resembling those of India;" (3) "a class who keep themselves socially distinct, or inherit exclusive privileges."

Customs and  
usages.

The Muhammadan law of succession and inheritance, or parts thereof, may also be displaced, with regard to particular parties, by their customs and usages: see s. 10, below.

SECTION 2.  
Marriage.

Marriage.  
How the  
Muhammadan  
law applied.

2. The Muhammadan law of marriage, and of the family relations generally, is enforced throughout British India.<sup>1</sup>

There has never been any question whether or not the Muhammadan law of marriage should be administered to the Mussulmans; and for obvious reasons. Though marriage is not expressly mentioned in the enactments relating to the Presidency towns, yet "the rights and authorities of masters of families and fathers of families" have to be preserved;<sup>2</sup> secondly, marriage is a matter of contract as regards Muhammadan law;<sup>3</sup> finally, there is no other marriage law that is directly applicable to the Mussulmans. The British Indian Acts relating to marriage and divorce have not been applied to Mussulmans.

Divorce.

The law of marriage is taken to include the law of divorce, though some of the enactments have specifically mentioned divorce as distinguished from marriage.

Doubtful  
matters.

There are, however, three matters that fall under the law of marriage, and on which it is not clear whether the Muhammadan law has not been altered in British India. These matters are, 1 the law relating to what is called legitimacy in English law, but more properly called the establishment of parentage with reference to Muhammadan law; the law relating to the rights of the husband to chastise his wife, and the operation (if any) of the Caste Disabilities Removal Act on the legal effects of marriage. These matters will be dealt with in the contexts relating to them respectively.

religion after  
celebration of  
marriage.

A marriage, that has taken place, between Hindu parties, in accordance with Hindu rites, will be governed by Hindu law, and it will depend upon Hindu law whether or not it has been dissolved. If, after a marriage has been so effected, the woman marries a Muslim, the validity of her second marriage will be tested by Muhammadan law. For the purpose

<sup>1</sup> Cf. s. 18, below.

<sup>2</sup> 21 Geo. III c. 70, s. 18, and 37 Geo. III.

c. 112, s. 12.

<sup>3</sup> See s. 1, above, and comment on it.

of so testing the validity of the second marriage, it will have to be SECTION 2, determined, first, whether or not (according to Hindu law) the first marriage was dissolved prior to the second marriage.<sup>1</sup>

In a recent case, it seems to have been seriously argued that the Maintenance question whether or not a Muslim father is bound to maintain his son should be governed by the English and not the Muhammadan law.<sup>2</sup>

3. The Muhammadan law of gifts is enforced all over British India, though the courts have differed in their reasons for doing so.

The law of gifts, though not always mentioned in the enactments requiring Muhammadan law to be enforced in British India,<sup>3</sup> has been enforced in Bengal,<sup>4</sup> the North-West Provinces and the Madras Presidency.<sup>6</sup> The Transfer of Property Act, 1882 s. 129 expressly saves the Muhammadan law of gift from being affected by the provisions relating to gifts, contained in that Act which may therefore be taken as a legislative recognition<sup>7</sup> of the correctness of the view taken by the Courts.

The Judges have, however, differed in the reasons they have assigned for administering the Muhammadan law of gifts to Mussulmans, where the Legislature has not expressly directed it to be so applied. Some hold that that law becomes applicable on the ground of justice, equity and good conscience,<sup>8</sup> and others that "questions as to gifts between Muhammadans are covered by the express provisions as to questions regarding . . . any religious usage or institution."<sup>9</sup>

4. The Muhammadan law of contract, so far as it is not affected by, nor inconsistent with, legislative enactments,<sup>10</sup> is enforceable in British India.

<sup>1</sup> *Budama Rother v. Fatema Bi* (1911) 26 Mad. L. J. 260.

<sup>2</sup> *Mahomed Jusat v. Haji Adam* (1911) 37 Bom. 71.

<sup>3</sup> See the Table of enactments at the beginning of this chapter.

<sup>4</sup> *Zohooroddin v. Baharoolly* (1864) W.R. 185.

<sup>5</sup> *Shamsuddinissa v. Zohra Bibee* (1873) 6 M. W. P. 2.; *Agra F.*, B. Ed. 1871, 286.

<sup>6</sup> *Chekkonkutti v. Ahmad* (1886) 10 Mad. 196; *Khader Hussain v. Hussain Begum* (1870) 5 Mad. H. C. R. 114.

<sup>7</sup> This expression is used by Scott C.J. in *Manji Karimbhai v. Hoorbai* (1910) 12 Bom. L. R. 1044 at p. 1050, relying for the proposition implied in it on *Seiff v. Jesbury* (1871) L. R. 9 Q.B. 3 12, and *Morgan v. London General Omnibus Co.* (1885) 12 Q.B.D. 205-7. In the former Coleridge C.J.

speaks of "Parliamentary exposition of a Statute."

<sup>8</sup> *Alabi Koya v. Mussa Koya* (1901), 24 Mad 513, 519-20 (where Benson J. collects the two previous decisions). See also (*Mussumat*) *Shumsool-Nissa v. (Mussumat) Zohra Bibee* (1873), 6 M. W. P., 2 (F. B.) (law of gifts applied on the ground of justice, equity and good conscience); and (*Mussumat*) *Chunda v. Hakram Alimooddeen*, ib. 28, (F. B.) (law of pre-emption applied on the same ground).

<sup>9</sup> *Vahazulleh v. Roopput* (1906) 30 Mad- 519, 521; see, the similar view expressed by Mahmood J. in *Gobind Dayal v. Inayatulla* (1885) 7 All. 775 (F. B.) as to pre-emption.

<sup>10</sup> *E.g.*, Indian Contract Act, 1872; Transfer of Property Act, 1882; and the Interest and Usury Acts XXXII of 1839 and XXVIII of 1855.

## SECTION 4.

Contract Act,  
s. 1.(1) Interest  
on mortgages.

The Indian Contract Act, s. 1, contains the following provision: "Nothing herein contained shall affect the provision of any statute or regulation not hereby expressly repealed; nor any usage, or custom of trade, nor any incident of contract not inconsistent with the provisions of this Act." A good example of the effect of this saving clause is furnished by the rule of 'damdupat' in Hindu law, which has been held to be in force as it is not inconsistent with the Contract Act.<sup>1</sup> but, on the other hand, ss. 86 and 88 of the Transfer of Property Act have abolished all other rules, so far as interest on mortgages is concerned.

(2) on other  
transactions

In regard to transactions other than mortgages, the Muhammadan law, by which the taking or giving of interest is absolutely prohibited,<sup>2</sup> has been nullified, partly by the almost universal practice of Mussulmans to give and take interest, and partly by the operation of the Interest and Usury Acts XXXII of 1839 and XXVIII of 1855 respectively,<sup>3</sup> and it has been held that the custom of taking interest should be recognised by the courts in British India.<sup>4</sup>

(3) on 'mahr.'

Even on a claim, based so entirely on Muhammadan law as that of the 'mahr' of a Muslim widow, the prohibition of Muhammadan law has been held not to apply, and interest has been allowed.<sup>5</sup>

## Pre-emption.

5. The Muhammadan law of pre-emption is enforced in Bengal and the North-West Provinces. In the Madras Presidency, it has been held to be contrary to justice, equity and good conscience.<sup>6</sup> In the Bombay Presidency, it is recognized as established by custom in the Gujarat, but the courts are opposed to its enforcement in places where it has not been customarily followed.<sup>7</sup>

The question of the applicability of the law of pre-emption more properly falls within Chapter XI. below see. s. 523A. below.

<sup>1</sup> *Nobin Chunder v. Ramnath Choudhry* (1887), 14 Cal. 78; *Sasandamappa v. Narbawara* (1907) 31 Bom. 351.

<sup>2</sup> *Muthu v. Venkataratnam* (1903), 26 Mad. 662, 971.

<sup>3</sup> See *Musbat-ul-Masabih* on 'Traditions' as to interest, Book XII, Ch. 4, Part 2, 'Abul Ibrahim said: "The Apostle of God, said: verily a time is coming to man when all will eat interest; and it be will not eat the interest, its impression will reach him, such as the giving interest the witness of it, or the writer of it."'

<sup>4</sup> *Mun Khan v. Bibijan* (1870), 5 Beng. L. R. 500, 14 W. R. 398; *Koor Zachariasiah v. Perbhajpai* (1871) 6 S. W. P. 358 (S. C.).

<sup>5</sup> *Per Phau J. Mun Khan v. Bibijan* (1870)

5 Peps. L. R. 400, 14 W. R. 398, *Hamam Bibi v. Zaidulla Bibi* (1910) 34 All. 182 (S. C.), affirmed by the P. C. (1916) 38 All. 580, *Contra Ham Lal Muskerjee v. Harnam Chander Dhar* (1869), 5 Ind. L. R. 10, C. 130. The P. C. however did not decide the point on which the two cases in the Bengal L. R. conflicted, viz., whether the Muhammadan law of usury was, or was not, abrogated by Act XXVIII of 1855: 38 All. 580, 588.

<sup>6</sup> *Soorinet Khatoon v. Altaffunnissa Khatoon*, (1863) 2 Hay 210, *Hamam Bibi v. Zaidulla Bibi*, (1910) 34 All. 182 (S. C.) affirmed by the Privy Council (1916) 38 All. 581.

<sup>7</sup> *Burham Sah v. Munu Mir U'din Sah* (1870), 6 Mad. L. C. R. 26.

<sup>8</sup> See comment

5A. The capacity of any Muslim to act in the following matters, namely, marriage, dower, divorce and adoption, is not affected by anything contained in the Indian Majority Act, and, *semble*, the Muhammadan law will be enforced with reference to it.

SECTION 5A.  
Majority.

SS. 5A to 5E refer to certain matters to which Muslim books on law give importance, and which deal with subjects that are either not declared to be applicable in British India, or are expressly declared to be inapplicable: but which yet deserve attention, because of the doubt as to their applicability, or on account of their general bearing on branches of the law that do apply, or for similar reasons.

Latent in  
Indian or  
Muhammadan  
law on some  
matters.

First, as to the age at which Muslims should be considered legally capable<sup>1</sup> of performing juristic acts, doubt arises from a number of considerations. It is, of course, not necessary that the law should be uniform on this matter for all transactions; in other words, the attainment of a specified age may make a person competent to enter into one transaction, and may still keep him incompetent as regards another. Thus the French Civil Code<sup>2</sup> recognises different ages for capacity for marrying, and for entering into other contracts, and the ages for males and females also differ. In England an infant, however young, can hold an advowson or patronage of a benefice, and can present to the benefice on an avoidance thereof<sup>3</sup>. In India a similar want of uniformity exists in the law; and this is partly the deliberate policy of the legislature: for the enactment dealing with the subject is specifically barred from affecting capacity in certain matters;<sup>4</sup> and again, the Act itself contemplates two different ages of majority, depending on the fortuitous circumstance whether a guardian has been appointed by the Court. Even as regards matters not expressly excepted from the operation of the Indian Majority Act, it does not seem to have been broadly laid down in any enactment, that in the absence of any special law to the contrary, non-attainment of majority shall generally incapacitate him as regards all acts in the law,<sup>5</sup> though in regard to specific juristic

Law or  
MAJORITY.  
Age varies  
for different  
juristic  
acts.

(a) Majority  
Act, excepts  
marriage,  
dower,  
divorce  
and  
religion.

(b) No general  
law as to all  
matters  
covered by  
Majority Act.  
(c) Special  
laws as to  
some such  
matters.

<sup>1</sup> The expression *sui juris* which is commonly used by English lawyers to predicate legal competence to act, did not, in Roman law signify that the person had arrived at any age of legal majority. "A child just born, is not under the *potestas* of the father, was *sui juris*," Hunter's "Roman Law," 194.

<sup>2</sup> Artt. 388, 114, 145, 148, 903, 305; see also artt. 374, 376-7, 176, 477.

<sup>3</sup> See Halsbury's "Laws of England," XVII, 10

s. 213; cf. *Brookbank v. Brookbank Borlase* (1911) 27 T. L. R. 569 (infant co-respondent without guardian *ad litem*).

<sup>4</sup> See the Indian Majority Act IX, of 1875, s. 2.

<sup>5</sup> The French Civil Code, art. 902, lays down a general rule as to acquiring property: "all persons can dispose of or receive property by donation *inter vivos*, or by will, excepting those whom the law declares incapable of so doing."

SECTION 5A. acts, the law has laid down that the attainment of majority is a condition precedent to capacity for doing them.<sup>1</sup>

The result, therefore, is, that while the Indian Majority Act has no application at all to such matters as marriage, dower, divorce or religion : as regards other matters, though in accordance with the provisions of the Act a person may be considered a minor, yet there is no law stating in terms the effect of a person being a minor, or laying down that non-attainment of the age of majority incapacitates the minor from doing any act in the law whatever. The consequence of this is, that the effect of a person being under the age of majority is left doubtful in regard to acts referring to matters<sup>2</sup> that are neither expressly excepted from the effect of the Majority Act, nor expressly covered by some such enactment as the Indian Contract Act, s. 11. In regard to such matters, it would seem that the rule of Muhammadan law operates. In Muhammadan law the age of puberty is generally the age of majority, or rather that age fixes the time of attaining the capacity to perform juristic acts generally. But there are special provisions for various juristic acts, such as marriage and wills, and the law of the different sects is not uniform on these points. These will be considered in their proper places.

Presumptions.  
'Adab-i-Qazi.'

5B. The texts on Muhammadan law abound with rules primarily consisting of directions to the 'Qazi' with reference to the decision that he must give, should the evidence before him be to a certain effect. It is sometimes not easy to determine whether or not these rules are presumptions of law, and thus saved under s. 103 of the Indian Evidence Act.

Presumptions-  
of Muham-  
madian law, —

The texts on Muhammadan law refer to some classes of matters, connected with the proof of facts, of which the effect in British India is not always easy to determine for it is not clear whether they are provisions merely as to the evidence<sup>3</sup> required for proving certain transactions,

<sup>1</sup> The most important of such provisions is s. 11 of the Indian Contract Act. On the other hand, though the Guardians and Wards Act a minor is a person who, under the "provisions of the Indian Majority Act is to be deemed not to have attained his majority," it does not anywhere lay down that the effect of being a minor is incapacity legally to act without a guardian.

<sup>2</sup> i. e., capacity to make wills, or *waqfs*. Thus in 1871 Mr. Justice Dwarakanath Mitter said "Every act done by a minor is not necessarily null and void. Those acts which are prejudicial to his interests can be questioned and avoided by him after he reaches his majority."

*Jagdish Narain Lalaker v. Surada Soundares Dubei* (1871), 15 N. R. 518.

<sup>3</sup> The rules relating to *Adab-i-Qazi* or proper procedure to be followed by the Qazi were referred to by Lord Parker in *Hamada Bibi v. Zubaida Bibi* (1916) 48 All. 781 (P.C.) See the paragraph in the comment to s. 12, below, headed "Equitable considerations."

<sup>4</sup> Even on matters of mere evidence a consideration of the principles which Muhammadan lawyers would apply may be of assistance. See (*Khajikh*) *Hidayat Oallah v. Rajan Khanum* (1841) 3 Moo. I. v. 295, 318 noted in the comment to s. 10, above.

or whether they fall under the head of presumptions of law, and thus are saved by the Indian Evidence Act, s. 103, which provides that "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person."<sup>1</sup>

Nor is it easy to appreciate the exact effect, in British India, of one particular class of presumptions (if they be presumptions of law falling within s. 103 cited above), with which the texts on Muhammadan law abound: *viz.*, where it is laid down that a statement on oath<sup>2</sup> of a party to certain specified transactions should be presumed to be a true account of the nature of those transactions, unless the contrary is proved. The presumption does not arise (it will be observed) merely from the existence of the facts making up the transaction in question, but from those facts, coupled with the statement of the favoured party. To illustrate the point, reference might be made to the rule of English law, that when a wife commits certain crimes (as burglary, receiving stolen goods, etc.) in the presence of her husband, she is presumed to have acted under his coercion, and therefore not liable to punishment.<sup>3</sup> This presumption arises merely from the fact of the wife having committed the crime in the presence of her husband, and the English law does not require a statement on oath by the wife that she was coerced, as a condition precedent to the presumption arising. In Muhammadan law, on the other hand, a presumption of a like nature is frequently made to depend on, and to arise only after, such a statement has been made. Now the Indian Evidence Act does not refer to any presumptions of this conditional nature. The Act contains presumptions as to the correctness of documentary evidence, but not as to the truthfulness of a statement referring to specified facts—though there is one presumption well recognised in the law of evidence against the truthfulness of a certain class of witnesses, *viz.*, the presumption against an accomplice's evidence unless corroborated.<sup>4</sup> And in the earlier legislation, even in British India provisions having an effect very similar to that of the presumptions of

—depending  
on declara-  
tion of inten-  
tion, or the  
like.

<sup>1</sup> On the distinction between burden of proof as a matter of substantive law, and of adducing evidence see *H. v. James Stoddart* (1909) 25 T. L. R. 612, 616-17 (C.C.A.), *Pickup v. Thames Insurance Co.* (1878), 3 Q. B. D. 591, 599, 600 (C.A.); *Wakelin v. London and S. W. Ry. Co.* (1886), App. Cal. 41, 52.

<sup>2</sup> The word "affirmation" should apparently be substituted in British India. See Oaths Act, 1873, s. 6; and General Clauses Act, s. 3 (30), (55).

<sup>3</sup> Halburty's "Laws of England," IX, 211, s. 519.

<sup>4</sup> See Indian Evidence Act, s. 114, *ibid.* (6). With reference to the effect of s. 114 "coupled with the general repealing clause at the beginning of the Bill (*i.e.* the Indian Evidence Bill) Sir J. F. Stephens said in the legislative council that it "makes perfectly clear that courts of justice are to use their own common-sense and experience in judging of the effect particular facts and that they are to be subject to no technical rules whatever."

**SECTION 5B.** Muhammadan law which are under consideration, were recognised. Thus, under regulation XV of 1793, s. 10, the mortgagee is required to swear or solemnly declare that the accounts he may deliver in, are true and authentic.<sup>1</sup> But the scheme of the Indian Evidence Act as well as the principles underlying the adjective law of British India is to leave it to the courts, seeing and hearing the witnesses give evidence, to determine whether the statement made on oath is to have credence, and, if so, to what extent.

Presumption as to  
declaration of  
intention.

But presumptions of the nature referred to, are of frequent occurrence in Muhammadan law; and one particular species of them is of some general importance, viz., where the act is of such a kind that it is possible for different legal results to flow from it, and the nature of its effect depends upon the intention with which it was done. With reference to such acts, the pure Muhammadan law frequently is to the effect that if the person says that he acted with a particular intention, he is to be presumed to have acted with that intention. Are these presumptions of Muhammadan law nullified by operation of the Indian Evidence Act, s. 106? A consideration of illustration (a) to that section seems to show that it is only "where a person does an act with some intention other than that which the character and circumstances of the act suggest, that the burden of proving that intention is on him."<sup>2</sup> So that where the overt acts of the party show a different intention from that which is alleged, the onus is placed on the person making the allegation. But there seems to be no provision for the class of acts just mentioned, viz., where the acts are capable of being interpreted as indications of an intention equally one way or the other.

Effect of such  
presumptions  
in British India.

There appear to be three possible ways in which presumptions of Muhammadan law of the kind in question may be considered:—(1) as mere rules for the appreciation of evidence, and as such of no application in British India, either because the Indian Evidence Act supercedes them, or because presumptions of such a nature are unknown to the law of evidence prevailing in India or (2) as presumptions of law, whose operation

<sup>1</sup> i. e., those on Mortgages, (11th ed.), p. 491.

<sup>2</sup> The procedure in a Qazi's court should be borne in mind. It is as follows: (1) The plaintiff orally states his facts not on oath. In a case or action is disputed, (2) the defendant is asked either to admit them, or to deny them on oath. (3) If he does the latter, the plaintiff produces witnesses who can swear to his statement, and their testimony is taken if they are trustworthy witnesses, (4) the defendant is asked to produce his evidence, if any. The presumption is alternately in favour of the plaintiff and

defendant, after each of the first three stages. If all four stages are complete, the Qazi decides whom to believe. The function of the witnesses is, it will be observed, analogous to that of a jury in the early English system, when the jurymen were chosen from amongst persons who knew the circumstances of their own knowledge, and swore to them. See Pollock and Maitland's *History of English Law*, I. 117, 119; II. 619.

<sup>3</sup> See also the Indian Evidence Act, s. 4, and the illustrations thereto.



is saved by the Indian Evidence Act, s. 103; or (3) as rules partly SECTION 5B of substantive law, and partly of evidence;—that, in so far as a statement on oath is required for proof of the intention, the rule of Muhammadan law is displaced by the Indian Evidence Act, and that the existence of the intention one way or the other may be brought to the cognizance of the Court in any manner authorized by the Act, and that the mode of doing so does not affect the presumption in question, and need not, therefore, be confined to the statement of the person concerned.

The question does not appear to be merely of academic interest, inasmuch as the rule of Muhammadan law, in effect, gives in many cases an option to the actor to determine the character of equivocal acts,—an option that may be of great importance in such matters as gift and divorce. Nevertheless, it is not a question on which the Courts would be likely to pronounce an opinion, inasmuch as it cannot often happen that the decision of a case should depend solely on the distinction between presumptions of law and the inferences that may be drawn from facts proved. The distinction however does exist; <sup>1</sup> and it has therefore been deemed best to state in the appropriate places, the presumptions that Muhammadan law recognises, even though their force may be questioned in British India, for reasons, some of which are stated above.

Option to his  
nature of acts.

5C. The Arabic texts contain many illustrations and precedents relating to the construction of words. An unconsidered reliance on such portions of the texts has frequently misled the Courts. But these must be distinguished from illustrations indicating the substantive law.

Verbal  
explanations  
and rules of  
law.

This is another subject of the kind to which reference was made in the comment to s. 5A, above. The illustrations given in the texts and particularly in collections of 'fatawa,' which apparently explain the effect to be given to the use of certain words, are often merely in the nature of guides to the interpretation of Arabic words. They are, therefore, in such cases, of little assistance in India, where the language is not Arabic. Arabic words—even words having a settled meaning in law—are apt to be used here with a new significance acquired in India, which is not necessarily the same as that which they had at the time when, and in the country where, the texts of Muhammadan law were written. Moreover, translations of such illustrations or examples are very likely to be misleading. On the other hand, there are many illustrations,

<sup>1</sup> It has been characterised by Lord Alverstone C. J., as very important *R. v. Stoddard* (1909) 26 T. L. R. 612, 616.

SECTION 5c. where, for the sake of brevity, or for greater clearness, a given position is, as it were, dramatised, by the statement of facts being put in the mouth of the agent: such a statement has to be considered as a recital of what has occurred, in order that an exposition may be given of the operation of law on the facts recited, rather than as mere words uttered at the time, irrespective of previous events. To distinguish examples of the one kind from those of the other, is not always as easy, as the importance of doing so, is obvious. The misuse of Arabic words and misunderstandings arising from it are exemplified only too well in reference to the law of 'hila bil' iwaz.' In this connection a judgment of Subramania Aiyar, J.'s. may be consulted with advantage <sup>1</sup>

Forms in  
Muhammadan  
law.

At the same time the books on Muhammadan law are full of references to the 'form' with which the legal transactions in question must comply. The authorised form or forms are generally given in the texts immediately after the definitions, at the beginning of each chapter. As most of the transactions are cast, in Muhammadan law, into the shape of contracts, the form mostly consists of the words of "declaration and acceptance," 'ijab o qubul,' which give effect to the juristic act. Coupled with these forms of declaration and acceptance, are statements of the result of disregarding the technical phraseology of the law, and this is frequently followed by a consideration of the effect of the intention with which the forms are used, as, for instance, whether the use of the strict form, technically required, is effective without any intention on the part of the speaker to give to the words the effect they have in law and conversely, whether the intention itself without the use of the formal words, is effective.

Formal terms and  
expressions.

English writers on Muhammadan law have been apt to pay too little attention to these forms, but this attitude has been based, it is submitted, on a total misconception, causing them to overlook its real importance. For the disregard of what the authors have to say regarding forms, is grounded apparently on the principle, familiar in modern English law, that the intention is all in all and that the words are of no importance. Now, except in regard to marriage, divorce and pre-emption it may be said at once, that the Muhammadan law usually agrees with the rule of English law on this point. This fact however goes a very little way towards proving that attention to the forms mentioned by the Muslim jurists would be labour spent fruitlessly. The decisions of the English Courts given at a time when the Common Law Courts were steeped in formalities, are still consulted for the

<sup>1</sup> *Chutai Zamindari v. Hanasooru Dhoru* (1889) 23 Mad. 318, 323.

purpose of discovering the exact ambit of legal rights and liabilities, and SECTION 5D. it is for this purpose, that the forms of declaration and acceptance should similarly be consulted : to arrive at an accurate conception of the nature of the transactions dealt with by the Muslim jurists, and the terminology they employed

5D. In pure Muhammadan law, the motive and intention with which certain civil overt acts are done (e.g., words are uttered), occasionally fix the act with specified legal effects. These rules of Muhammadan law are sometimes such that no effect can be given to them in British India ; at other times they are enforceable.

Intention  
and motive

Many rules in Muhammadan law based on the intention and motive with which the formal words are used have been often treated as mere surplusage, apparently, as having no force whatever in British India. Whether that is so or not, is a question that must be considered by itself. But it must, in the first place, be realised that in pure Muhammadan law the intention and motive of the agents frequently determine which one or more of various possible legal results follow from the same acts. "In all acts," says the author of the 'Hidaya,' "regard is paid to the spirit and intention." <sup>1</sup> Modern systems of law are, it is true, opposed to such rules, which give uncertainty to the legal results of transactions—uncertainty which cannot be easily removed by a consideration of overt acts alone. But Muhammadan law, which is merely an off-shoot of Islam as a religion, could not be affected by such considerations : for, just as in secular matters, intention (except as expressed in overt act(s) is relegated to the background, so in religious matters, ceremonies and formalities, when divorced from religious intentions, are, under most systems, ineffectual from a religious point of view. When, for instance, a text of Muhammadan law states, that a document in a specified form and words, creates a 'waqf,' if made with the intention of creating a 'waqf,' but, if executed in the same form and words, with the intention of making a gift, it is totally inoperative, because a gift cannot be validly made in such form and terms, such a text refers primarily to the effect of the document "between the man and his God" or "in conscience." <sup>2</sup> But it is recognised by the Muslim jurists themselves (as will appear from the example

Their  
importance  
in Muham-  
madan  
law ;

conflict  
between  
religious  
and secular  
effect of  
the same  
words or  
acts.

<sup>1</sup> Hed. 520 (col. 1).

<sup>2</sup> These expressions are used in antithesis to the expressions "as before the judge," "judicially" or "in law" : Bail. I. 27 (H. 25-27), 208

(par. 2), 213 (par. 1, 2 & 3), 217 (par. 3), 231 (par. 2), 401 (H. 5-8), Bail. II. 100 (H. 1-7), 116 (H. 17-19), 211 (H. 8-11) *et passim*. See Index sub verb. "conscience."

SECTION 5E. cited in the footnote), on the one hand, that secular courts may be unable to find out the real effect of certain acts, according to the law of God, and that the courts may even be under the necessity of giving decisions in conflict with what "conscience" might dictate to the parties. But this, it is submitted, is not enough to alter the substance of the law, which is, that the determining factor, in regard to the effect of certain transactions, is the intention and motive of the agent: the means by which the Courts endeavour to discover the intention or motive, or their inability to do so adequately, is a matter of adjective law, or the result of the limitations under which all human investigations are made. They do not necessitate a conscious disregard of the substantive law: though they may operate so as to give imperfect effect to it. On the other hand, a consciousness is observable from the earliest times of the fact that law is a practical science: that its rules must be based on existing circumstances; and that what mere speculative reasoning may point to, has to be tested, checked and corrected by its being practicable.<sup>1</sup> By the necessity of things, the court administering the law cannot altogether ignore this circumstance but the functions of the courts render it unsafe for them to do that which it is the province of the legislature to do.

Law of crimes and slavery.

5E. The Muhammadan law relating to crimes, to procedure, and to slavery, is not enforceable in British India: but it may have to be referred to for collateral purposes.

Slavery.

Slaves<sup>2</sup> form a valuable portion of property in places where the law permits their existence, and, as may be surmised, a great many provisions of the law in the Muhammadan text books apply to them, or are illustrated with reference to them. The law of slavery was never made applicable in British India,<sup>3</sup> and by the Indian Slavery Act, V. of 1843, it is provided that slaves shall not be sold in execution of decrees or orders or enforcement of any demand of rent or revenue (s. 1), that no rights arising out of alleged property in slaves shall be

Indian Slavery Act.

<sup>1</sup> The following will furnish an instance. The Hanafi doctors were disinclined to allow the dedication of any property for a mosque unless the property dedicated was quite divided off from all private property. But this strict view of the law was modified in the matter which is thus recorded on the *Hudud*: "It is recorded also, that when Abou Yousaf went to Bagdad and beheld the narrow and crowded condition of that place, he held the appropriation to be lawful and absolute in other cases,—that is, whether the mosque be in the lower story and the

develing in the upper, or *vice versa*:—but this was admitted out of necessity. The same is recorded of [Imam] Muhammad when he went to Ras, [the Capital of Irak (the ancient 'Chaldæa')] and for the same reason."—Hed. 239 (col. II).

<sup>2</sup> Macnaghten has a concise chapter on slavery see "Muhammadan Law," p. 312: "Procedents of Slavery," case II., for an "enumeration of different modes by which slavery is created."

<sup>3</sup> It will be observed that there are no means by which the status of slaves, as known to Muhammadan law, can arise in British India.

enforced by the Courts (s. 2), that no slave shall be dispossessed of or prevented from taking possession of property acquired by him, by his own exertions, or by inheritance or gift, etc., (s. 3), and that any act that would be a penal offence if done to a free man, shall be equally an offence if done to any person on the pretext of his being in a condition of slavery (s. 4).

"It is the general intention of the legislature in passing this Act to relieve all persons then subject thereto from all the disabilities arising out of the status of slavery . . . . In construing this remedial statute, the Courts ought to give to it the widest operation which its language will permit."<sup>1</sup>

Scope of the Act.

Questions may, however, arise in British India as to the effect of slavery, the slave being in a country where slavery is recognised. The determination of the law which would be applicable in such a case would be a question of private international law. Again it may not be easy to say how far the Slavery Act must be taken to affect not disabilities arising from the status of slavery, but rights arising therefrom.<sup>2</sup> No cases have been found on these subjects in the reports, and it has seemed unnecessary to introduce into the following pages any reference to slavery, except where the illustrations given by the original texts refer to slavery and where it has not seemed possible or advisable to omit, or to alter the form of, the illustration :

Rights of Slaves.

Slavery was not abolished in England till 1834, though the slave trade had been abolished in 1807.

6. Where it becomes necessary, for the purpose of adjudicating upon any civil rights, with reference to status, or property, connected with the religious tenets or beliefs of the Mussulmans, the Court will consider such religious tenets or beliefs, and give a decision thereupon, without pronouncing on their truth or regulating religious ceremonies.<sup>3</sup>

Religious right or status.

<sup>1</sup> (*Sayed*) *Mir Hujumuddin Khan v. Zawal-Nissa Begum* (1879) 3 Bom. 122, 129, 130; 6 L. A. 137.

<sup>2</sup> See cases on the Caste Disabilities Removal Act, Act XXI. of 1850 on a similar distinction, in the comment to s. 1, above.

<sup>3</sup> It may be noted here that a contract to serve one's whole life a particular master is allowed by English law: *Walford v. Day* (1837) 2 M. and W. 273; see Smith's Leading Cases (1901, 11th Ed.), 1, 430.

<sup>4</sup> *Mokond Lal Singh v. Nabolip Chunder Singh* (1898), 25 Cal. 1881: "The Court judi-

cially administering the law cannot say that one religion is better than another" *per* Maclean C.J., *ib.* 885; *Krishna Sani Tata Chaga, v. Krishnaamma Charvar* (1882) 5 Mad. 318; *Elumthear Reddy v. Nambrenmal Chettiar* (1890) 23 Mad. 298. The decision of religious questions was involved in *Krishnasami v. Krishnamma* (1883), 5 Mad. 413, 415. See also *Narasimma Charvar v. Sri Krishna Tata Chavara* 6 Mad. H. C. R. 449, which was approved by the P. C. in *Krishnama v. Krishnasami* (1879) 2 Mad. 62, *cf.* *Syed Amin Sahib v. Ibrahim Sahib* (1868) 1 Mad. H. C. R. 112.

SECTION 6. The same provision is contained in the Civil Procedure Code, 1908, s. 9 (corresponding to s. 11 of the Code of 1882), to which and the decisions given under it the reader is referred.

### § 2.—Choice of Law.

Choice of law  
how made by  
the forum.

6A. The question whether the rights of the parties are to be determined in accordance with the rules of Muhammadan, or of some other system of law depends primarily upon the legislative enactment constituting the court by which the matter must be adjudicated upon. *Semble*, in British India the course that the courts are required to adopt<sup>1</sup> is to consider whether the particular transaction in regard to which the court has to adjudicate, falls within the denomination of any of those matters that are governed by legislative enactments having territorial application,<sup>2</sup>—in which case the law laid down in the said Acts must be applied. If the transaction is not one with regard to which the law is laid down in a legislative enactment, then, as a rule, the law by which the parties have been customarily<sup>3</sup> governing their own conduct, is selected by the Court as that which is most in accordance with justice, equity and good conscience.<sup>4</sup>

#### Illustration.

A Memon died in Mombasa and the question arose whether his estate was governed by Muhammadan or by Hindu law. The facts proved (in so far as they appear from the judgment of the Privy Council) were as follows: (a) the deceased's father, with his wife and children, including the deceased, belonged to the Memon community of Cutch, who follow the Hindu and not the Muhammadan law of succession; (b) they migrated to, and settled in, Mombasa about half a century before the judgment;

<sup>1</sup> *Rajahm v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (o.c.) 27.

<sup>2</sup> *E. G.* the Indian Contract Act, the Transfer of Property Act, &c. Thus, if the transaction conforms to the definition of an agent for consideration laid down in the Indian Contract Act then the sections of that Act will apply.

<sup>3</sup> See *Krishnaiah v. Kalanthur* (1914) 38 Mad. 1052. The law may not in its origin, be based on customs. The main portions of Muhammadan law were promulgated by the Prophet and did

not arise by spontaneous adoption, but the force of Muhammadan law in British India is derived from the fact that large numbers of people have been governing their conduct in accordance with it, and that the legislation requires it to be entered in regard to people who have been following it.

<sup>4</sup> *Rajahm v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (o.c.) 27. See *Muhammad Ismail Khan v. Lala Sheo Math* (1913) 17 C. W. N. 97.

(c) at Mombasa, the succession to Muhammadans is, in general, governed SECTION 1 by Muhammadan law, "although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing a special law of succession;" (d) eleven cases were proved in which succession among the members of the Memon community at Mombasa had taken place according to Muhammadan law; (e) the only documentary evidence also was in accordance with this view. On the other hand it was proved: (f) that in a few cases distribution in accordance with Hindu law had taken place; and (g) that there had been a custom or at least a practice, that ornaments given to a wife in a husband's lifetime were allowed to remain with the widow only during her life, or until re-marriage,—a custom or practice more nearly resembling the rule which obtains among Hindus, than any which regulates such cases among Muhammadans. *Held*, by the Privy Council that the question was simply one of the proper inference to be drawn from the circumstances. And, inasmuch as there was no distinctive political or social organisation established by the Memons for themselves, and nothing to show that they, as a body, ever claimed to be outside the system of law which naturally follows from their religion, hence the presumption may easily be drawn that they had accepted the law of the people they had joined in another country, the case being different from that of a Hindu family migrating from one part of India to another. Hence, the trial judge was wrong in throwing the burden of proof on the respondent to show that there was a Muhammadan custom which applied to the Memons in Mombasa, that this custom was ancient and invariable, and that it had superseded the custom which governed the Cutch Memons in such cases before migration. The true inference to be drawn from the facts was that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa.<sup>1</sup>

When the question arises whether the rule of law governing the determination of any issue by the court, should be a rule of Muhammadan law or of any other law, the court will in the words of Sir Erskine Perry, C. J., consider what is the law delivered to it for being enforced by the Sovereign.<sup>2</sup>

The law is so delivered by the Sovereign generally on one of two occasions,—either (1) when the court is constituted certain general directions are given; such as are given in the Letters Patent of the High Courts, or the Civil Courts Acts, which are tabulated at the beginning

Law delivered  
to the Courts

<sup>1</sup> See *Muhammad Ismail Khan v. Lala Shoa Mukh* (1913) 17 C. W. N. 97.

<sup>2</sup> *Khojaha and Memons' Case: Hurler v. Sonabae* (1847) 101r. Or. Cas., 110, 122.

SECTION 6A. of this Chapter: or (2) at the time when any particular legislative enactment is passed, the legislature provides in the enactment itself, that the rules laid down therein shall be applicable on the occasions, or in the circumstances, or with reference to transactions between the parties particularized therein.

Principles on which choice of law made,

The bases on which these directions of the legislature are given, or, to put it in another way, the principles in accordance with which the Sovereign delivers one system of law or another for being enforced, depend on the following, amongst other, considerations:—(1) In regard to certain transactions, the legislature lays down that their legal result is to be determined by the courts according to certain rules enunciated by the legislature itself, irrespective of the persons who are the parties to the transaction, and irrespective of the place where the transaction has taken place; (2) in regard to other matters the law so delivered by the Sovereign, consists of law fixed not only with reference to the nature of the transaction, but with reference to the locality in which it takes place: the law selected being the 'lex loci'. (3) in regard to still other matters, the law is determined with reference to the persons concerned in the transaction, and then it is said that the 'lex personæ' or the personal law has to be applied.

Operation of law in British India.

Sometimes it is not easy to decide how the law operates, on a particular transaction, or state of facts, the difficulty arising from a doubt as to which one of several systems of law must be applied. From a reference, however, to the Acts which are tabulated at the commencement of this chapter, it would seem that the course to be followed in British India in the majority of cases is to turn to the real nature of the transaction irrespective of the name which is applicable to the transaction: and then to see if any legislative enactment which is applicable to the parties governs the case.<sup>1</sup> Subject to such an enactment the Muhammadan law and usage will prevail where the parties are Muhammadans; either because the subject is specified, as being governed by the Muhammadan law, or under the head of justice, equity and good conscience. It may, however, still be of importance to determine whether a particular transaction is to be classed under one head or the other, in order to determine whether it was intended to be included under one legislative provision or under another.

Rule when a family migrates.

In *Abdur-Rahim v. Halimabai*<sup>2</sup> Lord Haldane said that when a Hindu family migrates from one part of India to another, *prima facie*

<sup>1</sup> *U. Jeyapalan v. Ismail Ahmed* (1876) 7 Bom. H.J. (C. 27).

<sup>2</sup> *Abdumathis Haji Ismail Mathu v. Halimabai*.

*ibid.* (1915) 1, L. A. 35, 30 Mad. L. J. 227 (on appeal from the Court of Appeal for Eastern Africa).



they carry with them their personal law, and if they are alleged to have SECTION 6A. become subject to a new local custom this new custom must be affirmatively proved to have been adopted; but when such a family migrate to another country, and, being themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. Their Lordships of the Privy Council considered that such an inference might be raised from the facts that the Memons in Mombasa did not at any time establish any political or social organization for themselves and that such organization as had been formed, appeared to have been mainly, if not entirely, for purposes of worship and they also stated that there was no sufficient reason in what was brought before the courts in that case, for regarding the Memons who had migrated from Cutch to Mombasa, as other than a number of individual Muhammadans who had settled down among a people who are of their own religion.<sup>1</sup>

7. Where both the parties to a transaction are Mus- Where parties Muslimans, Muhammadan law applicable. sulmans<sup>2</sup> of the same sect, the Muhammadan law of the particular sect<sup>3</sup> to which they belong will be administered, in regard to matters hereinbefore mentioned.<sup>4</sup>

See the commentary and notes to the next section. In a suit for inheritance the claimants, or some of them, may be of a different religion from the deceased, but the law governing the case will be that of the sect to which the deceased belonged.<sup>5</sup>

Another rather difficult set of questions arises when the parties or some of them have changed their religion. See the comment to s. 9, below.

8. Where both the parties are not Mussulmans (of When only one party Mussul- man. the same sect),<sup>6</sup> the High Courts and the Courts of Burma are required to determine the rights of the parties in accordance with the law of the defendant; and the other

<sup>1</sup> *Abdurahmaji Ismail Mitha v. Halimatus* (1915) 43 I. A. 35, 30 Mad. L. J. 227 (on appeal from the Court of Appeal for Eastern Africa).

<sup>2</sup> Whether from birth, or by subsequent conversion: *Abraham v. Abraham* (1863) 9 Moo. L. A. 195, 239; *Jawida v. Dharan* (1866) 10 Moo. L. A. 511, 537-539; *Raj Bahadur v. Bishan* (1882) 4 All. J. 313, 350.

<sup>3</sup> *Rajah Deedar Hossein v. Banee Zuhooroonissa* (1841) 2 Moo. L. A. 141; *Ali Hamin v. Fazal Hamin*, (1914) 36 All. 191.

<sup>4</sup> This is subject to the fact that certain Mussulmans are governed by Non-Mussulman systems of law, according to the customs prevailing amongst them: see s. 10, below.

<sup>5</sup> *Hagatun Nissa v. Muhammad Ali Khan* (1890) 12 All. 290, 17, L.A., 73.

# SECTION 8. Courts to act according to justice, equity, and good conscience.<sup>1</sup>

Example of defendant's law prevailing.

Explanations and limitations of rule.

1. Only when there have been dealings between the parties to the suit.

2. The question must relate to succession by the defendant.

3. Parties with reference to inception of right.

There can be no doubt as to the effect and application of the rule that the defendant's law should prevail in a case where, for instance a Shiah has married a Sunni wife, and sues for restitution of conjugal rights, and the wife pleads a defence which is valid only in Sunni law.<sup>2</sup> In some other cases the question becomes a little more difficult; and the decisions point towards various explanations and limitations of the rule (a) For instance, it has been apparently held that the application of the rule is confined to cases where there have been dealings between parties to the suit, and a suit is brought in respect of that transaction. This opinion was expressed by the Madras High Court in a case where the plaintiff's title depended on a gift of lands, which had taken place originally between Muhammadans only, and though the donor<sup>3</sup> afterwards dealt with persons not Muhammadans, and not subject to Muhammadan law the plaintiff was no party to any such dealing," and it was held that the plaintiff could not "by the donor's acts be rendered subject (as regards her property) to any other than the Muhammadan law."<sup>4</sup> In the result the plaintiff's law was applied, and not the defendant's (b) In 1881 Guth, C.J., said, "The concluding words of the section it is clear . . . do not mean thus that when a Hindu purchases land from a European in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position than a European purchaser would be . . ." and Pontifex, J., said that the true construction of the section must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. (c) These dicta were referred to with approval by Westropp, C.J. (delivering the judgment of a Full Bench consisting of himself, Melville, and Kemball, JJ.). In the course of the judgment it was said that Govardhan v. Sekharan<sup>5</sup> was open to doubt "in respect of the view, there entertained, that the validity of a mortgage by a Muhammadan to a Hindu mortgagee, if the latter be the defendant, should be tested by Hindu law—a proposition which seems to involve a serious misapprehension and misapplication of Bombay Regulation IV of 1827, section 26." (d) Again Mahmood, J., said that the word parties, "as used in section 24 of the Bengal Civil Courts Act does not mean

<sup>1</sup> *Indumati Banerjee v. Fatima Begum* (1911) 24 Mad. L.J. 200.

<sup>2</sup> *Nasim Hossain v. Hatimuddin* (1882) 4 All 295. Though in this case the Court did not state that they gave the wife the benefit of her own law because she was the defendant.

<sup>3</sup> The husband of the plaintiff was the donor.

<sup>4</sup> *Azmatunnissa v. Clement Dale* (1868) 6 Mad. L.J. 151 171-5.

<sup>5</sup> *Sarkies v. Promothnagar Dosee* (1881) 6 Cal. 304, 306, 308.

<sup>6</sup> *Lakshminarayana v. Dasari* (1890) 6 Bom. 166.

<sup>7</sup> (1861) 8 Harrington, S. D. Ad. Rep. 189.

parties to an action, but must be interpreted with reference to the inception of the right to be adjudicated upon." <sup>1</sup> (e) On the other hand, the Calcutta High Court <sup>2</sup> expressed a doubt, whether on a Hindu creditor suing the heirs of a Muhammadan debtor, the Muhammadan law applied; and (f) the Bombay High Court <sup>3</sup> laid down the rule that the Hindu law applied so long as the debtor was a Hindu and the Muhammadan law when the debt was transferred to a Muslim. In the case last cited, the plaintiff sued for redemption; the original mortgagor was a Hindu who had transferred the equity of redemption to a Muhammadan (the plaintiff). The Court held (over-ruling the contention of both parties) (1) that the Hindu law of 'dandapat' should be given effect to, though both parties to the suit were Mussulmans; (2) that that rule applied only so long as the debtor was a Hindu, and that as soon as the equity of redemption was assigned to the plaintiff, a Muhammadan the applicability of Hindu law ceased. The question was recently alluded to by the Bombay High Court, but not considered <sup>4</sup>.

As  
between  
debtors  
and creditor

9. Where the question is, whether or not a person is a Mussulman, it will be decided in accordance with the tenets of the particular sect to which he professes, or is alleged, to belong; provided, (1) that where a person claims or is alleged to be a Mussalman, and his avowed belief and conduct in the past do not conform to those of any recognised sect of the Mussulmans, the Court will apply that law to him which will be in accordance with justice, equity, and good conscience, <sup>5</sup> and that may not be Muhammadan law; and (2) that the Court will not permit anyone to commit a fraud upon the law by pretending to be a convert to Islam in order to elude the personal law by which he is bound.

Persons  
subject to  
Muhammadan  
law.

Sometimes rather difficult questions come before the Courts, as to whether or not a particular person is to be classed as a Muhammadan for the purposes of the law to be applied to him. <sup>6</sup> These questions may be covered under the following heads: -

Who is a  
Muhammadan.

<sup>1</sup> *Gabind Dasoul v. Inayatullah* (1885) 7 All. 775, 793 (F. B.).

<sup>2</sup> *Bhuxandaram Marwari v. Kamaluddin Ahmed* (1885) 11 Cal. 421.

<sup>3</sup> *Ali Sahib v. Shabji* (1895) 21 Bom. 85.

<sup>4</sup> *Nikaram Bhaurao v. Sagad Inayatkhau* (1917) 41 Bom. 636, 650.

<sup>5</sup> See *Itaj Bahadur v. Bishen Dasoul* (1882) 1 All. 343.

<sup>6</sup> *Ct. (Rhatiga) Sher Bahadur v. Bhagur Ganga Baksh Singh* (1915) 18 Cal. W. N. 491 (P. C. appeal from Judl. Commr., Oudh).

## SECTION 9.

## 1. Muhammadan by birth.

The sect  
of Islam to  
which  
parties  
belong.

Where a person is born a Mussalman there is little difficulty in his being recognised as such.<sup>1</sup> The burden of proof would be on those who allege that such a person does not follow Islam.

(1) It has also been judicially stated, that where it is not shown, nor alleged, that the parties are Shias, there is a presumption that they are Sunnis, "to which sect the great majority of the Muhammadans of this country belong as has been pointed out by Baillie in the introduction to his Digest of the Immere Law"<sup>2</sup>

(2) The Sunnis can become adherents of any one of the four schools of Sunni law at their choice, and an adherent of one school may transfer his allegiance to another, by a mere declaration to that effect.<sup>3</sup>

(3) The same does not apply, however, to the different schools of the Shiah sect.

## 2. BELIEF IN OR PROFESSION OF ISLAM.

## 2. Is belief in Islam required

In a case decided by the Allahabad Court, the suit being for partition, the chief issue was whether the family to which the parties belonged, consisted of Hindus or Muhammadans. The Court held that they were neither the one nor the other; and stated that to be recognised as one or the other under s. 24 of Act VI of 1871, not only must one call oneself a Hindu or Muhammadan, but must be an orthodox believer in, and must follow and observe, that religion.<sup>4</sup> "That is to say, their status before the law depends absolutely on their religious belief, and this in the strict sense of the term." It is submitted that this proposition must be interpreted as referring not to the state of the mind itself, but in so far as that state is externally manifested. For, as Brian, C.J., said in 1478 "It is trite law that the thought of man is not triable, for even the devil himself does not know what the thought of man is;" and another old authority has said, "The intent of man is uncertain, and a man should plead such matter as is, or may be, known to the jury."<sup>5</sup> It is difficult therefore to give any force to

<sup>1</sup> For an instance of a Muhammadan family that in matters of worship had adopted the Hindu religion, but which was governed by Muhammadan law, see *Aman Bibi v. Manchi Shantchand* 17 Cal. W. N. 121 (P. C.) 17 Mad. L. T. 159, [1912] Mad. W. N., 125.

<sup>2</sup> *Belatou v. Belatou Khanom* (1903) 30 Cal. 687, 686.

<sup>3</sup> *Mohammad Ibrahim v. Gulam Ahmad* (1864) 1 Bom. H. C. R. 236, cf. *Fazal Karim v. Manchi Bakhsh* (1891) 18 Cal. 148, 159, 161 (P. C.)

<sup>4</sup> *Raj Bahadur v. Bheo Dutt* (1882) 1 All. 713, 717 sqq. See also *Aman v. Pathanpore* (1897)

22 Mad. 194, 504, 506, *Kuchanbi v. Kandy* (1880) 27 Mad. 77, *Aman Bibi v. Manchi Shantchand*, 17 Cal. W. N. 121 (P. C.), 13 Mad.

L. T. 159, [1913] Mad. W. N. 125. Similar difficulties might have been encountered by Sir Joseph Arnould in the *Agha Khan Case* (1866) 12 Bom. H. C. R. 323, had the evidence as to the origin of the Khojas been less conclusive.

<sup>5</sup> Quoted by Lord Blackburn in *Brogden v. Metropolitan Ry. Co* (1877) 2 App. Cas. 666, 692.

<sup>6</sup> (116) Y.B. Ld. 14, 89, quoted in Holland's "Jurisprudence," (7th Ed.) 106, note.

the epithet "or orthodox" as applied by the Allahabad High Court SECTION 9. to a "believer." It need hardly be stated that the Courts will decline to pronounce any particular version of a religion the true or orthodox one.<sup>1</sup>

Where the Privy Council had to consider the question of conversion, in order to decide whether or not the marriage of the alleged convert with a Mussulman, was valid they substituted, for an enquiry into the state of mind of the alleged convert an enquiry into the conformity of her acts to an external standard viz., to the conduct which may reasonably be expected from a person of her alleged religion; and they remarked, that it was a well-founded criticism on the part of the appellants, to say that the lower courts ruling was based on a proposition to which exception could be taken, inasmuch as no court could test or gauge the sincerity of religious belief, and that if the alien in belief embraces the Muhammadan faith, profession, with or without conversion, is necessary, and sufficient, to remove the bar to marriage arising from unbelief or difference of creed.<sup>2</sup>

In another case the judges said that it was difficult to conceive how the plaintiff (who claimed his inheritance) could come into court styling himself a Muhammadan when neither he nor his brother had been circumcised.<sup>3</sup> Circumcision can, however, be only one of the tests for deciding whether or not a person considers himself, and desires to be recognised, as a Mussulman—but the question of his religion cannot be decided without reference to the tenets, beliefs, and customs of the particular sect to which he professes to belong; and applying them to all the circumstances of the case.<sup>4</sup>

### 3. PRETENDED CONVERSION.

Where, on the other hand, it is shown that the parties to the suit are pretending to be converts to Islam, in order to elude the personal law

<sup>1</sup> See *Mokoond Lal Singh v. Nabodip Chunder Singh* (1898) 25 Cal. 881, *Compani Thornton v. How* (1862) 31 Beav. 14; *O'Hanlon v. Logue*, [1906] 1, J.R. 247, cited at length in *Jamshed v. Soomabai* (1907) 33 Bom. 122, 265-211 10 Bom. L. R. at p. 485.

<sup>2</sup> *Abdul Razak v. Aga Mahomed Jaffer Bandareet* (1894) 21 I. A. 55. Note that there was no evidence tending to show that the alleged convert made any profession of Islam. "She said she knew nothing about the Muhammadan religion; all her life she lived and worshipped as a Burmese," *ib.*, p. 61.

<sup>3</sup> *Sahabzade Begum v. (Mirza) Himmatt Bahadur* (1860) 12 W. R. 512. The learned judges then go on to state that in accordance with

Had II., 265, they gave the benefit of the law to the plaintiff, and considered him a Mussulman. The passage from Baillie which is referred to deals with the "impediment of infidelity" and lays down that in considering whether an infant (who cannot declare or choose his religion) should be excluded from inheritance as an infidel, or not, "the construction of the law is in favour of Islam." The provision of Muhammadan law disqualifying non-Muslims from inheriting, would, in most cases, have no force owing to the Caste Disability Removal Act, XXI. of 1850.

<sup>4</sup> On circumcision, see Hughes's "Dictionary of Islam," *supra* vol. p. 57. As an external test it may be of use, but it can hardly be conclusive one way or the other.

SECTION 9. applicable to them, the courts will not allow the pretended conversion to affect the rights and liabilities of the pretended converts.<sup>1</sup>

#### 4. HONEST CONVERSION.

Effect of honest conversion on rights already accrued.

As to the effect of honest conversion, on rights, which had their inception previous to the change of religion, "Whether a change of religion, made honestly, after marriage, with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage is a question of importance, and, it may be, of some nicety."<sup>2</sup> The cases of '*Gobind Dayal v. Inayatulla*'<sup>3</sup> and '*Ali Sahib v. Sabbji*,'<sup>4</sup> enunciate principles, which appear to give a reply to the question; but the difficulty to which their Lordships of the Privy Council refer, consists in applying the principles to the facts of any particular case, especially with reference to a transaction like marriage with its far-reaching consequences.<sup>5</sup>

Converts and choice of law.

In a Bombay case<sup>6</sup> the following propositions were laid down as governing converts:—

1. Muhammadan law generally governs converts to that faith from the Hindu religion.<sup>7</sup>
2. A well-established custom of such converts, following the Hindu law of inheritance, would over-ride the general presumption.
3. This custom should, however, be confined strictly to cases of succession and inheritance.
4. And, if any particular custom of succession<sup>8</sup> be alleged, which is at variance with the general Hindu law applicable to these communities, the burden of proof lies on the party alleging such special custom.

#### 5. RETENTION OF LAW BY CONVERTS ON MATTERS OTHER THAN SUCCESSION.

Whether they retain their original law or

With reference to the third proposition mentioned above, which confines the scope of custom strictly to matters of succession and inheritance, it may be noted that, —

1 Glts.

1. As to gifts, Tyabji, J., has said<sup>9</sup> "Inasmuch as no authority has been cited in support of the proposition that Khojas, in the

<sup>1</sup> *Skinner v. Ode* (1871) 14 Moo. T. V. 309, 10 Ben. L. R. 425, 17 W. R. 77; *Skinner v. Skinner* (1897) 25 Cal. 537, 516; 25 L. A. 31, 2 C. W. N. 209; *Re Ram Khandari* (1891) 18 Cal. 264.

<sup>2</sup> *Skinner v. Skinner* (1897) 25 Cal. 537, 516.

<sup>3</sup> (1885) 7 All. 775.

<sup>4</sup> (1895) Bom. 85.

<sup>5</sup> See, e.g., *Zinbaidust Khan and his wife* (1870) 2. N. W. P. 370, referred to in the comment below.

<sup>6</sup> *Law Baij v. Bai Santak* (1894) 20 Bom. 25, 57 referred to with approval in 23 Bom. 539.

<sup>7</sup> *Bodamma Bhatkar v. Futma Bi* (1911) 26 Mad. 1, J. J. 260; [1911] Mad. W. N. 278; 15 Mad. 1, T. 107.

<sup>8</sup> This is taken from the head note, which has slightly varied the wording of the judgment.

<sup>9</sup> *Moosabhai v. Yencobdhas* (1904) 20 Bom. 267, 276; 7 Bom. L. R. 45, 19.

cases of gifts, are governed by Hindu law, I am not disposed to apply the Hindu law to Khojas, more than in decided cases."

2. So also Chandavarkar, J., said that the law of adoption is not a part of the law of inheritance or succession, and the presumption in the case of converts being that they have abandoned their original law, a convert to Islam alleging the retention of the Hindu law of adoption, must prove it.<sup>1</sup>
3. On the other hand the Hindu law of joint family firms was applied to Mussulmans in Bombay by Sargent C.J., and Scott, J.,<sup>2</sup> and (following them) by Russell, J.<sup>3</sup> But Beaman, J., has put in a strong protest against this, saying, "Speaking for myself, I would not extend the Hindu law of the joint family one inch further than the authorities compel me."<sup>4</sup>

2 Adoption.

3 Joint family.

These questions must, however, depend upon whether the parties themselves, have been conforming their conduct to the one system of law or to the other: see s. 6A, above

#### 6. CONVERSION FROM ISLAM TO ANOTHER RELIGION

In the case of conversion from Islam to another religion, again, very difficult questions may arise. Thus, where a Muslim husband and wife both became converts to Christianity, and the husband afterwards applied for divorce under the Divorce Act IV of 1869, the Court held<sup>5</sup> that he could not do so as the Act applied only to monogamous marriages; and that an application for restitution of conjugal rights would have been similarly dismissed, as the woman had lost her status as a Muhammadan wife by her conversion,<sup>6</sup> and when a Hindu woman, after having married in accordance with Hindu law, became a convert to Islam, it was held that she could not marry a Mussulman husband during the life-time of her Hindu husband.<sup>7</sup>

Conversion from Islam to another religion.

### § 3.—Conflict or Absence of Laws and Customs.

10. Customs and usages which are held to be reasonable, certain and sufficiently ancient, and are found to have

Customs and usages may alter the Muhammadan law.

<sup>1</sup> *Bai Mochibai v. Bai Hirbai* (1911) 32 Bom. 261, 13 Bom. L. R. 251, 256. See s. 218, below.

<sup>2</sup> *In re Haroon* (1894) 14 Bom. 189.

<sup>3</sup> *Haji Nour Mohamed v. Marcott* (1907) 9 Bom. L. R. 274.

<sup>4</sup> *Jan. Mohamed v. Dada Jaffer* (1913) 38 Bom. 449, 550.

<sup>5</sup> *Zubardust Khan and his wife* (1870) 2 N. W. P. 370.

<sup>6</sup> But see *Ball. L. 182*, *Med. 66*, which shows

that under Muhammadan Law when both parties apostatize together, the marriage subsists, at least to this extent, that if they should both become Muslims again, their marriage continues.

<sup>7</sup> A custom would not be held "reasonable" if it is opposed to public policy: Cf. *Budamaa Ranthar v. Fatema Bi* (1914) 28 Mad. L. J. 260, where a custom was alleged to the effect that a woman may marry again during the life-time of her husband without being divorced by him.

SECTION 10. been adopted by a body of persons, will be enforced<sup>1</sup> even though the persons that have adopted them are Muslims, and the customs are opposed to strict Muhammadan law,<sup>2</sup> and notwithstanding that the Legislature has not expressly directed the courts concerned to enforce customs, or usages.<sup>3</sup>

Converts may retain their original laws,  
1 Khojas  
2 Cutchhi Memons  
3 Sunni Bohras  
4 Molesalam Girasias of Broach governed by Hindu law of succession.

(2) A convert to Islam may carry his original laws and usages with him, and may be governed by them even after conversion to Islam;<sup>4</sup> and it has been held that the Khojas,<sup>5</sup> Cutchhi Memons,<sup>6</sup> Sunni Bohras of Gujrat,<sup>7</sup> and Molesalam Girasias of Broach,<sup>8</sup> are governed by the Hindu law of inheritance and succession, though they profess the Muslim religion.

(3) Several families of the Mapillahs<sup>9</sup> of North Malabar have been held to be subject to the Marumakkatayam law though they are Mussalmans.<sup>10</sup>

<sup>1</sup> See comment to s. 9, above.

<sup>2</sup> The courts of all places except of Bengal and Eastern Bengal, Assam, and the United Provinces, are required to enforce customs, as the High Courts in their Ordinary Civil Jurisdiction are required to enforce usages. As to Bengal and other excepted places, see the comment to s. 10, and Table of Enactments.

<sup>3</sup> *Kunchambi v. Vaid Vellois Annalakuttan*, (1914) 27 Mad. L. J. 156; 16 Mad. L. J. 16.

<sup>4</sup> See, however, *Hirbae v. Gorbis* (1875) 12 Bom. H. C. R. 291. See also *n. 1* to s. 1 above.

<sup>5</sup> *Hirbae v. Sonabai*, known and reported as the "Khojas' and Memons' Case" (1847) Petry, Or. Cas. 110. Morley, Dig. H. 431. *Hirbae v. Gorbis* (1875) 12 Bom. H. C. R. 291 (per Sargent, J.), *Gangubai v. Thaver Mulik*, 1863 Bom. H. C. R., 71, 73 (per Sarsse, C.J.). In *Siti Mahomed v. Datu Jajir* (1918) 38 Bom. 419-552 the history of the application of Hindu law has been traced with great interest.

<sup>6</sup> *Khojas' & Memons' Case* (1847) Petry, Or. Cas., 110, Morley, Dig. H. 431. *Ashabi v. Haji Tye* (1882) 9 Bom. 115 (Sargent, C.J.). *Abdul Cadur Haji Mahomed v. C. A. Turner* (1880) ib. 158 (Scott J.); *Muhammed Suleit v. Haji Ahmed* 1885, 10 Bom. 1 (Scott J.). As to Cutchhi Memons, it has been held that it has never been proved affirmatively that they had ever adopted as part of their customary law the Hindu law of the joint family as a whole, or the distinction existing in that law, between ancestral family and joint family, and self-acquired property; but that Cutchhi Memons were subjects by custom to the Hindu law of succession and inheritance

as it would apply to the case of an intestate separate Hindu possessed of self-acquired property, and no more; and that they had acquired by custom the power of disposing of the whole of their property by will.—*Advocate-General of Bombay v. Jivabai* (1915) 11 Bom. 181. HAJI MEMONS are not governed by Hindu law. See also *Abdurahim Haji Ismail Mulla v. Hali-maher* (1915) 13 F. A., 35, 40 Mad. L. J. 227, which is given as the illustration to s. 64, above. The case decided that Memons of Bombay were governed by Muhammadan and not by Hindu law. The KHARWA COMMUNITY OF BROACH has been held to form a caste of its own, and to be bound by the rules of that caste. *Bai Sina v. Kherai Juna Kalia* (1907) 31 Bom. 366.

<sup>7</sup> *Datu Hajir v. Datu Suleib* (1891) 20 Bom. 53 (per Ramade and Fulton, J.J.).

<sup>8</sup> *Mahomed Shera Fateh Saugan Jaganath Saugan v. Asrar Hanwariji Fatmagaji* (1894) 20 Bom. 181 (Jardine and Ramade J.J.).

<sup>9</sup> Also written *Mapillas*. These include 800,000 out of the 813,000 of the Mussalman population of Malabar. The name was "originally applied to Arab traders, and their descendants by the women of the coast, but now used to include all indigenous West Coast Muhammadans among whom are comprised large numbers of converts from the lower Hindu castes, and descendants of the victims of Tipu's persecution"—Imperial Gazetteer of India (2nd ed.) XVII, 60.

<sup>10</sup> See *Aswan v. Pathamma* (1890) 22 Mad. 194; *Kudhumbi Umma v. Kandy Marikun* (1903) 27 Mad. 77.



(4) Among the 'Lubbais' of the Coimbatore District SECTION 10. in the Madras Presidency, a custom prevails under which they retain the rule of Hindu law excluding females from inheritance.<sup>1</sup>

(5) A great number of Mussulmans in the Punjab have been held to be governed by rules of customary law at variance with Muhammadan law.<sup>2</sup>

(6) Hindus or other non-Muslims may, by their customs, be subject to Muhammadan law.<sup>3</sup>

(7) Hindu, or other, laws and usages, may be partly, or wholly, applied to Muslims, even on matters referred to in ss. 1 to 6, above.<sup>4</sup>

(8) Certain customs, such as family customs relating to succession, may be of such a nature, that without any violation of law, they may be put an end to or discontinued.<sup>5</sup>

It will be observed, from the Table preceding this chapter, that the enactments of the British Legislature are not uniform in regard to the directions to enforce customs prevalent amongst Mussulmans. They are not specifically required to be enforced in Bengali, North-Western Provinces and Assam, where Act XII of 1887 prevails. The Allahabad High Court had held that where that Act prevails, evidence was inadmissible to prove a custom of succession at variance with Muhammadan law.<sup>6</sup> But that view of the law has been held to be erroneous by

Custom where the Legislature expressly requires it to be enforced

<sup>1</sup> *Shaukh Ibrahim Roathan v. Muhammad Ibrahim Roather*, (1915) 39 Mad. 661.

<sup>2</sup> *E.g.*, a Kashmiri who resided and carried on the business of a comb-maker in the city of Jhelum, was held to be governed not by Muhammadan law, but by a custom, under which a will regarding self-acquired property was valid, notwithstanding that it referred to more than one-third of the estate, and was in favour of four heirs; (*Muzamat Mehtal Bibi v. (Muhammad) Hussain Bibi* (1913) 48 Punj. Rec. No. 17, p. 60.

<sup>3</sup> *E.g.*, the Hindu population of Behar is governed by the Muhammadan law of prescription: *Fakree Rowed v. Sheikh Emambolch* (1863) W.R. (Full Bench Rulings) (Sp. No. 143), Ben. L. R., Supp. Vol., 35, (P. n.).

<sup>4</sup> *E.g.*, the class of people known as "Nayayats" (or new-comers) on the West Coast who are descendants of Arab Merchants that settled several centuries ago at Bhakal, in North Canara, have adopted the Hindu system of managing joint family property: *Khatia v. Jemal* (1889) 12

Mad. 380. A custom to adopt in Punjab is referred to in *Muhammad Umar Khan v. Muhammad Niazuddin Khan* (1911) 39 Cal. 418 (P. G.). The Oudh Estates Act, I, of 1869 lays down special rules of inheritance, and permits adoption amongst persons referred to in the Act, though they are Muslims.

<sup>5</sup> *Raikesh Singh v. Ramjoy Surma Moosoomdar* (1872) 1 Cal. 186, 195 & 196 (P.C.). The custom in question was, one of succession. The estate (prior to certain regulations by Government) by custom descended on single male heirs; after the regulations the custom was discontinued, and the family acted for twenty years on the basis that the ordinary law of joint Hindu families applied. Their lordships distinguish "a territorial custom, which is the *lex loci*, binding all persons within the local limits in which it prevails."

<sup>6</sup> *Jammoo v. Duran* (1900) 23 All. 20. See also *Hakim Khan v. Gul Khan* (1882) 8 Cal. 826, 830, 10 C. L. R. 603.

SECTION 10. the Privy Council.<sup>1</sup> Their Lordships give no reasons for their decision. But after their decision the mere absence of any express direction to enforce customs, does not prevent evidence of customs being given. The law adopted by the customs of the people would be that to which justice, equity and good conscience would point, as the law governing the parties, and these general considerations must now be considered to outweigh what was pointed out in the Allahabad decisions, that in Act XII of 1887 it is expressly laid down that the Muhammadan law of succession is to be enforced, and there is no provision in the said Act similar to that contained in other Acts to the effect that if Muhammadan law is modified by customs, it is to that extent not to be enforced. Had the Privy Council decision been otherwise, the customary, or commonly accepted, interpretation of the Muhammadan law could not, consistently, have been held to be binding upon the courts, (see s. 11, below),<sup>2</sup> and the duty would have to be cast upon them to interpret the original sources of Muhammadan law for themselves, just as they are under a duty to interpret Acts of the British Legislature.

Importance of  
custom  
relatively  
to other law.

Custom, it has been said, "exists as law in every country, though it everywhere tends to lose its importance relatively to other kinds of law."<sup>3</sup> It has lost much of its importance in Muhammadan law as administered in British India, owing to the fact that the texts to which the Courts<sup>4</sup> refer for that law, were to all intents and purposes codifications, in which it is not possible to distinguish portions based on custom, from the rest. The original customary law being thus disguised beyond recognition—clothed, as it is, in the garb of a canonical exposition of the law—the courts have been far more averse to recognising any custom altering the law as laid down in the texts, than they would have been had they known the origin of a considerable portion of Muhammadan law, or had the texts referred to custom in the same manner as (for example), the writers on Hindu law do. The result is also that where the texts have laid down a particular rule of law, such a rule will be enforced though it may be proved that it had its origin in custom, and that that custom was opposed to strict Muhammadan law as laid down, for instance, in the Quran or 'Sunna.'<sup>5</sup> For the courts will not go behind such commentaries, and will not interpret anew the authorities

Custom  
source of  
Muham  
an

<sup>1</sup> *Muhammad Ismail Khan v. Lala Shoo Mukh* (1913) 17 Cal. W. N. 97.

<sup>2</sup> As in *Agst Mohamed Jaffer v. Kulsom Beeber* (1897) 25 Cal. 9 (F. C.).

<sup>3</sup> Holland's "Jurisprudence" § 52; cf. "Usage, or rather, the spontaneous evolution by the popular mind, of rules, the existence and

general acceptance of which is proved by their customary observance, is, no doubt, the oldest form of law-making: "Ib. 50.

<sup>4</sup> New law books and new editions of the old books are still coming out.

<sup>5</sup> Cf. the *bada'i* or innovated form of divorce, see s. 142 (comment), below,

on which the exposition of the law purports, or appears, to be based; SECTION 10. but will consider themselves bound by the prevalent interpretation.<sup>1</sup>

Nor is express reference to custom altogether absent from the texts themselves.<sup>2</sup> The place of custom in pure Muhammadan law in some of its aspects has been discussed in the Introductory Chapter.

The following illuminating quotation from Mr. Justice Abdur-Rahim's "Muhammadan Jurisprudence" is transcribed with the kind permission of its author :-

Reference to customs in Muslim texts.

Place of Pre-Islamic customs of Arabia in Muhammadan law.

"Those customs and usages of the people of Arabia which were not expressly repealed during the life-time of the Prophet are held to have been sanctioned by the Law-giver by His silence. Customs ('urf, ta'amul, 'adat) generally as a source of laws are spoken of as having the force of *Ijma'*, and their validity is based on the same texts as the validity of the latter. It is laid down in '*Hidaya*' that custom holds the same rank as '*Ijma'*' in the absence of an express text,<sup>3</sup> and in another place in the same book, custom is spoken of as being the arbiter of analogy.

"Custom does not command any spiritual authority like '*Ijma'*' of the learned, but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy; it must not, however, be opposed to a clear text of the Quran or of an authentic tradition.<sup>4</sup> There is agreement of opinion among the Sunnis, that custom overrides analogical law, and a student of Muhammadan law cannot help noticing that custom played no small part in its growth especially during the time of the Companions and their successors. The Hanafi writers on Jurisprudence include custom as a source of law, under the principle of '*istihsan*' or juristic preference.

Authority of customs.

"Custom properly so called should be distinguished from the usage of a particular trade or business. The latter, from its very nature, need not be prevalent among the people generally.

Characteristics of valid customs in Muhammadan law.

"Custom which is recognised as having the force of law, must be generally prevalent in a country. It is not necessary that it should have had its origin in the time of the Companions of the Prophet; but it does not appear what time, if any, must elapse before a custom will be accepted by the court. It may be that even a custom, which has sprung up within living memory, will be enforced if it be found to be generally prevalent among the Muhammadans of the country in which the

<sup>1</sup> *Aga Mahomed Jaffer v. Kooloom Beebe* (1807) 25 Cal. 9, 18, (r. c.).

<sup>2</sup> See, e. g., *Bail. I.* 97, 126, 146, 300, 546, 559, 562; *Bail. II.* 16, 109, 116, 212, 216.

<sup>3</sup> *Hidaya*, VI., 177-8.

<sup>4</sup> [Customs may be enforced in British India though they are opposed to the Quran or Sunna as explained in the comment to the present section.—F. B. T.]

SECTION 10. question of its validity has arisen. The author of *Radd-ul-Mukhtar* defines '*ta'ammul*' as custom as what is more often practised than not.<sup>1</sup>

1. General prevalence.

"The practice of a few individuals or of a limited class of men will not, however, be recognised. Nor would a usage have the force of law, so long as it is confined to a particular locality, such as a village, or a town, and has not found general vogue in the country in which the question arises.<sup>2</sup> Practice on a few occasions will not be recognised as a valid custom.

2. It is territorial.

"It is of the very essence of a custom that it should be territorial, so that custom of one country cannot affect the general law of other countries. Further, it has authority only so long as it prevails, so that the custom of one age has no force in another age.<sup>3</sup> In India in the Punjab and among the Khojas of Bombay, Muhammadan law has on many points been superseded, or considerably modified by customs adapted from the Hindus and sanctioned by the legislature and the courts. But some of these customs, such as those relating to succession and inheritance, would, according to the principles of Muhammadan Jurisprudence, be illegal, being opposed to the text law."<sup>4</sup>

When the Legislature expressly requires custom to be enforced. Case of Khojas and Memons.

Where the Legislature has expressly declared that customs are to be enforced, a new set of considerations comes in. Sir Erskine Perry, Chief Justice of Bombay, in a memorable judgment<sup>5</sup> delivered in 1847, has considered the question from all its bearings. He deals, first, with the question as to what it is that gives to customs their binding force. Customs, he holds, represent the rules about the various relations of life that the exigencies of man have framed long before written laws, which have been spontaneously adopted, and with which the legislator in his wisdom, or indifference, or want of skill, has not interfered. When (as in Rome) the mere suffrage of the people can give to rules the force of law, the Chief Justice held, that there might be some ground for holding that customs may have 'the validity of a law *per se*,' but "according to English law," and "to the sound principle of universal law, the custom would require the sanction of the court, as representing the sovereign authority, before it obtained any legal validity" (p. 119). He then lays down, that if there exists a custom that is ancient, not injurious to public interests, and does not conflict with any express law of the ruling power, it is entitled to receive the sanction of a court of law

<sup>1</sup> *Radd-ul-Mukhtar*, III, 108.

<sup>2</sup> *Pathul-Qadir*, VI, 65.

<sup>3</sup> *Radd-ul-Mukhtar*, III, 108-100.

<sup>4</sup> *Abdur-Rahim*, "Muhammadan Jurisprudence" 136-137.

<sup>5</sup> *Hirbat v. Sunbhat*, known as the *Khojas and Memons' Case*, (1847) *Perry's Oriental Cases*, 110, 117, 123; *Morley's Digest* II, 431; Cf. *Kumbhari v. Kalandhar* (1914) 27 *Nad. L. J.* 57.

(p. 121). The question still remained, whether, if persons who are generally governed by Muhammadan law, set up a custom inconsistent with the law of the Quran, the custom is not invalid, just as, in England, conflict between a custom and an Act of Parliament invalidates the custom. The conclusion at which the learned Chief Justice arrived, was that Courts have to give decisions in accordance with the law as "delivered to them for administration by their sovereign" (p. 122); and, after a consideration of the legislative enactment<sup>1</sup> requiring the customs prevailing amongst the parties to be enforced, he laid down that the law to be enforced by the Courts subject to such an enactment,<sup>1</sup> is not that law which the Mussulmans ought to observe in accordance with their religion, nor is it the law in accordance with the interpretation which the Court thinks is its true interpretation, but that that law should be enforced, which they are proved to have themselves adopted, and which, evidence shows, has been prevailing amongst them—subject only to this, that it is not opposed to public policy. Sir Erskine Peary, therefore, held that the Hindu law should be administered to the Khojas and Memons, who by their customs and usages had been following the Hindu law, though they professed Islam.<sup>2</sup>

Conflict between the Muhammadan law and custom

'Optimus interpres legis consuetudo.'

With reference to the judgment just considered, it has been said. "It is possible, but, *prima facie*, unlikely that whole bodies of Mahomedans, rejecting the commands of their own law, and the influence of their own religion, should adopt, merely by way of custom, the entire complicated and technical law of the Hindu joint family."<sup>3</sup> Two observations may be made in this connection: (1) Probabilities of conduct may be of importance in the consideration of the evidence that may be adduced in any particular case; they do not affect the rules of law that may be applicable after the facts are found. (2) As regards the particular set of people concerned, the Khojas,—their history, as generally believed, and as found in the Agha Khan case<sup>4</sup> seems to be somewhat at variance from the assumptions on which the remark last cited seems to proceed: the Khojas do not appear, at their first conversion to Islam, to have adopted the whole of the law, or even of the religion, of Islam. The remark, therefore, that has been just referred to, and that which follows a little later, viz., that "converts are usually most zealous for their new faith,"<sup>5</sup> are not perhaps applicable to a community such as that of the Khojas

Special custom grafted on the general law.

The case of the Khojas.

<sup>1</sup> After the Privy Council decision above referred to, less stress is necessary on the terms of the enactment.

<sup>2</sup> To the same effect (with an examination of books on jurisprudence) is the judgment of Freyre and Holloway, JJ., in *Twarchand v. Reeb*

*Ram* (1866) 3 Mad. H. C. R. 50, 55-57.

<sup>3</sup> *Jau Mahomed v. Dattu Jaffer* (1913) 38 Bom. 449, 460.

<sup>4</sup> *Advocate General v. Muhammad Hussain* (1866)

12 Bom. H. C. R. 323, see s. 481, *id.*, (2), below.

<sup>5</sup> 38 Bom. 449, 461.

SECTION 10. to the same extent as they might be to a relatively small body of Muslims, who are enveloped by a surrounding mass of Hindus, and who, owing to the mere dead weight of surrounding numbers, give up the laws that they have so far been following,— laws that have the sanction of their religion, no less than their own long-established practices. In the case of the Khojas it would appear that the Quranic law of succession had not for them the sanction of religion, because the religion that they purported to adopt was not given to them as based on the Quran :<sup>1</sup> their own long-standing practice was opposed to it, and was never ousted, on their conversion, by any new rules of succession and inheritance. They retained the law that they had been following.

Grafting of special rules of custom.

Even a special custom as to a particular right may be engrafted on, or alter, the general law, and such a right may be enforced : as, for instance, a Mussulman widow may, contrary to the law of Islam,<sup>2</sup> acquire a life-interest in the whole of the property of her husband ;<sup>3</sup> or may altogether lose the right to inherit ;<sup>4</sup> or the rule of primogeniture may be held to prevail,<sup>5</sup> and this may happen although in all other respects the parties may be governed by the Muhammadan law of inheritance.

Deductions from customary rule.

The Privy Council have approved of the following reference to the attitude of the Legislature in regard to custom, even when custom is given priority over Muhammadan law, as is done in the Punjab Laws Acts: "The Legislature did not show itself enamoured of custom rather than law, nor does it show any tendency to extend the principles of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of customary law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any

<sup>1</sup> For instance, it is common knowledge that the Khojas until quite recently did not recite the Quran, but had a religious book of their own, which was supposed to represent for them the Quran; within the last 20 years or so they have commenced to read the Quran for themselves.

<sup>2</sup> The widow, by general Muhammadan law takes a fourth or an eighth of the estate, as to life-interests see the chapter on Gifts, and the Index.

<sup>3</sup> *Mahomed Ruwat Ali v. HANU BEEU* (1898) 21 Cal. 137 (F.C.), virtually over-ruling (*Mahomed Saiepi v. Mukh Ram* (1870) 2 N. W. P. 227. In *Hab Ali v. Wazirwanian* (1900) 28 All. 406, *Abdul Hussain Khan v. Sana Dero* (1917) 14 All. L. J. 17 (F.C. Appeal from Sindh), the custom could not be proved. See also Sir R. K. Wilton's "Anglo-Muhammadan Law," 87, and the quotations given there from Bouhays and Rattigan's "Punjab Customary Law," p. 97 Rattigan's "Digest" (6th ed.) p. 20. The Kayiles

of Algeria "retain non-Islamic usages formerly embodied in written 'Kanonous' [i. e. *Qanuns* or 'laws'] and guaranteed to them by treaty with the French Government, some of which is the denial of all rights of inheritance to women."

<sup>4</sup> See *Mahomed Azmat v. Lalli Begum* (1881) 8 Cal. 422, 425 (par. 3), 427 (par. 2); 9 I. A.

<sup>5</sup> A custom excluding females from inheritance was set up, but not held to be proved in *Mirai bibi v. Vellaganna* (1885) 8 Mad. 464.

<sup>6</sup> *Mahammad Inam Ali Khan v. Sarfaraz Hussain Khan* (1898) 25 L. A. 161; 26 Cal. 81. In (*Mirza*) *Mahomed Akul Beg v. (Mirza) Kayum Beg* (1876) 25 W. R. 199, a custom of strict primogeniture was set up and enforced by the Calcutta High Court (*per* Markby J.). See also the Oudh Estates Act I. of 1869, which recognises the rule of primogeniture amongst some of the *talukdars*, and empowers the British Government to give *saukats* declaring that the succession shall be regulated by that rule, ss. 8 and 22.

custom applicable to the parties concerned, which is not [contrary to SECTION 10. justice, equity or good conscience, and has not been by this or any other enactment altered or abolished; and has not been declared to be void by any competent authority]."<sup>1</sup>

As already stated,<sup>2</sup> though a custom is proved to be prevalent, it will be disallowed any force if it is opposed to public policy.<sup>3</sup> In this connection, a case decided by the Privy Council<sup>4</sup> should be noted, in which they held that the customs that were proved in the case, which would have had the effect, if valid, of varying the "common law of the Muhammadans" relating to inheritance, could not be upheld, because they were immoral; in deciding that they were immoral, their Lordships referred to the terms of reprobation in which the 'Fatwa 'Alam-giri,' the 'Hidayat' and the Quran refer to 'zin' (illicit intercourse) which was involved in the customs in question. It would, therefore, seem that public policy, with reference to questions governed by Muhammadan law, must be understood by the standard of Muhammadan lawyers; or at least, that regard has to be paid to that standard.<sup>5</sup> Similarly, referring to the presumptions in Muhammadan law of parentage and marriage from acknowledgement, Dr. Lushington said, in delivering the opinion of the Privy Council: "We apprehend that in considering this question of Mahomedan law, we must at least, to a certain extent, be governed by the same principle of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question."<sup>6</sup>

Custom and public policy.

Policy of Muhammadan law.

Principles of evidence.

These dicta, showing that the attitude of Muhammadan lawyers should be considered, even in matters that may have been placed beyond the pale of strict Muhammadan law, either by the adoption of customs, or by enactments like the Indian Evidence Act, do not necessarily conflict with the rulings by which customs opposed to Muhammadan law are given effect to; for, in the cases last referred to, the Privy Council were not considering the effect of two opposed provisions, one of Muhammadan law, and the other of custom, or of the adjective law of British India, relating to the same subject. What they were dealing with was,

<sup>1</sup> *Daya Ram v. Sohr Singh* [1906] 41 Punj. Rec. 390, 410, (no. 110), per Robertson, J., - approved by the Privy Council: *Abdul Husain Khan v. Sona Dero* (1917) 16 All. L. J. 17, 21.

<sup>2</sup> See s. 10, above.

<sup>3</sup> "*Malus usus est abolendus*," Co., Litt., s. 212; cf. *Outburt v. Cumming* (1855) 10 Ex. 809, 813, 816; on appeal (1855,) 11 Ex. 405.

<sup>4</sup> *Ghanji v. Umraoan* (1893) 21 Cal. 119; 20 I. A. 193.

<sup>5</sup> Thus, for instance, the Hindu law adopts perhaps a different attitude towards prostitution: *Mathura v. Nandan* (1880) 4 Bom. 545; *Venku v. Mahalinga* (1888) 11 Mad. 393. Hindu law is also more favourable to customs: *Parachand v. Reeb Russ* (1866) 3 Mad. H.C. R. 50, 56.

<sup>6</sup> (*Khajah Hidayat Dallah v. Rui Jan Khan*) (1844) 300, I. A. 295, 318; cited and followed in *Ashrafud Daulah v. Hyder Hossein Khan* (1866) 11 Moo. I. A., 94, 107.

**SECTION 10.** in the first decision, a custom that was inconsistent with the rest of the law governing the parties in question, that general law being the Muhammadan law; and in the second decision, they were fixing the scope and effect of Muhammadan law, by considering how Mussulman lawyers would themselves deal with the question.

Pleading and proving customs.

Before quitting the subject of customs, it may be useful to refer to some points connected with the manner in which customs must be pleaded and established in the Courts. Where a custom is in question two issues are involved: one of fact, whether the custom has been actually observed as a course of conduct having binding force, the other of law whether the custom has legal force.<sup>1</sup>

Customs described.

Custom has been described by Jessel, M. R.<sup>2</sup> as local common law.<sup>3</sup> It must be reasonable,<sup>4</sup> not opposed to public policy, and certain<sup>5</sup> in respect of its nature generally, as well as in respect to the persons whom it is alleged to affect.<sup>6</sup>

Age of customs.

When any custom or usage relates to a course of dealing or line of conduct, generally adopted by persons engaged in a particular trade or profession, or by persons bearing certain contractual or domestic relations, it need not, even in England, have existed from time immemorial, and it need not be confined to any definite locality.<sup>6</sup> Almost all the customs and usages relating to matters on which Muhammadan law prevails in British India presumably come under this category; and it is evident that many of the customs held to be proved in India could not have existed from time immemorial.<sup>7</sup> Even in England, if a man about 50 years old comes forward and asserts a certain custom, his testimony constitutes 'prima facie' proof of the custom.<sup>8</sup>

<sup>1</sup> On the question how far findings relating to custom can be the subject of second appeals see *Kakkar Abhai v. Raja Venkata Purayud Rao* (1905) 20 Mad. 24, *Chakura Devi v. Sundari Devi* [1896] All. W. N. 111, *Thakurani v. Abdul Rahman* (1906) 28 All. 698.

<sup>2</sup> *Hamerton v. Horsey* (1876) 24 W. R. 603, 604. See also *Lockwood v. Wood* (1811) 4 Q. B. 76. See on customs generally the *Khoyas & Memons Case*, Perry, Or. Cas., 100; Morley, Dig. 11, 134; *Howard v. Prestonj, Perry*, Or. Cas., 335; *Tatachand v. Arab Ram* (1866) 3 Mad. H. C. R. 50, 55-57; *Bhav Nani v. Subdrabai* (1874) 11 Bom. H. C. R. 249; *Muthura Nankin v. Eas Naraina* (1880) 4 Bom. 545.

<sup>3</sup> Lord Hobhouse speaks of the "common law of the Muhammadans" in *Ghousi v. Um-mojan* (1893) 21 Cal. 140, 153 (P. C.).

<sup>4</sup> *Moult v. Halliday* (1898) 1 Q. B. 125.

<sup>5</sup> *Rethaji Dubai v. Pahlwan Bhagat* (1910) 33 All. 106 (P. B.), *Ramu Kanta Das Mahapatra*

*v. (Chandhar) Shumapand Das Pakara* (1909) 11 Bom. L. R. 530 (reversing Calcutta High Court). See also *Tanna v. Smith* (1838) 9 Ad. & El. 106, 421. *Simpson v. Wells* (1872) L. R., 7 Q. B. 211.

<sup>6</sup> *Moult v. Halliday* (1898) 1 Q. B. 125; *Cantero Insurance Co. of Milan v. Merchants Marine Insurance Co.* (1897) 2 Q. B. 93.

<sup>7</sup> See the paragraph headed "customs and usages distinguished," in the present comment.

<sup>8</sup> See, as to proof of customs, Halsbury's "Laws of England," Tit. "Custom and Usage"; and "Customs and Customary Law in British India," by S. Ray (Tagore Law Lectures for 1908). As to proof of the custom of pre-emption, see *Dahyabhai v. Chunilal* (1913) 35 Bom. 183; *Janki Mir v. Ramo Singh* (1913) 35 All. 473. *Jivan Lal v. Kalia* (1905) 28 All. 170, 173 discloses an interesting attempt by a caste to adopt a new set of customs by resolving to do so in a caste meeting.



Its existence<sup>1</sup> however must be clearly proved,<sup>2</sup> and the burden of proof is, of course, on the person alleging the custom<sup>3</sup> who must also establish that it has been consciously accepted as having the force of law,<sup>4</sup> unless prevalence of the custom has been so often proved that the Court takes judicial notice of it.<sup>5</sup> But proof of a custom or usage in one case does not make it judicially noticeable in all subsequent cases.<sup>6</sup> And this is specially the case where a very wide custom is in question: the fact that the court may find it necessary to decide the controversy between the parties before it on the basis of the evidence adduced does not necessarily make the decision a satisfactory precedent if in any future instance fuller evidence regarding the custom is forthcoming.<sup>7</sup>

It must be proved in the exact terms<sup>8</sup> in which it is alleged; and, if the evidence tends to prove a custom wider than is alleged, the Court will not take it as proof to the extent to which the custom is alleged, which would involve the taking the rest of the evidence as surplusage.<sup>9</sup>

Customs are distinguishable, in the strict terminology of English law, from usages.<sup>10</sup> The latter, unlike the former, (a) need not have existed from time immemorial,<sup>11</sup> nor (b) need they be confined to a limited locality, but (c) they must be consistent with the general law. The

Proof of customs.

"Customs" and "usages" distinguished. Their incidents in English and Muhammadan law.

<sup>1</sup> *Ramasand v. Surjani* (1894) 16 All. 221; *Lachman Raj v. Akbar Khan* (1887) 1 All. 14; *Gopalayyan v. Raghupatayyan* (1873) 7 Mad. H. C. R. 250 (1876); *Hurpurad v. Sheo Dayal* (1876) 3 L. A. 259, 285; *Beni Madhab Banerjee v. Jai Krishna Mukerjee* (1866) 7 Ben. L.R. 152; *Rama Lukhmi Amal v. Sivanantha Perumal Shihurayar* (1872) 14 Moo. L. A. 570.

<sup>2</sup> This does not necessarily imply a great body of evidence: *Johnson v. Clark* (1908) 1 Ch. 303, 309; and see *Urbai v. Gorbai* (1875) 12 Bom. H. C. R. 294. In *Ali Asghar v. Collector of Buland shahr* (1917) 38 Cal. 574, the Court examined in great detail the evidence of a custom prevalent in Punjab generally, and amongst the Beswadars of Palwal in particular, which was alleged to have the effect of excluding daughters from inheritance; the decision was that the custom was not proved.

<sup>3</sup> *Abdul Hussain Khan v. Sona Daro* (1917) 16 All. L. J. 17, (P. C., Appeal from Sindh).

<sup>4</sup> *Mirabadi v. Villayana* (1885) 8 Mad. 464.

<sup>5</sup> *Shioji Haam v. Datu Maaji Khoja* (1874) 12 Bom. H.C.R. 281; *Shambher Nath v. Gyanchand* (1894) 15 All. 379; *Gangabai v. Thaver Mulla* (1889) 1 Bom. H.C. R. 71, 73. (Sausse C. J.); *Re Chemworth* [1902] 2 Ch. 488; *Re Matthews* (1976) 1 Ch. D. 501; *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144, 156, 156. See *George v. Davies* [1911] 2 K. B. 145, where the Divisional Court (Bray and Lord Coleridge, JJ.) held that the County Court was not in error in taking judicial notice of a custom, which, twelve years before, *Hawkins and Chunnel JJ.* had felt un-

able to notice judicially in *Moult v. Halliday* [1898] 1 Q. B. 125. For a somewhat parallel instance in India see *Gopalayya v. Raghupatayyan* (1873) 7 M. H. C. R. 250, and *Fayyadina v. Appu* (1860) 9 Mad. 44; and Cf. Mayne's Hindu Law, §136. In Roman law the best evidence was to produce the judgments of the courts of law. Dig. I. 3, 34.

<sup>6</sup> *Re Parker, ex parte Turquand* (1885) 14 Q. B. D. (C. A.), 636, 645; *Southwell v. Rowditch* (1876) 1 C. P. D. 374; *Moult v. Halliday* [1898] 1 Q.B. 125. See Halsbury's "Laws of England," X. ss. 500-503, pp. 272-4; cf. *Bar Ba Jai v. Bai Shukot* (1894) 2 Bom. 53; *Dahyabhai v. Ohm-nidai* (1913) 38 Bom. 183, 187.

<sup>7</sup> *Rupchand v. Jamba Farshad* (1910) 37 L.A. 93; 32 All. 247.

<sup>8</sup> *Moult v. Halliday* [1908] 1 Q. B. 125, 129; *Urbai v. Gorbai* (1875) 12 Bom. H. C. R. 294; *Sayad Abdulla Edrus v. Sayad Zaina* (1888) 13 Bom. 562, 566.

<sup>9</sup> *Hammerton v. Honey* (1876) 21 W. R. 603. Jessel M. R. at p. 604; but see *Farghar v. Newburg Rural Council* [1909] 1 Ch. 12 (C.A.) affirming *Warrington, J.*

<sup>10</sup> See Halbury's "Laws of England," X. 221 (§ 122); Bayley, J., speaks of usage being "the legal evidence of custom": *Read v. Rann* (1830) 10 B. & C. 138, 140.

<sup>11</sup> *Dashwood v. Magnum* [1891] 3 Ch. 306, 370, (Kay L. J.); *Crouch v. Credit Foncier of England* (1873) L. R. 8 Q. B. 374, 386 per Blackburn, J.).

SECTION 10. distinction between the two terms is, however; seldom observed even by eminent authorities in England, and they are used as if they were interchangeable.<sup>1</sup> The law relating to customs, especially when they come into competition with Muhammadan law as enforced in British India, does not, it seems, correspond exactly to the legal incidents either of customs or usages in their strict sense.<sup>2</sup> It does not, *e.g.*, seem to have been held, that a custom to be valid in British India must have existed from time immemorial,<sup>3</sup> though "antiquity" is required even in India;<sup>4</sup> and, whereas English law apparently requires customs to be confined to a limited locality,<sup>5</sup> the Muhammadan lawyers required just the reverse,<sup>6</sup> on the other hand in British India its extent is in so far as Muhammadan law is concerned not local or territorial, but personal.

Ancient and authoritative interpretation of the law will be adhered to.

New rules of law will not be deduced.

11. The Courts will not attempt to put their own construction on the Quran in opposition to the express ruling of commentators of great antiquity and high authority, nor give effect to new rules of law which may be logically deducible from the ancient texts,<sup>7</sup> but which have not been deduced by the authoritative commentators (nor been adopted by the customs and usages of the parties).<sup>8</sup>

In the absence of law and custom,—analogous.

The present section is based on the decision of the Privy Council.<sup>9</sup> Their Lordships disapproved of the Courts acting upon "logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts," on the ground that in the absence of rules expressly laid down in the ancient texts or commentaries, it is safer to follow the

<sup>1</sup> See on this, Askes, "Customs and Usages of Trade," (1909) p. 13.

<sup>2</sup> *Abdul Hussain Khan v. Sarda Dero* (1917) 12 All. L. J. 17, 21 (P. C. in appeal from Sindh).

<sup>3</sup> Thus in *Lakhranj Bhathe v. Anandh Thirai* (1906) 28 All. 431 it was held that the custom of pre-emption need not be immemorial, following *Kuar Sen v. Maumun* (1865) 17 All. 87, *Gokul Dikhol v. Maheswari Dikhol* [1905] All. W. N. 208 and *Mohdun v. Sringappan* (1899) 23 Bom. 666, see also *Hobart v. Gorbai* (1875) 12 Bom. H. C. R. 201, see pp. 316-7, 319-29,—that case has, however, relevance to the peculiar state of the law governing the Khojast; *Abdul Hussain Khan v. Sarda Dero* (1917) 16 All. L. J. 17, (P. C., Appeal from Sindh.)

<sup>4</sup> *Ramdasakshi Ammal v. Sreenantha Perumal* (1872) 1 A. Supp. Vol. 1, 3, 17 W. R. 553,

and see *Dowd Jinnahat Rai v. Spratle Numa Dosa* (1811) Mouton's Case, H. L., 596.

<sup>5</sup> Halsbury, "Laws of England," X., 219, 221, 229.

<sup>6</sup> See the passage from *Abdul Rahim Muhammad* similar jurisprudence, set out in our earlier portion of the present comment.

<sup>7</sup> See *Dama Ram v. Sahel Singh* [1906] 41 Punj Rec. 390, 110, referred to, in the paragraph in the comment to s. 10, above, headed "deductions from customary rules."

<sup>8</sup> (*Agst*) *Mahomed Jaffer Bindonum v. Kondom Beebe* (1897) 25 Cal. 9, 18, (P. C.) There is no express reference to customs in the judgment *C. Collector of Madras v. Madlao Ramalinga* (1868) 12 Moo. I. A. 397) 436, for similar remarks in connection with Hindu law.

<sup>9</sup> *Baqar Ali Khan v. Anjuman Ara Beyum* (1902) 25 All. 236; 252-255; 30 I. A. 91.

analogy of another branch of the same school of law.<sup>1</sup> See the paragraph SECTION 11. headed "Deductions from customary rules" in the comment to s. 10, above, and see also, s. 12, below.

**11A.** When Muslim jurists of authority have expressed dissenting opinions on the same question, the Islamic Courts, presided over by the Qazi, have authority to adopt that view which in the opinion of the presiding officer is most in accordance with justice in the particular circumstances.<sup>2</sup>

Discretion to Court to adopt either of two dissenting opinions.

There being three exponents of the Hanafi school of Sunni law it became necessary to have some principles for acting when they differed in opinion. These rules are stated in the following forms in the 'Tabqat-ul-Hanafia': "When Abu Hanifa is on one side, and Abu Yusuf and Muhammad on the other, the 'mufti' is at liberty, if he chooses to follow the opinion of the latter two. But if the one or the other is of the same opinion as Abu Hanifa, the 'mufti' is obliged to prefer that opinion unless jurists of authority have declared their opinion to the contrary."<sup>3</sup>

Rule when Abu Hanifa and his disciples disagree.

These rules, it will be observed, by reason of the implication in the last sentence, are not so rigid as to leave the Court without any discretion and the British Indian Courts have, therefore, assumed the right of deciding for themselves which opinion they will prefer;<sup>4</sup> and this is in accordance with the following statement of the duties of the Qazi.

Practice of Courts in India.

<sup>1</sup> See also *Tarbi v. Mawla Khan* (1917) 41 Bom. 183, 492, 103. Similarly in the case of the *Khoja and Memons Perry*, Or. Cas., 110; *Mori*, Dig. II, 431 it was held that the law to be enforced by the High Court under the enactments governing them is the law which has been actually adopted by the parties in question, and not what the Court may logically conclude they ought to adopt. Compare the dicta in England as to introducing in the common law new rights "which ought to exist according to notions of what is just and proper," per Pollock, C. B. in *Jeffrey v. Boosey*, (1851) 1 H. L. 815, 936, Bowen L. J. in *Dashwood v. Maguire* [1891] 3 Ch. 307; Stephens' "History of Criminal Law," II, 359. On the other hand as to equity, see per Jessel M. R. on *re Hallet's Estate* (1879) 13 Ch. D. 696, 710; Lord Cottenham in *Wallworth v. Holt* (1841) 4 My. and Cr. 619, 635; Lord Brough in *Gee v. Pritchard* (1818) 2 Swanst. 102, 114.

<sup>2</sup> See the comment to s. 11B, below.

<sup>3</sup> *Jour. As.* 4 Ser., Tom. XV; cf. Justin, I, 2, § 203. See also Morley's Digest, I, p. cclxii.

<sup>4</sup> "In choosing between conflicting authorities the principles of justice, equity and good conscience should be regarded"; (*Sherik Muhammad Mumtaz Ahmad v. Zubaida Jan* (1890)

11 All. 160, 16 F. A. 204, 215 (*Bibi Khaoor Sultan v. Bibi Rakhat Sultan* (1905) 29 Bom. 108; 6 Bom. L. R. 983; *Vahazullah Sahab v. Bayazid Nagaqa* (1906) 30 Mad. 519, 522. There are many cases in India in which the question of the relative authority of Abu Hanifa and his two disciples has been considered; (*Sherik Adel, Sherik Koor v. Ruheem-un-nissa* (1874) 6 N. W. P. (H. C. R.) 91 (Abu Hanifa's opinion followed in preference to that of the two disciples), *Abdul Kader v. Salina* (1886) 8 All. 102; (Abu Yusuf's followed); *Muhammad Az-ziddin Ahmad Khan v. Layal Remembrance* (1891) 15 All. 321; *Bikani Mia v. Sherik Lal Poddar* (1893) 20 Cal. 116; *Ali Rahimuddin Chaudhry v. Musammasat Saigal Bibi* 8 All. C. 953B, Ind. Cas., 820. (The two disciples, followed against Abu Hanifa). In *Dam v. Aswaha Bibee* (1870) 2 N. W. P. (H. C. R.) 360 it was said that, as the highest Shah authorities differed, the Court conceived itself at liberty to consider what had been the practice among the Shahs in India for the last 50 years. See also Baillie I, 564; "When the Judge has given his decision for the validity of a *Waqf* of *Mooshad*, his decree is operative in all matters on which there is a difference of opinion."

SECTION 11A, "If in any case the 'Qazi' be perplexed by opposite proofs, let him reflect upon the case, and determine as he shall judge right; or, for greater certainty, let him consult other able lawyers, and if they differ, after weighing the argument, let him decide as appears just. Let him not fear or hesitate to act upon the result of his judgment after a full and deliberate examination."<sup>1</sup>

The 'Qazi's' powers.

Mr. Justice Abdur Rahim, than whom there can be no greater authority on this subject, has said :—"It may be a matter for argument whether on a question of this character (necessity for possession for completing a transfer by gift) it is not open to the Courts, according to the theory of Sunni jurisprudence, in a case where the parties are Hanafis, to adopt a rule of law laid down by jurists of one or the other of the four Sunni schools, if that rule is more in consonance with substantial justice, than the rule laid down by the Hanafi doctors themselves."<sup>2</sup>

'Fatawa,'

Mr. Justice Abdur Rahim's remarks about 'fatawa' are equally deserving of consideration : "The facts" he said, "must be borne in mind that mostly the 'fatwas,' or opinions of jurists, were delivered in answers to abstract questions, intended to illustrate a certain principle of law, and it would be entirely misleading to treat such opinions as absolute rules of law, having the same authority as a text of the Quran, or a universally accepted ruling of the Prophet, or a proposition established by 'ijma,' or consensus of opinion of jurists. They are mere deductions of jurists, or applications of certain well-established rules, in particular cases, actual or supposititious, and, until they are shown to have been accepted by consensus of opinion, cannot be regarded as of binding authority. The distinction between the deduction of a jurist in matters which fall within the province of 'ijtihad,' or juristic opinion, 'mujtahidil,' and rules based on 'nuss,' or authority of a text of the Quran, or a well known precept of the Prophet, or sanctioned by 'ijma,' or consensus of opinion, is a principal feature of the Muhammadan legal system, and cannot safely be ignored."<sup>3</sup>

<sup>1</sup> "Bidayat" of Abu Bakr bin Mus'al al Kashani (d. A. H. 587) quoted in the *Fatawa Alamgiri* translated in Morley's "Digest," Vol. I, p. CXXI. In *Shams Churn Ray v. Abdur Rahim* (1898) 3 C. W. N. 158, Anwar Ali and Prati, JJ., stated that the Civil Court of superior jurisdiction in the District is vested, generally speaking, with the powers exercised by the Qazi under the Mahomedan regime, p. 160. Woodroffe, J., followed that decision in *re Waziatunnessa Bibee* (1908) 36 Cal. 21. Two years later however Faghi J., declined to follow that case, and refused to assume jurisdiction as extensive as that of the Qazi unless there was some statutory power to

authorize the Court doing so.—*Re Halima Khatoon* (1910) 37 Cal. 870.

<sup>2</sup> *Fokir Nymai Muhammad Bouter v. Kondumumy Kulathu Vandan* (1911) 85 Mad. 120, 129. See also *Atmaniasa Bibi v. Abdul Soban* (1915) 20 Cal. W. N. 115. Where Mookerjee, J., expressed the opinion that under Muhammadan Law no Qazi had authority to deal with the administration of *waqf* unless he is specially authorised to that effect, and that consequently the subordinate Judge had no such jurisdiction.

<sup>3</sup> *Mahar Sahib v. Hussain Sahib* (1912) 23 Mad. L. J. 731 737.

The plenary powers of the ‘Qazi’ must, however, be taken in SECTION. 11A.  
British India to be subject to the direction of the Privy Council, that “it would be wrong for the Court on a point of this nature (right of the widow to inherit) to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority”<sup>1</sup> (as the ‘Hidaya’ and the ‘Fatawa’ Alangiri’)

11B. The Courts of British India have occasionally Jurisdiction of the  
‘Qazi’ and British  
Courts.  
considered the functions and powers of the ‘Qazi’ in Muhammadan states, for the purpose of determining whether they have jurisdiction in regard of particular matters: *semble*, in the majority of cases this question depends upon the constitution of the courts in accordance with the adjective law of British India.<sup>2</sup>

There has been difference of opinion on the point as to how far the Powers of  
Qazi and of  
British Courts  
compared.  
British Indian Courts can exercise the powers of the ‘Qazi’; in the later of the two judgments cited in the footnote<sup>3</sup> it is also considered, whether the rules in the Muslim texts defining the powers of the ‘Qazi,’ are rules of substantive law, and as such of full effect in India, or of adjective law, and as such abrogated by the Civil Procedure Code, and other statutes, regulating procedure.

The functions of the ‘Qazi’ and the ‘Chief ‘Qazi’ in Muhammadan states were elaborately considered by Mukerjee, J., in a recent decision,<sup>4</sup> and the conclusion arrived at, that a Subordinate Judge not expressly authorized by Government to exercise functions in connection with the administration of ‘waqfs,’ is not competent to act in that behalf, and that whether a District Judge has implied authority to exercise the functions performed by a ‘Qazi’ under Muhammadan law, is doubtful. It is submitted, however, that the functions exercised by the ‘Qazi’ have little bearing on the question what powers are delegated by the sovereign to Subordinate and District Judges respectively in British India. and the dictum of the highest tribunal cited in the next following paragraph seems to support this view.

<sup>1</sup> *Aga Mahomed Jaffer Bandanus v. Koolsoom Bibee* (1897), 25 Cal. 9, 18. See s. 11, above.

<sup>2</sup> See the comment to s. 11A, above.

<sup>3</sup> In the matter of *Woozianness Bibee* (1908) 36 Cal. 21. *In re Hafiza Khatun* (1910) 37 Cal. 870.

<sup>4</sup> *Atinanness Bibi v. Abdul Subhan* (1915) 43 Cal. 467. The extracts cited by Mukerjee J.

in his judgment refer to the question whether the Qazi has the power of appointing the successor to a *mutawalli*, unless he is expressly authorized to appoint (p. 476 of the report); whether the Chief Qazi alone has such power and whether he has such power without being expressly authorized. (pp. 477, 484); also with reference to the exchange of properties forming the subject of *waqf*, see s. 467.

## SECTION II.B.

In the majority of cases, the Courts in British India will probably be satisfied with the following parenthetical dictum in a judgment delivered on behalf of the Privy Council by Syed Sahib Ameer Ali:—  
 “The Qazi, whose place in the British Indian system is taken by the Civil Court.”<sup>1</sup> This pronouncement is made while laying down that, generally speaking, in the case of a ‘waqf’ or trust created for specific individuals, or a determinate body of individuals the ‘Qazi’ has, in carrying the trust into execution, to give effect, so far as possible, to the expressed wishes of the founder.

Justice, equity  
and good  
conscience.

12. In the absence of an express or implied rule of Muhammadan law, or custom, the Courts will either follow the analogy<sup>2</sup> of the law in similar instances, or decide the matter in accordance with justice, equity, and good conscience,<sup>3</sup> which expression is generally interpreted to mean rules of English law, if found applicable to Indian society and circumstances.<sup>4</sup>

See the notes to s. 11, above, and compare s. 355, below.<sup>5</sup>

In some Indian Acts<sup>6</sup> the Courts are expressly required to conform to the principles of English law.

Equitable  
considerations  
and Muhammadan  
law.

Lord Parker, delivering the advice of the Privy Council, has observed that “The chapter ‘on the Duties (Adab) of the Qazi’ in the principal works on Mussulman law, which clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England, are not foreign to the Mussulman system, but are in fact often referred to, and invoked in the adjudication of cases.”<sup>7</sup>

The phrase  
“Justice, equity  
and good  
conscience.”

A great judge has made a vigorous defence of the phrase “justice, equity and good conscience”, as “denoting those ultimate principles of

<sup>1</sup> *Mahomed Ismail Ariff v. Ahmed Moolla Dawood* (1916) 43 Cal. 1085, 1100 (P. C.).

<sup>2</sup> *Bagar Ali Khan v. Anjuman Ara Begum* (1902) 25 All. 236, 252-255; *Abdul Hussain Khan v. Sons Dero* (1917) 16 All. 117 (P. C.) Appeal from Sindhi.

<sup>3</sup> *Budamma Roether v. Fatema Bi* (1914) 26 Mad. L. J. 260, citing *Subbarayan Pillay v. Ramasami Pillay* (1900) 23 Mad. 171.

<sup>4</sup> Per Lord Holdhouse *Waghela Rajmaji v. (Shankh) Mahaddin* (1887) 11 Bom. 551, 561; 11 L. J. 89. *In re. Khandas Narandas* (1890) 5 Bom. 151, *Dada Hanajiv v. Babaji Jagushat* (1865) 2 Bom. H. C. R. 36, *William Webb v. William Foster*, (1865) ib., p. 52; *Mollao v. Court of Wards* L.R., I.A., SUPP. VOL., 86; 10 Beng. L.R. 312; 18 W. R. 284; but see (*Mussamat*) *F. Barlow v.*

*Sophia Kelline Ode* (1870) 13 Moo. I.A. 277; 13 W. R. (P.C.) 41; 5 Beng. L.R. 1. See also First Report of Commissioners for preparing Codes for India, p. 9, Second Report, p. 10. The Austrian Civil Code art. 7 requires the courts to decide “in accordance with the principles of natural law.” The French Civil Code, art. 4, makes a judge “who refuses to render judgment under pretence that the law is silent, obscure, or insufficient” liable to prosecution.

<sup>5</sup> See also *Braya Kishan Sarma v. Kula Chandrasarma* (1871) 7 Ben., L.R. 19, 25, *Re Khandas Narandas* (1890) 5 Bom. 154 and the cases cited in the next footnote.

<sup>6</sup> *E.g.*, Divorce Act, IV, of 1869, s. 7.

<sup>7</sup> *Hamara Bibi v. Zuhoud Bibi* (1916) L. R. 43 L.A. 291, 301, 302; 33 All. 381 589.

what is right and proper, fair and reasonable, and good and expedient-- SECTION 12. principles which judges here as elsewhere cannot help resorting to in dealing with the difficult questions not directly governed by existing precedents, which often arise in the course of the administration of justice." 1

The Privy Council have referred to the necessity for all Courts in the Empire yielding to the High authority of the Court of Appeal in England, and to the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same 2

### TEXTS ON MUHAMMADAN LAW.

The following is a classified list of texts on Muhammadan law and allied subjects, most of which here first enumerated in Morley's Digest, to which work the author must acknowledge his immense indebtedness.

The figures following the names represent the years of the Hijri Era when the authors flourished or died; the corresponding year of the Christian era is given in parentheses.

#### A.—Sunni Tests.

##### 1. —Commentaries on the Quran

Abu Ja'far Muhammad ibn Jarir al Tabari. 3 310 (922).—*Tafsir-ul-Quran*.

Abu Qasam Jar Allah Mahmud ibn 'Amr Al Zamakhshari, d. 538 (1143).—*al Kashshaf an Haqai'iq-al-Tanzil*.

Nasiruddin Abdallah bin amr al Buzawi d. 685 (1286).—*Anwar at Tanzil wa Asrar al Ta'wil*.

Abu Hamid Muhammad Al Ghazali, d. 504 (1110).—*Yakut-at Tawil* usually called *Tafsir-ul-Ghazali*

Fakhruddin Muhammad ibn Jalal-uddin ibn Abdur Rehman ibn Abi Bakr As Syuti, d. 911. (1505) —*Durrul Mansur Itqan*, or *al-Itqan fi Ulum al Quran*.<sup>3a</sup>

Jalaluddin Muhammad ibn Ahmad al Mahalli, d. 864 (1459), and Jalal-uddin Abdur Rehman ibn Abdullah Bakr as-Syuti, d. 911, (1505). —*Tafsir-ul-Jalalain*.<sup>3b</sup>

1 *Rajah of Vizianagaram v. Raja Setracherla Soma Sekhararaj* (1902) 26 Mad. 686, 723, 726 (F. B.) per Subramanlya Aiyar, J., who points out that the exposition of the Law by Irish Courts may be referred to equally with the expositions by the Courts in England. On the latter point see also *Jamshed v. Sonabai* (1907) 33 Bom. 122.

2 *Tremble v. Hill* (1879) 5 App. Cas., 342, 344, 345.

3 The great historian

<sup>3a</sup> Published by the Asiatic Society, Bengal ed by Sprenger, 1857.

<sup>3b</sup> Printed in Calcutta, 1840.

## SECTION 12.

Shah Adbul Aziz Dahlawi.—*Tafsir Fath-al-Aziz*.<sup>4</sup>Mulla Jain Junfuri.—*Tafsirat-Ahmadia*.<sup>5</sup>Ismail Hakki.—*Ruh-al-Bayan*.<sup>6</sup>II.—*Sunna or Traditions.*Abu Bakr, Ibn-Shihab, az-Zahri d. 120, aged 84.<sup>6a</sup>

Abdal-Malik ibn Juraij.

Malik ibn Anas, d. 179—*al Muwatta*.<sup>6b</sup>

Ar Rabia ibn Subaih.

Ibn Abdallah Muhammad ibn Idris Ash-Shafi'i—*Masnad Sunan*.\* *Sahih* \*Abu Abdullah Muhammad ibn Ismail al Bukhari,<sup>7</sup> 194-256, (809-869).—*Jami-us-Sahih*.<sup>7a</sup> sometimes called *Sahih-al-Bukhari*.Abu al-Husain Muslim ibn al-Hajaj ibn Muslim al Kushairi, surnamed an-Nishapuri, 206-261, (819-874).—*Jami-us-Sahih*<sup>7a</sup> or *Masnad-as-Sahih*, known as *Sahih-i-Muslim*.Abu Isa Muhammad ibn Isa at-Tirmizi, the Shafi'ite, d. 279 (892).—*Jami' Wa al-Hal* known as *Jami-ul-Tirmizi* or *Sunan-al-Tirmizi*.<sup>7a</sup>Abu Dawood Sulaiman ibn Alshas,<sup>8</sup> surnamed as-Sajistani, 202-275 (817-888).—*Kitab As-Sunan*.<sup>7a</sup>Abu Abdur Rehman Ahmad ibn Ali ibn Shuaib an-Nasai.<sup>9</sup> 215-303 (830-915).—*Sunan-al-Kabir Al-Mujtaba*.<sup>7a</sup>Abu Abdulla Muhammad ibn Yazid ibn Majah al Kazwini 209-273 (824-886).—*Kitab-us-Sunan*, *Sunan ibn Majah*.<sup>7a</sup>

Abu al-Husain Ali ibn Amr ad Darikutni d. 385 (995).

Abu Bakr Ahmad ibn Husain Ali Barhaki. d. 458 (1065).

Abu Muhammad Husain ibn Mas'ud al Farra al Ba'ghawi, d. 516 (1122).—(i) *Musabih-us-Sunnat*.<sup>10</sup> (ii) *Jama bain al-Sahihain*.Abu Abdalla Muhammad al Humaidi.<sup>11</sup> d. 488 (1095).—*Jama bain al-Sahihain*.Razin ibn Mua'wiyah al Abdari,<sup>12</sup> d. 520 (1126).

Abu al-Hasan.

<sup>4</sup> Persian, printed in Calcutta, 1843.<sup>5</sup> Printed in Calcutta, 1847; composed in Aurangzeb's reign.<sup>6</sup> Published, Bulak, 1840.<sup>6a</sup> In time of Umar Abdal 'Aziz: first collector of traditions.<sup>6b</sup> Considered as next in importance after the "Six *Sahih*s."<sup>7</sup> The first and most celebrated pupil of Ibn Hanbal. The *Sahih-ul-Bukhari* contains 7,000 traditions.<sup>7a</sup> This and the next five works are together considered to be the six most authentic collections of *sunna*. The first two of these, (both styled the *Jami-us-Sahih*) are referred to asthe *Sahihain*, or two *Sahih*s. The next four are referred to as the "*Al-Kutub-ul-Araba*" (i. e. The Four Books). All the six together are spoken of as *Al-Kutub-us-Sultat fiat-Hadith* or "The six *Sahih*s."<sup>8</sup> 4,800 chosen from 500,000, collected by the author, Abu Daud as-Sijistani.<sup>9</sup> This book contained many wrong traditions, so *Al-mustajab* abridged from it. The latter is the 5th *Sahih*.<sup>10</sup> Extracted from the six *Sahih*s.<sup>11</sup> Collections of *Al-Bukhari* and *Muslim*.<sup>12</sup> A compilation of the works of *Al-Bukhari*, *Muslim*, *Muwatta* of Malik, *Sunan* of Abu Daud, and *Sunan* of An Nasa'i.



Abu as-Sa'adat Mubarak ibn Asir al-Jazari, commonly called Ibn Asir d. 806 (1209).—*Jami-ul-Usul*.

Jalaluddin Abdur Rehman ibn abi Bakr, as-Syuti.—(i) *Jami-ul-Jawamia*; (ii) *Jami-us-Saghir*.<sup>13</sup>

Shaikh Ismail Hakki—*Hadis Azbain Sharhi* or *Sharh-al-Arbain*.<sup>14</sup>

Mulla Ali Hafiz al Kastamanni.

Mulla Furati.—*Kurak Sawal*.<sup>15</sup>

Shaikh Waliuddin Abu Abdalla Muhammad ibn Abdallah al-Mishkat-ul-Khatib.—*Mishkat-ul-Masabih*, finished in 737 (1336).<sup>16</sup>

Shahabuddin Abu al Fazl Ahmad al Askalani, 552 (1448).

(i) *Muntakhib-i-Bulugh al-Maram*; <sup>17</sup> (ii) *Labab-al-Akhar*.<sup>18</sup>

### III.—Texts on Sunni Law.

(1) Works recognized by all the four Sunni sects.

*Jami-al Mazahib*.<sup>19</sup>

*Majma' al Khilafiyat*.<sup>19</sup>

*Yanabia al Ahkam*.<sup>19</sup>

*Uyun*.<sup>19</sup>

Sirajuddin Abu Hafs Amr al Ghaznavi, d. 773 (1371).—*Zubdatul Ahkam*.<sup>19</sup>

Abu Hanifa Nu'man ibn Sabit al-Kufi (699-767).—*Fiqh-al-Akbar*.<sup>20</sup> Abu Hanifa

Abu Yusuf Ya'qub ibn Ibrahim al-Kufi.<sup>21</sup> 113-182 (731-798).—Abu Yusuf *Adab al-Qazi*.<sup>22</sup>

Abu Abdullah Muhammad ibn Husain ash-Shaibani, 132-187, Imam Muhammad (749-802), generally called Imam Muhammad.<sup>23</sup>—(i) *Jami-ul-Kabir*, <sup>24</sup>

(ii) *Jami-ul-Saghir*; <sup>25</sup> (iii) *Mabsut-fi-furu'-al-Hanafiyat*; (iv) *Zin'dat fi-furu al Hanafiyat*. <sup>26</sup> (v) *Siyar al Kabir wa as-Saghir*; <sup>27</sup> (vi) *Nawadir*.<sup>28</sup> 'Zahir Riyayat.'

<sup>13</sup> An abridgement of the above.

<sup>14</sup> Printed, Constantinople. V H 1253, (1837).

<sup>15</sup> I. e., 40 questions and answers: printed at Constantinople, (1810)

<sup>16</sup> New and augmented edition of the *Masabih-us-Sunnat*, by Abu Muhammad Husain ibn Mas'ud al Balghawi 510-516, translated by Capt. Mathews, Calcutta 1809-10.

<sup>17</sup> Printed, Calcutta, with interlined Urdu translation, no date.

<sup>18</sup> Containing 395 authentic traditions, printed Calcutta, 1837.

<sup>19</sup> These five books are mentioned by Haji Khalifah as the chief works treating generally of the doctrines of the five principal sects of the Sunnis.

<sup>20</sup> Principal work of Abu Hanifa, treats of *Im-al-Kalam*.

<sup>21</sup> Appointed Qazi by the *Khalifa* al Hadi, made *Qazi-at-Qusat* by Haroon at Rashid.

<sup>22</sup> The reputation of Abu Yusuf's *Adab-al-Qazi* eclipsed by Khassaf's work of the same name.

<sup>23</sup> Abu Yusuf entrusted his notes to his pupil Imam Muhammad who made great use of them. Imam Muhammad and Abu Yusuf were fellow-pupils of Abu Hanifa, then the former became pupil of Abu Yusuf's. Imam Muhammad is said to be also instructed in his younger days by Imam Malik.

<sup>24</sup> This and the next four works are together known as the *Zahir-ar-Riwayat*, "the conspicuous reports." Some of the commentaries on the *Jami-ul-Kabir* are mentioned below.

<sup>25</sup> Some of the commentaries on the work are mentioned below. The *Jami-ul-Saghir* is even more celebrated than the *Jami-ul-Kabir*. In the *Mabsut* he seems to be mostly indebted to the notes of Abu Yusuf.

<sup>26</sup> The *Zin'dat* is said to be written under the inspection, and with the approbation, of Abu Yusuf.

<sup>27</sup> Latest work of Imam Muhammad.

<sup>28</sup> Not so highly esteemed as the preceding five works of Imam Muhammad,

## SECTION 12.

Imam Zafar ibn al Hazal,<sup>29</sup> d. Basrah, 158 (774).

Hasan ibn Ziyad.<sup>30</sup>

Abu Bakr Muhammad as-Sharakhsi, d. 490 (1096).<sup>31</sup>—*Al-Muḥit as-Sharakhsi*,<sup>32</sup> commentary on the *Jam'at al-Kabir*.

Burhan-uddin Mahmud ibn Ahmad. —*Al Muḥit-al-Burhani*.<sup>33</sup>

Burhannuddin Ali —Notes on *Jami-us-Saghir*.

Abu Bakr Ahmad ibn Amr al Khassaf, d. 261 (874).—*Adab-al-Qazi*.<sup>34</sup>

Amr ibn Abdal Aziz ibn Mazeh, commonly called Husain ash-Shahid, killed, 536, (1141) A commentary on the lastmentioned work.

Abu Ja'far Ahmed ibn Muhammad at Tahawi, d. 321 (933) —(i) Commentary on the *Jami-us-Saghir*; <sup>35</sup> (ii) *Mukhtasar al Tahawi*.<sup>35</sup>

Abu Al Husain Ahmed ibn Muhammad Al Quduri, d. 428 (1036). — (i) *Mukhtasar-al-Quduri*;<sup>36</sup> (ii) *Al-Jawharat an-Nayirat*, sometimes called *Al-Jawharat al-Mumrat*.<sup>37</sup>

Shams al Aimmah.—*Mabsut*.<sup>38</sup>

Abu Bakr Muhammad ash-Sharakhsi — (i) *Mabsut*, (ii) *Muḥit*.

Shaikh Ala'uddin Muhammad as-Samarqandi. —*Tuhfat-ul-Fuqaha*.<sup>39</sup>

Abu Bakr ibn Mas'ud al-Kashani,<sup>40</sup> d. 587 (1191) —*Al-Bada'ia as-Sana'ia*.<sup>41</sup>

## (2) Texts on Hanafi Law.

(a) General Treatises.

The 'Hidayat'

Burhan-uddin Ali ibn Abu Bakr-al Marghinani, d. 593 (1196).—*Hidayat*,<sup>42</sup> i. e., the *Bada'ia-al-Mubtada*, with a commentary

<sup>29</sup> Chief Judge at Basrah, contemporary. friend, and scholar of Abu Hanifa

<sup>30</sup> Like the lastmentioned a contemporary. friend and scholar of Abu Hanifa.

<sup>31</sup> See this author's works mentioned below

<sup>32</sup> This work is the most celebrated of this name, (*Muḥit*) derived mainly from *Mabsut*, *Ziadat* and *Nawadir*.

<sup>33</sup> Not so great an authority as the last-mentioned.

<sup>34</sup> Contains 120 chapters: the most celebrated book of this name.

<sup>35</sup> Both works quoted in India, but, according to Morley's Digest, not known to exist here.

<sup>36</sup> Haji Khalifah calls it "*al Kitab*," i. e., the book in law. Contains upwards of 12,000 cases. The portion of the work relating to warring against infidels published in the original with Latin translation by Rosenmüller, 1825.

<sup>37</sup> A commentary on the above

<sup>38</sup> Compiled while in prison at Uzjend.

<sup>39</sup> Compendium of *Mukhtasar-al-Kuduri*

<sup>40</sup> Pupil of the last-mentioned

<sup>41</sup> Comment on the above

<sup>42</sup> The divisions, etc., seem to be taken from the *Jame-us-Saghir* Haji Khalifah. The text of the *Hidayat*, it is said in Morley's Digest, generally corresponds with the *Mukhtasar-al-Kuduri*, and the commentary with the *Jawharat-al-Nayirat* and that it may be inferred therefore that the *Mukhtasar al Kuduri* is the original text of the *Hidayat*. Morley also points out that in the *Hidayat*, the opinions of the two disciples are first stated, then of Abu Hanifah, then the opinions of the two disciples are related if there is any difference, and that whenever the author deviates from this rule, he may be taken to incline to opinion of the disciples. In praise of the *Hidayat* it has been said, that, like the *Quran*, it has superseded all previous books of law

Hamilton translated the *Hidayat* not from the original Arabic, but from a Persian version of it. Text published in Arabic at Calcutta, 1818; edited, with its commentary, the *Kifayah*, by Hakim Mowlavi Abdul Majid in 1834, Persian version, Calcutta, 1867.

Hamid-ud-din 'Ali al-Bukhari, d. 667 (1268).—*Fawa'id*.<sup>43</sup>

Husain-ud-din Hussain ibn Ali.<sup>44</sup>—*Nihayah*.<sup>45</sup>

Shaikh Akmaluddin Muhammad ibn Mahmud, d. 746 (1384).—*Inayah*,<sup>46</sup> or *Inayat*. A commentary on the *Hidaya*.<sup>47</sup>

Imam-uddin Amir Khatib ibn Amir Amr (i) *Kifayah*; <sup>48</sup>  
(ii) *Ghayab-al-Bayan*.<sup>49</sup>

Kamaluddin Muhammad As Siwasi, commonly called Ibn-Hammam.—*Fath-ul-Kadir-hill-'ajiz al-Fakir*.<sup>50</sup>

Abu Barakah Abdulla ibn Ahmed, commonly called Hafizuddin an-Nasafi, d. 710 (1310).—(i) *Wafi*; <sup>51</sup> (ii) *Kaf*, <sup>52</sup> (iii) *Kanz-ul-Daqa'iq*.<sup>53</sup>

Zain-al-Abidin ibn Nujain Almusri d. 979 (1562) - (i) *Bahr-ur-Raiq*.<sup>54</sup> (ii) *Ashbah wa an-Nazair*.<sup>55</sup>

Siraj-uddin Amr.<sup>56</sup>—*Nahr-ur-Fuq*.<sup>56</sup>

Fakhruddin Abu Muhammad ibn Ali az-Zuhari d. 743 (1342).—*Taby-in-al-Haqaiq*.<sup>57</sup>

Badrudin Muhammad ibn Ahmed al-'Amr d. 855 (1451) - *Ramiz-al-Haqaiq*.<sup>58</sup>

Badrudin Muhammad ibn Abdur Rehman al-Dairi. —*Matalabul-Faiq*.<sup>59</sup>

Burhan ash-Sharyat Mahmud.—*Viqayah*.<sup>60</sup>

Ubaid-ullah ibn Mas'ud, d. 750 (1349).—(i) *Sharh-al-Viqayah*, <sup>61</sup> (ii) *Nikayah*,<sup>62</sup> sometimes called *Mukhtasar-al-Viqayah*.

Abu al Makarim ibn Abdallah.—Commentary on the *Nikayah*.<sup>63</sup>

Abu Ali ibn Muhammad Birjindi.—Commentary on the *Nikayah*.<sup>64</sup>

Shamsuddin Muhammad Al Khurasani.—Commentary on the *Nikayah*.<sup>65</sup>

Shaikh Jun ibn Abi Sayyid al-Makki.—(i) *Nur-al-Anwar fi Sharh al-Manar*; <sup>66</sup> (ii) *Usul ash-Shashi*.<sup>67</sup>

<sup>43</sup> A short tract. A commentary on the *Hidaya*.

<sup>44</sup> A pupil of Burha'uddin Ali.

<sup>45</sup> A commentary on the *Hidaya*. Supplies a chapter on law of evidence.

<sup>46</sup> A commentary on the *Hidaya*, much esteemed for its studious analysis and interpretation of the text. Published Calcutta 1837, ed. by Ramadhan Sen.

<sup>47</sup> A commentary on the *Hidaya*; not so well known as the preceding one.

<sup>48</sup> Finished 747, (1346).

<sup>49</sup> Written before the last mentioned.

<sup>50</sup> Most comprehensive of all the commentaries on the *Hidaya*.

<sup>51</sup> Work of some authority.

<sup>52</sup> The *Kanz* is a book of great reputation.

<sup>53</sup> Commentary on the *Kanz-ul-Daqa'iq*, which it has almost superseded in India.

<sup>54</sup> Elementary work of great reputation.

<sup>55</sup> Brother of the last mentioned; completed *Bahr-ur-Raiq*, which was left incomplete by

Zain al-Abidin.

<sup>56</sup> Commentary on *Kanz-ul-Daqa'iq* inferior to *Bahr-ur-Raiq*.

<sup>57</sup> Of great repute as commentary on *Kanz* in India as it upholds Hanafi against Sha'fi's doctrine.

<sup>58</sup> A commentary on the *Kanz-ul-Daqa'iq*.

<sup>59</sup> A commentary on the *Kanz-ul-Daqa'iq*, much esteemed in India.

<sup>60</sup> Comparatively eclipsed by the *Sharh-al-Viqayah*, written as an introduction to the study of *Hidaya*.

<sup>61</sup> Printed Calcutta; no date.

<sup>62</sup> Elementary book; abridgment of *Viqayah* printed Kasan 1845.

<sup>63</sup> Written 907 (1501); much esteemed.

<sup>64</sup> Written 935 (1528); much esteemed.

<sup>65</sup> Written 941 (1534); much esteemed.

<sup>66</sup> Published Calcutta, 1819.

<sup>67</sup> Published Delhi, 1847.

SECTION 12. Ahmed ibn Muhammad al Hamawi,—editor of Zainal Abidin's *Isbah-wa-an-Nazir*, with commentary, *ma-Sharhal Hamawi*.<sup>68</sup>

Shaikh Ibrahim ibn Muhammad al Halabi. 956 (1549).—*Mullaqa al Abhar*.<sup>69</sup>

Abdur Rehman ibn Shaikh Muhammad, commonly known as Shaikh Zadah.—*Majma-ul-Anhar*.<sup>70</sup>

Muhammad Mauqufati.—*Al Mauqufati*.<sup>71</sup>

Mulla Khusrav,<sup>72</sup> d. 885 (1480).—(i) *Ghurur-al-Ahkam*; (ii) *Durar-al-Hukkam fi Sharh Ghurar-al-Ahkam*; <sup>73</sup> (iii) *Qanoon Nama-i-Jaza*; <sup>74</sup> (iv) *Suruh-i-Khatti-Sharif*.<sup>75</sup>

(b) *Hawafi Collections of Fatawa.*

Imam Iftikharuddin Tahir ibn Ahmed Albukhari, d. 542 (1147).—(i) *Khulasat al Fatawa*.<sup>76</sup> (ii) *Khizanat-ul-Waqiyat*; (iii) *Kitab-an-Nisab*.<sup>77</sup>

Burhanuddin ibn Mâzâh al Bukhari.<sup>78</sup>—(i) *Zakhirat-al-Fatawa*; (ii) *Zakhirat-al-Burhania*.

'Fatawa Qazi Khan.'

Imam Fakhruddin Hasan ibn Mansur al Uzjandi al Farghani, commonly called Qazi Khan, d. 502 (1195).—*Fatawa-Qazi Khan*.<sup>79</sup>

Yusuf ibn Jumaid, commonly known as Akhi Chalabi at Tukati.<sup>80</sup> Zahiruddin Abu Bakr Muhammad ibn Ahmed al-Bukhari. d. 619 (1222).—*Fatawa-az-Zahiriyah*.<sup>81</sup>

Badrudin Abu Muhammed Mahmud ibn Ahmed al Aini, d. 855 (1451).—*Masâit-al-Badriya*.

Muhammad ibn Mahmud commonly called al Isturushi.—*Fusul-ul-Isturushi*.<sup>82</sup>

Abul Fath Muhammad ibn Abu Bakr Abdul Jalil al Marghinani as Samarqandi *Fusul al Imadiyah*.<sup>83</sup>

<sup>68</sup> Edited, Calcutta, 1260 (1844).

<sup>69</sup> A Universal Code of Muhammadan Law containing opinions of the four Chief *Mutakhal* Imams, illustrated by the opinions of the principal juriconsults of Hanafi School, printed Constantinople, 1251 (1835); more frequently referred to in Turkey than any other book. D'Osson's *Tahsin General Def Empire Ottoman, I* Intro, p. I. Translated in great part into French, and constitutes basis of D'Osson's work. That book contains more about religion than about law. But there are three or four pages on *waqf* in Vol. I towards the end.

<sup>70</sup> Commentary on the above, published Constantinople, 1210 (1824).

<sup>71</sup> Turkish Translation of the *Mullaqa*, with commentary, —published Bulak, 1838.

<sup>72</sup> One of the most renowned of Turkish juriconsults.

<sup>73</sup> Very voluminous. This work is second only to the *Mullaqa* and that preferred for its comparative brevity. Published with transla-

tion, Constantinople 1258 (1842).

<sup>74</sup> Tract on penal laws. Published Constantinople, 1254 (1839).

<sup>75</sup> Tract on penal laws. Published Constantinople, 1251 (1841).

<sup>76</sup> Select collection of great authority.

<sup>77</sup> On these books the last-mentioned is grounded, and many subsequent collections indebted to these.

<sup>78</sup> Author of the *Mukht-al-Burhan*.

<sup>79</sup> Held in the highest estimation; equal to the *Hidayat* of Burhanuddin Ali, with whom Qazi Khan was contemporary. Published Calcutta, 1835 ed. by Mouli Muhammad Murad Hafiz Ahmed Kadir Gulam Isa, and Tameezuddin Aizami.

<sup>80</sup> Wrote an epitome of the *Fatawa-Qazi Khan*.

<sup>81</sup> Mainly from *Khizanat-ul-Waqiyat*.

<sup>82</sup> Written 625 (1272). Principally restricted to mercantile decisions.

<sup>83</sup> Composed 651 (1253) (mercantile) lithographed and printed, Calcutta, 1827.

SECTION 12.

Jamaluddin ibn Imaduddin.<sup>84</sup>

Badruddin Mahmud known as Ibn-al-Qazi Sinawanah. d. 823 (1420).—*Jaina-ul-Fusulain*.<sup>85</sup>

Mukhtar ibn Mahmud ibn Muhammad az Zahidi Abu art Riza al Ghazmini, surnamed Najmuddin. d. 658 (1259) —*Qunyat-ul-Munayyah*.<sup>86</sup>

An Nawawi<sup>87</sup>.—(i) *Fatawa-an-Nawawi*; (ii) *Uyun al Masail al Muhkummat*.<sup>88</sup>

Imam Husain ibn Muhammad as-Samâ'ani. — *Khizana-ul-Mustafîr*.<sup>89</sup>

Ahmed ibn Muhammad ibn Abi Bakr al-Hanafi. — *Khizanat-ul-Fatawa*.<sup>90</sup>

Imam Alim ibn ala al-Hanafi. — *Fatawa Tatarikhaniyah*.<sup>91</sup>

Imam Ibrahim ibn Muhammad al Halabi, d. 556 (1549).—(i) *Tatar Khaniya*,<sup>92</sup> (ii) *Fatawa-Ahl-Samargand*.<sup>93</sup>

Zainal Abidin Ibrahim ibn Nirjain al-Miri.<sup>94</sup>—*Fatawa-i-Zariniah*.

Shahabuddin Ahmed. — *Fatawa Ibrahim Shahi*.<sup>95</sup>

Shaikh Shamsuddin Muhammad ibn Abdalla al Ghazali. — (i) *Tauwir al-Absar*; <sup>96</sup> (ii) *Manh-al-Ghaffar*.<sup>97</sup>

Muhammad Alaiddin ibn Shaikh Ali al Huskafi. — *Durr-ul Mukhtar*.<sup>98</sup> — *Durr-ul-Mukhtar*.

Muhammad Amin Shami (the Syrian), flor. under Amurath IV.—

*Radd-ul-Mukhtar*.<sup>99</sup> Radd-ul-Mukhtar.

Moulvi Muhammad Khabl-uddin. — (i) *Nuskhah-i-Tarjimai-tazkirat-i-kitab-i-Durrul Mukhtar*; <sup>100</sup> (ii) *Hashiyat al Tahtawi ala Durrul Mukhtar*.<sup>101</sup>

By order of the Emperor Aurangzeb, 'Alamgir.—*Fatawa-al-'Alam-giri*.<sup>102</sup>

Shaikh-al-Islam Muhammad ibn al Husain.—*Fatawa-i-Anqirawi*.<sup>103</sup>

<sup>84</sup> Completed the above, which had been left incomplete by Abul Fath.

<sup>85</sup> Incorporating the *Fusul-ul-Isurushi* and *Fusul-ul-Imadiya*.

<sup>86</sup> Published, Calcutta, 1829.

<sup>87</sup> Author of the Biographical Dictionary, *Takrib-ul-Asma*.

<sup>88</sup> In form of question and answer.

<sup>89</sup> Written 740, (1339).

<sup>90</sup> Comprises questions of rare occurrence. Taken from *Mukht-al-Burhani* and *Zakhira, Khaniya* and *Zahiriya*.

<sup>91</sup> Epitome of the last-mentioned work.

<sup>92</sup> Supplement to *Fatawa Tatarikhaniyah*, and *Jami-ul-Fusulain*.

<sup>93</sup> Author of *Behr-ar-Raiq* and *Ashba wa-an-Nawair*. Collected by his son Ahmed, about 790 (1562).

<sup>94</sup> Collected by order of Ibrahim Shah of Jampur, 9th Century, A. H.; not of much

authority.

<sup>96</sup> Enriched with variety of questions and decisions; considered very useful.

<sup>97</sup> Well-known commentary on the above.

<sup>98</sup> A well-known commentary on the *Tauwir al-Absar*, printed with translation by Dajal, 1916.

<sup>99</sup> Commentary on the above. One of the best known authorities on Hanafi law.

<sup>100</sup> Persian translation of the book on *Tajrat* from *Durrul Mukhtar*, Calcutta, 1813, (1827).

<sup>101</sup> Printed and published, Bulak, 1839; not seen by Morley.

<sup>102</sup> Commenced 1067 (1656) by order of the Emperor Alamgir; main portions translated by Neil Baillie in the first volume of his "Digest of Moolhimmudan Law."

<sup>103</sup> Collection of decisions of Al-Anqirawi, who died 1098 (1686).

SECTION 12. Abul Fath Ruknuddin ibn Hussin an-Nagûri.—(i) *Fatawa-i-Hammadiya*; <sup>104</sup> (ii) *Fatawa-As-Sirajiyah*; <sup>105</sup> (iii) *Fatawa-i-Muhammadi*; <sup>106</sup> completed by order of Tipu Sultan: consisting of 313 Chapters.

Hafiz Muhammad ibn Ahmed al Kudusi.—*Kitab fi al Fiqh-al Kudusi*. <sup>107</sup>

Mufti Abdur Rahim — *Fatawa Abdur Rahim Effendi*. <sup>108</sup>

Dabagzada Nu'man Effendi.—*Tuhfatus-Sukuk*. <sup>109</sup>

Muhammad 'Arif.—*Jami'-al-Ijaratin*. <sup>110</sup>

M.D. Adelbourg.—Collection of Fatawa on leases, with a chapter on leases from the *Multaqa*.

(c) *Hanafi Texts on Inheritance.*

Abu Sa'ad Zaid ibn Thabit, d. Medina, 54 (673). <sup>111</sup>

Imam Muwaffiq-ud-din abi Abdallah Muhammad ibn Ali Ar Rahabi, surnamed Inam al Mutakannah.—*Bighyat-ul-Bahis*. <sup>112</sup>

Sirajiyah.

Sirajuddin Muhammad ibn Abdur-Rashid as Sajawandi.—*Sirajiyah*, sometimes called *Faraiz-as-Sajawandi*. <sup>113</sup>

Maulavi Muhammad Rashid.—Persian translator of the *Sirajiyah*. <sup>114</sup>

Sayyid Sharif Ali ibn Muhammad al-Jurjani, d. 814 (1411).—*Sharifah*, a commentary on the *Sirajiyah*.

Shahabudin Ahmed ibn Mahmud as Siwasi, d. 803 (1400).—A commentary on the *Sirajiyah*.

Burhanuddin Haidar Muhammad al Harawi, d. 830 (1426).—A brief commentary on the *Sirajiyah*

Shamsuddin Ahmed ibn Hamza al Fanari, d. 834 (1430).—A commentary on the *Sirajiyah*

Abdul Karim ibn Muhammad al Hamadani.—*Al Faraiz at Taji fi-Sharh Faraiz us-Siraji*.

Burhanuddin al Marghinani. <sup>115</sup>—*Faraiz al Usmani*.

Irtiza Ali Khan Bahadur. — *Faraiz Irtizia*. <sup>116</sup>

<sup>104</sup> Dedicated to his tutor, Hamaduddin Ahmed Chief Qazi of Nahr Walah

<sup>105</sup> Bare Cases. Published, Calcutta, 1827

<sup>106</sup> Compiled by order of Tipu Sultan, consisting of 313 Chapters.

<sup>107</sup> Constantinople, 1297 (1821). Composed in 1226 (1808) in Turkish and Arabic languages.

<sup>108</sup> Constantinople, 1243 (1827)

<sup>109</sup> Containing 670 decisions

<sup>110</sup> Decisions on farming and tenure of land, printed 1836.

<sup>111</sup> Wrote a work on inheritance. The prophet said: "The most learned among you

in the law of heritage is Zaid," Zaid was one of the *Ansur*

<sup>112</sup> Memorial verses on the law of inheritance according to the doctrine of Zaid: translated by Sir William Jones; Morley pronounces them unintelligible owing to their conciseness.

<sup>113</sup> Highest authority on inheritance amongst Hanafi Sunnis. Original published with *Sharifa*, Calcutta, 1245 (1829).

<sup>114</sup> Persian translation made by order of Warren Hastings.

<sup>115</sup> Author of the *Hidaya*.

<sup>116</sup> Printed Madras. no date,

(3) *Texts on Maliki Law.*

SECTION 12.

*Al-Magrizi.*<sup>117</sup>

Abu Muhammad Abdulla ibn Abu Zaid al Qairumani.<sup>117</sup>—writer on Criminal law.

Khalil ibn Ishaq.—*Mukhtasar*<sup>118</sup>

(4) *Texts on Shafi'ī Law.*(a) *General Treatises on Shafi'ī Law.*

Abu Abdullah Muhammad ibn Idris Ash-Shafi'ī, 150-204 (767—819).

—*Al-Fiqh al-Akbar.*<sup>119</sup>

Abu Ibrahim Ismail ibn Yahya al Muzani, d. 264 (877).—(i) *Mukhtasar*;<sup>120</sup> (ii) *Mansur*; (iii) *Rasail al Mu'tabara*; (iv) *Kitab al Wasaiq*.

Abu Khwaja.—*Mukhtasar*.

Shamsuddin Abu Abdulla ibn Qasim al Ghazzi.—*Taqrib*

Abul Qasim Abdul Karim ibn Muhammad ar Rafi.—*Muharrar*.

Mohiuddin Abu Zakaria Yahya ibn Sharafan. Nawawi, d. 676. *Minhaj-ut Talibin.*<sup>121</sup>

(b) *Fatawa of Shafi'ī Qazis*

Abu Amin 'Uthman ibn Abdur Rehman ash-Shahrazuri, commonly called Ibn As-Saiah, d. 642 (1244).—*Fatawa Ibn-As-Salah.*<sup>122</sup>

Burhanuddin Abu Ishaq al Fazari, commonly called Ibn Firqah, d. 729 (1328).—(i) *Fatawa-Ibn-Firqah*.<sup>123</sup> (ii) *Fatawa-i-Bazaziya*; (iii) *Fatawa-i-Nakshbandiyah*; (iv) *Mukhtar-ul-Fatawa*.

Mulla Sadruddin ibn Yaqub.—*Fatawa-i-Karakhani*<sup>124</sup>

(c) *Shafi'ī Texts on Inheritance.*

Shamsuddin Muhammad ibn Killayi, d. 777 (1375).—*Al-Faraiz al-Fariqiya*.

Burhanuddin Abu Ishaq al Fazari, d. 729 (1328).—commonly called Ibn Firqah.—*Faraiz al-Fazari*.

<sup>117</sup> Translated partly in p. 13 of *Études Sur la Loi Musulmane (Rit de Malék) Legislation Criminelle*, Par M. B. Vincent. 8vo, Paris, 1842.

<sup>118</sup> Translated into French: *Procès de Jurisprudence Musulmane Selon le Rite Malékite Par Khalil ibn Ishaq, Traduit de l'Arabe, par M. Perron*. Paris, Imp. 8vo. Tom. I, 1818, 11, 1849. With illustrations from different commentators. "When finished, it will present the first complete translation of a general treatise on Muhammadan Jurisprudence that has yet appeared." Morley, Digest I. cclv.

<sup>119</sup> It is questioned whether Ash-Shafi'ī is

the author. Morley pronounces it a most excellent treatise.

<sup>120</sup> The basis of all treatises on Shafi'ī doctrine.

<sup>121</sup> Translated into French by M. Van Den Berg, of which an English rendering by Mr. E. O. Howard was published in 1914 Thacker, London.

<sup>122</sup> Morley pronounces it "The one most esteemed amongst the decisions according to Ash-Shafi'ī."

<sup>123</sup> Author of *Faraiz-al-Fazari*.

<sup>124</sup> Persian compilation, arranged some years after his death by Kair Khan.

SECTION 12. Abu Sa'id Abdur Rehman ibn Mamun al-Mutawalli, d. 748 (1085).

—*Faraiz al-Mulawalli*.

Abu al-fazal Abdul Malik ibn Ibrahim al Hamdani al Muqaddasi, d. 489 (1095).—*Faraiz al-Muqaddasi*.

Abu Mansur Abdal Khan al Baghdadi, d. 429 (1037).

## B. Shiah Texts.

### I.—Commentaries on the Quran.

Imam Ja'far-us  
Sadiq,

Abu Abdullah Ja'far ibn Muhammad ibn Ali ibn Muhammad ibn Ali ibn al Husain ibn Ali ibn Abu Talib Babawiyah Shaikh Ja'far-us Sadiq,<sup>125</sup> d. 80 (148).—*Tafsir*.

Abu Ja'far Muhammad al-Tusi. - *Majma'-'i-Bazal li Ulum al Quran*, called *Tafsir-ul-Tusi*<sup>126</sup>

Abul Fatah Razi.—*Tafsir*.

Nuruddin Abdur-Rehman Jami, d. 898 (1492).—*Tafsir*.

Kamal-uddin Husain al Waiz al Kashifi as Sabzawari, d. 910 (1504).<sup>127</sup>—*Mawnehbat Aliyah*,<sup>128</sup> known as *Tafsir-i-Husain*.

Banu'uddin al Amib, d. 1031 (1631)<sup>129</sup>

Abdullah ibn Ali ibn Abu Shuabah al Halabi,<sup>130</sup>

Abu Muhammad Hushan ibn Al-Hakim al Kindi ash Shaibani,<sup>131</sup> d. 179 (795).

Yunas ibn Abdur-Rehman al Yaqtaani,<sup>132</sup> d. Medina, 108 (823).—

(i) *Il-al-Hadith*: (ii) *Ikhtilaf-at-ah-Hadith*.

Shaikh Abu Ja'far al Tusi<sup>133</sup>—(i) *Tanzih-ul-Ahkam*.<sup>134</sup> (ii) *Istibsar*.<sup>134</sup>

Abu Ja'far Muhammad ibn Yaqub al Kalini ar Razi,<sup>135</sup> d. Baghdad, 328 (993), called "Rais-ul-Muhaddisin.—*Jami-ul-Kafir*.<sup>134</sup>

Abu Ja'far Muhammad ibn 'Ali ibn Babavaih al Kumi,<sup>136</sup>—(i) *Man-la-Yahzar-ul-Faqih*.<sup>134</sup> (ii) *Kitab-ul-Masabih*.<sup>137</sup>

<sup>125</sup> Most celebrated of all the Imamiyah lawyers of Kumi.

<sup>126</sup> In 20 volumes.

<sup>127</sup> Author of the *Anwar-i-Subahi* and *Akhaq-i-Mohsinia*.

<sup>128</sup> Published in 1837, at Calcutta, with interlinear Hindi translation and another Persian commentary, *Tafsir-i-Abbasi*.

<sup>129</sup> A great lawyer.

<sup>130</sup> His grandfather is said to have collected traditions from Imams Hasan and Husain.

<sup>131</sup> Wrote a work on the traditions.

<sup>132</sup> Made Haj 45 times; and 51 *Aqrata* to Mekka. Said to have written 1,000 works, con-

travelling the opponents of the Shiaks.

<sup>133</sup> Author of the *Fahrsat*, or list of authors, and of a commentary on the Quran.

<sup>134</sup> These four books are known as the *Kitab-i-Arbaa* and considered in India to form the most authentic books on tradition.

<sup>135</sup> His *Jame-ul-Kafi* contains 30 books, and took 20 years to write.

<sup>136</sup> Author of two *Tafsirs* or commentaries on the Quran. Wrote 172 works on Law and Hadith.

<sup>137</sup> Al-Nagash calls this the chief work of this author.



Abu al-Abbas Ahmad ibn Muhammad, known as Ibn-u-Uqdah,<sup>138</sup> SECTION 12.  
d. 333 (954).

Ali ibn al-Husain al-Mas'udi al Hudaili,<sup>139</sup> d. 346, (957).

Abul Faraj al-ibn al Husain al Isfahani, d. 356 (966).—*Kitab-i-Afghani*.<sup>140</sup>

Ash Sharif Abul Qasim al Murtuza, d. 406, or his brother, Ash Sharif al Raza al Baghdadi.—*Nahj-ul-Balagh*.

Shaikh Allamah Jamal-uddin Hasan ibn Yusuf al Mutahhir Hilli<sup>141</sup> known as Shaikh Allamah Hilli.—(i) *Istigha-al-Istibrar* (ii) *Masabih-ul-Anwar*; (iii) *Durar-wa-al-Murjan*.

Muhammad Baqir ibn Muhammad Taqi.—(i) *Bahar-ul-Anwar*; (ii) *Haq-al-Yaqin*.<sup>142</sup>

Abu al Futuh Razi.—*Kitab-i-Hastuniyah*

Abus Sabah Ibrahim Kinani<sup>143</sup>

### III.—Texts on Shi'ah Law.

#### (a) General Treatises

Abdullah ibn 'Ali al Halabi<sup>144</sup>

Yunas ibn Abdur Rehman Yaqani<sup>145</sup> *Jam'-'i-ul-Kabir*.

Abu al-Hasan Ali ibn al Hasan al Qumi,<sup>146</sup> known as Ibn Babavaih, d. 320 (940).—*Kitab-us-Shari'ah*.

Ja'far Muhammad ibn Ali ibn Babavaih al Kunni 328.<sup>147</sup>—(i) *Al-Kafi*, a 'Collection of Tradition'. (ii) *Maqa'-'fi al-Fiqah*.

Abu Abdullah Muhammad An-Nu'man, surnamed 'Shaikh Mufid,' and 'Ibn-Mu'allim,' d. 413 or 416 (1022 or 1025).<sup>148</sup>—*Urshad*.

Abu Ja'far Muhammad at-Tusi<sup>149</sup>.—(i) *Mabrut* (ii) *Kikilaf*; (iii) *Nihayah*; (iv) *Muhil*; (v) *Risalat-i-Ja'fariyah*.

Shaikh Najmuddin Abul Qasim Ja'afar ibn Mu'ayyid al-Hilli, d. 676, (1277) commonly called Shaikh Mu'ayyid.—*Sharay'-'ul-Islam*.<sup>150</sup>

<sup>138</sup> Said, by *Addara-Lutuf*, the Sunni traditionalist, to have known 300,000 traditions of the *Ahl-i-Bait*, and the *Bani Hashim*.

<sup>139</sup> Author of *Manhaj-uz-Zuhab*, called the "Herodotus of the East."

<sup>140</sup> Said to have taken 50 years in writing.

<sup>141</sup> Characterized by Morley as controversial, but containing many traditions.

<sup>142</sup> Reporter of traditions: mentioned in Sir William Jones' Digest of Shi'ah Imami Law, by Baillie, I p. 39.

<sup>143</sup> No works seem to be extant.

<sup>144</sup> Wrote many more works, which do not seem to be extant.

<sup>145</sup> These two, father and son, are quoted together as "the two 'Sadiqs'" (the truthful). The reputation of the father has been eclipsed by that of his son, Imam Ja'far-us-Sadiq, who

is said to have written 172 works, and was especially skilled in *Ijtihad*.

<sup>146</sup> These two quoted in conjunction as the "Two Shakh's" (*Shakhaw*). "The first is said to have written 200 works, described by Ja'far al-Tusi in the "*Fihrid*" as the greatest orator and lawyer of his time, the most eminent Mujtahid, most subtle reasoner, and chief of those who gave *fatwas*."

<sup>147</sup> The chief work on Shi'ah Law known in India; edited by Maulavi Sayyad Aulad Husain of Lucknow, late Head Professor of Muhammadan Law according to Shi'ahs in the College of Haji Muhammad Mohsin, and Maulavi Zoonoor Ali of Bareilly; and published by the Asiatic Society of Calcutta, 1830. Translated into English by Baillie and published as the second part of his "Digest."

'Sadiqs'  
'Shaikhs'

Sharay'-'ul-Islam

## SECTION 12

'Masalik'  
'Jawahir'

Zainuddin Ali Saili, commonly known as Shahid-i-Thani.<sup>148</sup>—  
(i) *Masalik-ul-Afham*;<sup>149</sup> (ii) *Madar-ul-Ahkam*.<sup>149</sup>

Shaikh Muhammad Hasan an-Najafi.—(i) *Jawahir-ul-kalam*;<sup>141</sup>  
(ii) *Najat-ul-Ibad*.<sup>150</sup>

Yahya ibn Ahmad al Hilli, d. 679 (1280).—(i) *Jama'-ush-Sharaya*  
(ii) *Madkhal dar-Usul-i-Fiqah*.

Shaikh Allamah Jamaluddin Hasan ibn Yusuf al Muta'hir Hilli,  
known as Shaikh Allamah Hilli.<sup>151</sup>—(i) *Talkhis-ul-Maram*; (ii) *Ghayat-  
ul-Ahkam*; (iii) *Tahrir-ul-Ahkam*; (iv) *Mukhtalaf-ush-Shiah*; (v) *Irshad-  
ul-Azzan*.<sup>152</sup> (known as *Irshad-i-Allamah*.)

'Jamil-ul-  
Abbasi.'

Bahauddin Muhammad 'Amili, d. 1031 (1621).—*Jami'-ul-'Abbasi*;  
Books I.—V.

Nizam ibn Husain as-Sawai. —*Jami'-ul-'Abbasi*, Books VI.—XX.

Izzaddin Muhammad ibn Mir Abul Husaini al Musawa. —*Majma'a-  
i-Idariyat*.<sup>153</sup>

Muhammad ibn Murtaza, surnamed Muhsau. —*Mafatih*.

Muhammad ibn Murtaza, surnamed Hadl.<sup>154</sup>—Commentary on  
*Mafatih*.<sup>155</sup>

The third Mujtahid of Oudh.—*Ruzat-ul-Ahkam*.<sup>156</sup>

Abdul Aziz ibn Ahmed al Azadi.—On the Law of Inheritance.<sup>157</sup>

Abu Muhammad al-Kindi.<sup>158</sup>—On the Law of Inheritance.<sup>157</sup>

Abu Ja'far Muhammad al-Tusi.<sup>158</sup>—*Al-I'jaz fi-ul-Faraiz*.

Sa'ad ibn Abdulla al-Ashair.—*Ihtijaz ush-Shiah*.

Abu Al-Hasan Ali Babavaih.—(i) *Kitab-ul-Mawaris*; (ii) *Humal-  
ul-Faraiz*.

(b) Collections of Shah Fatawa

Shaikh Abu Ja'far Muhammad at-Tusi.<sup>159</sup>—*Mujirad fi al Fiqh wa al  
Fatawa*.

Shaikh ash-Shahid Abu Abdullah Muhammad ibn Makki ash-Shami,  
killed, 786 (1384).—*Lum'ah-i-Dimishqiya*.<sup>160</sup>

Zainal Abidin.—*Ruzat-ul-Bahiyat (Sharh-i-Lum'ah-i-Dimishqiya)*.<sup>161</sup>

<sup>148</sup> Or second martyr.—Shamsud-din Muhammad ibn Makki being the first martyr (Jones's Dig. I, 430, note).

<sup>149</sup> Commentaries on the *Shariyat-ul-Islam*.

<sup>150</sup> Smaller work. See 6 Bom. L. R. 849.

<sup>151</sup> Chief of lawyers of Hillah, also biographer and traditionist. Second to none as an authority on law of Shuhs; Morley, cxcviii, Jones's Digest, Ch. III, Sections I, II, III, on options in sale, translated from this book.

<sup>152</sup> Quoted, Jones's Dig. I, 425.

<sup>153</sup> I.e., Books I-V of *Jami'-ul-Abbasi* with running commentary; Morley, cxcix.

<sup>154</sup> Nephew of the last.

<sup>155</sup> Portion translated. Sir William Jones's Digest, tr. by Capt. Baillie, Vol. I., p. 397.

<sup>156</sup> First Chapter on inheritance, most full and perspicuous. Lithographed, Lucknow, 1257, and 1261 Hijri.

<sup>157</sup> Earliest writer on inheritance.

<sup>158</sup> Lived in the reign of Haroon al Rashid.

<sup>159</sup> Author of *Alabak, Khilaf, Nahaya, Mahit, Rasalatul-Jafaria*.

<sup>160</sup> The origin of this work is said to be that the author was sent for by Sultan Ali Mu'ayyid, ruler of Khurasan; he excused himself, and sent this Collection of *Fatawa* as a substitute.

<sup>161</sup> A commentary on the above.

## C.—Books on Religious Tenets and Biography. SECTION 12.

(1) *Sunni Tenets and Biography.*

Abu Ishaq ash-Shirazi, d. 476 (1083).—*Tabaqat al Fugaha*.<sup>162</sup>

Maulavi Subhan Bakhsh.—*Basid ibn Khalligan* and *as-Sayuti*.<sup>163</sup>

Shaikh Muhiuddin Abdul Qadir ibn Abi al Wafa al Misti, d. 775. (1373).—*Jawahir-ul Muziyat fi Ta'baqat-ul-Hanafiyyat*.<sup>164</sup>

Taqiuddin Tamin, d. 1005 (1599).—*Tabaqat as Saniiyat-fi Tarriju al-Hanafiyyat*.<sup>165</sup>

Burhanuddin Ibrahim ibn Ali ibn Farhun, d. A. H. 799, (1396).—*Dibaj-al-Muzahib*.

Tajuddin Abdul Wahhab ibn as Subki, d. 771 (1369).—*Tabaqat-ush-Shafi'at*.<sup>165</sup>

Qazi Abul Hasan ibn abu Yaali al Zairi continued by Shaikh Zainuddin Abdur Rehman ibn Ahmed, commonly called 'Ibn Rajab'.—*Tabaqata al-Hanbaliyyat*.<sup>166</sup>

Abu Hamid Muhammad ibn Muhammad ibn Ahmed al Ghazali,<sup>167</sup> Imam Ghazali, surnamed Hujjat ul-Islam (proof of Islam), born, TUS, 430 (1058) d. 505 (1111).—(i) *Ihya'-ul-Ulum-ildin*, (ii) *Al Maqсад-ul Asma*.

(2) *Shiah Tenets and Biography.*

Nurullah ibn Sharif al Husaini ash-Shustari.—*Majalis-ul Mu'minin*.<sup>168</sup>

Muhammad Baqir ibn Muhammad Taqi.—*Haqq-ul-Yaqin*.<sup>169</sup>

Abul Falul-ul-Razi Makki. —(i) *Risali Husainiyah*, or *Kitab-i-Hasaniyah*,<sup>170</sup> (ii) *Tabsarat-ul-Awam*.

Abul Fath Muhammad ash Shahrastani d. 548 (1153).—*Milawa-Nahal*.

Muhammad ibn Amar ibn Tamini.<sup>171</sup>

Abul Husain Ahmed ibn Ali an-Najashi,<sup>171</sup> d. 405 (1014)—quoted as *Kitab-i-Rijal*.

Shaikh Allamah Jamaluddin Hasan ibn Yusuf al Mutahhir Hilli,<sup>171</sup> known as Shaikh Allamah Hilli, d. 726 (1325).—*Khulasat-ul-A'qal*.

Shaikh Ja'far Muhammad ibn al-Hasan al-Tusi<sup>172</sup> d. A. H. 460 (1167).—(i) *Fihrist-i-Kitab-i-Shiah wa Asmal-ul Musannifin*, quoted as *Majalis-ul-Muminin*; (ii) Commentary on the Quran.

Abu Yahya Ahmed ibn Daud al Farazi-ul Jurjani.<sup>173</sup>—*Kitab-fi-Ma'rifati-ur-Rajal*.

<sup>162</sup> Biographical Dictionary.

<sup>163</sup> Published, Dehli, 1848 in Hindi.

<sup>164</sup> Hanafi, alphabetical.

<sup>165</sup> Shafi'i.

<sup>166</sup> Hanbali.

<sup>167</sup> Theologist : see a portion of his writings cited, above, in p. 23 n. 2

<sup>168</sup> Biographical Dictionary.

<sup>169</sup> Shiah Tenets : dedicated to Shah Sultan Husain.

<sup>170</sup> Translated from Arabic into Persian by Ibrahim Isfahani, 958 (1551).

<sup>171</sup> Biographer.

<sup>172</sup> One of the Chief Mujtahids.

<sup>173</sup> Originally a Sunni : converted Shiah.

## CHAPTER III.

### MARRIAGE.

#### § 1. - Preliminary.

##### SECTION 13.

Marriage.

**13.** Sexual intercourse by a man with a woman who is neither his wife <sup>1</sup> nor his slave is, according to Muhammadan law unlawful and prohibited entirely. <sup>2</sup>

'Zina' or illegitimate intercourse and its offspring.

**14.** Sexual intercourse, without either the reality or semblance of the right to have it, is termed 'zina,' <sup>3</sup> and the off-spring of such intercourse is necessarily illegitimate. <sup>1</sup>

"Semblance of right."

Semblance of right arises, where the parties have purported to marry, but the marriage is irregular, <sup>5</sup> or, where a husband purports to revoke a divorce, which in law is irrevocable, (*e.g.* a 'khul') or where there is a mistake as to the identity of the wife, or she is by error supposed to be unmarried, or a widow, or a divorced woman. If the irregularity or invalidity of the acts in question is known to the parties, it does not give rise to "semblance of right." <sup>6</sup>

Regular and irregular, permanent and temporary marriages.

**15.** Marriages recognised in Sunni law may be either regular or irregular; <sup>7</sup> both classes of marriages are permanent. <sup>8</sup> In accordance with the Shiah Ithna 'Ashari law, besides the permanent form of marriage (which corresponds to the regular form of marriage under Sunni law), a relation

<sup>1</sup> So that intercourse after dissolution of the marriage is also prohibited: Bail. I, 397.

<sup>2</sup> Bail. I., 1, citing *Hidayat*, II, 638; *Hammur Bahadur v. Shukhrabadi Begum* (1870), 14 W. R. 125, affirming on review S. C. (1869), 12 W. R. 512, 1 Ben. L. R. (C.C.) 104. See the Indian Slavery Act, 1843, and comment to s. 59, above.

<sup>3</sup> *Zina*, i.e., fornication or adultery is, in Islam, punishable by stoning to death, or scourging with 100 or 50 stripes: Bail I., 2, see Bail I., 151-154 on *Zina*; cf. Indian Penal Code, s. 494.

<sup>4</sup> Bail. I., 3.

<sup>5</sup> See s. 81, below.

<sup>6</sup> Bail. I., 397, 402, 411, 413, 414, 93 (par. 3 & 4). The marriage in such a case is not merely

irregular, but void. *Ala Mahomed Chaudhary v. Musamat Saqul Bibi* (1910) 8 All. L. J. 933; 7 Ind. Cas. 820.

<sup>7</sup> The Arabic word for regular is *nikah*, i.e., correct. Bailie translates it "valid." See ss. 83, 86, below on irregular marriages.

<sup>8</sup> *Ala Mahomed Chaudhary v. Musamat Saqul Bibi* (1910) 8 All. L.J. 933; 7 Ind. Cas. 820, contains a very long judgment by Kammal Hussain, J., on the distinction between void and irregular marriages and the status of the issue, in each case, the matter was appealed against, and the Appellate Court decided it on another point.

arising out of the contract of 'mut'a' is also recognised : SECTION 15. this has been called a temporary marriage.<sup>1</sup> Other sects of Shiah do not recognize the validity of 'mut'a'.<sup>2</sup>

16. In this chapter, (1) the words "marriage," <sup>Permanent marriage.</sup> "husband" and "wife," refer, respectively, to a permanent marriage, and persons permanently married, unless there is something in the subject or context showing that a 'mut'a,' or persons who have contracted 'mut'a,' are referred to, or included, in the said words or expressions; (2) "contract of marriage" means and includes all that the <sup>'Contract of marriage.'</sup> law requires to effectuate the marriage and not merely the agreement to marry; and a marriage is said to be contracted when the parties have lawfully become husband and wife.<sup>3</sup>

## § 2.—How the Relation of Marriage Arises

### (1) Marriage defined: Essentials of contract of Marriage

17. (1) Marriage,<sup>1</sup> in accordance with Muhammadan <sup>Marriage defined.</sup> law, brings about a relation between a man and woman (who are referred to as "parties to the marriage," and who, after being married, become husband and wife),—based on, and arising from, a permanent contract<sup>2</sup> for intercourse and procreation of children.<sup>6</sup>

(2) Such a contract<sup>3</sup> is valid (and gives rise to the rights <sup>its essentials and effects.</sup> and obligations mentioned in s. 24, below), provided that it is entered into,—

(a) in accordance with the rules and forms contained in ss. 17A to 23, inclusive;

(b) by, or on behalf of, parties who are not prohibited from intermarrying, under ss. 26 to 53, below;

<sup>1</sup> Bad. 11, 1. See s. 25, below, on *mup'a*.

<sup>2</sup> E.g., in the *Daragun-ul-Islam* *mufta* is repudiated. I cite from Shaikh Fazlulhabat's notes (see p. 33 above).

<sup>3</sup> I.e., by the contract of marriage is always to be understood the marriage itself (*matrimonium*) as distinguished from betrothal (*sponsalia*) or the mere engagement to marry.

<sup>4</sup> See *Asha Bibi v. Kadir Ibrahim* (1909) 37 Mad. 22 (Munro and Abdur Rahim, JJ.)

<sup>5</sup> Bail. I, 18, Hed. 33. As to *mup'a* or temporary marriage, see s. 25, below.

<sup>6</sup> Hed. 33; Bail. I, 10, 18, 16; II, 1.

<sup>7</sup> I.e., a contract, (a) which is not restricted as regards its duration and (b) which has as its object intercourse and procreation of children.

**SECTION 17.**

Tabular statement  
of essentials of  
marriage

- (c) by persons who are competent, under s. 17B, below, and to contract in marriage either themselves or (as the case may be) the parties concerned.
- (d) with the intention that the contract shall come into immediate operation: its coming into operation not having been made to depend on a condition or contingency.<sup>1</sup>

The contents of s. 17 may also be stated in the following form:—

“Marriage arises in Muhammadan law from a contract,—

- (a) providing for intercourse and the procreation of children ;
- (b) commencing from the time of the contract ;
- (c) made by, or on behalf of, a man and woman whose intermarriage is not prohibited by law ;
- (d) entered into in accordance with the rules and forms laid down in s. 17A to s. 23, inclusive; and,—
- (e) by a person who has authority to contract in marriage the persons purported to be married.”

Biological  
meaning of  
marriage.

Care of young.

“It is probable,” says a recent author,<sup>2</sup> “that most anthropologists and social writers are in agreement concerning the biological meaning of marriage. The word has reference to a union of the male and female, which does not cease with the act of procreation, but persists after the birth of offspring, until the young are capable of supplying their own essential needs;” and then he proceeds to say “the source of marriage then must probably be looked for,—not in the sexual instinct, but “in the utter helplessness of the newborn offspring, and the need of both mother and young for protection and food during a varying period.”

### § 2.—Competence for Marriage.

Capacity to be  
married.

**17A.** Every person is capable of being contracted in marriage, i.e., of becoming a husband or wife.

The capacity to be married is to be distinguished from the competence to enter into a marriage contract. Competence to do the latter is referred to in s. 17B, below. The present section implies that no person is under a legal disability to have the rights and duties of a husband or

<sup>1</sup> An option to cancel a marriage is void—*Hal. T. 21*; *II. 5, 76*.

<sup>2</sup> Willystine Goodsell, “A History of the Family as a Social and Educational Institution,” (1913, New York), pp. 6, 7, 8.

wife conferred and imposed upon him or her, and this question is distinct from the question by whose legal act such rights and duties can be conferred and imposed. The answer to this latter question depends upon whether the person in question is 'sui juris.' If he is 'sui juris,' then he alone can confer and impose them, either by his own act, or by the intervention of an agent; if he is not 'sui juris,' then the rights and duties can be conferred and imposed by his guardian for marriage, or by an agent of the guardian.<sup>1</sup>

**17B.** (1) According to all schools of Muhammadan law, a male becomes competent to enter into a contract of marriage (whether on his own behalf or, as guardian, or agent, on behalf of another) when, being of sound mind, he attains puberty.

Competence to contract marriage.  
(1) Males.

(2) With reference to the competence of a female so to enter into a contract of marriage,

(2) Females.

(a) according to the Hanafi law, she becomes competent when, being of sound mind, she attains puberty.<sup>2</sup>

(b) according to Shafi'i and Maliki law,—a 'thayyaba'<sup>3</sup> is competent so to contract,<sup>4</sup> but not a woman who is a virgin;<sup>5</sup>

(c) the Shiah Ithna 'Ashari law is as follows:<sup>6</sup> (A) the authorities are agreed that a woman until she attains puberty, is not competent to contract herself in marriage, without the consent of her father or grandfather,—irrespective of her being a virgin or a 'thayyaba';<sup>3</sup> (B) the

<sup>1</sup> These sentences apply with the necessary changes to females.

<sup>2</sup> Ball I. 10, 55; Ifed. 39.

<sup>3</sup> Ball, II. 7. *Thayyaba* = a woman who has had sexual intercourse with a man (presumably therefore a widow or divorcee.) The distinction between virgins, and girls who are not virgins, has a parallel in the English law relating to the marriage of a person under the age of 21 years, which ordinarily may be contracted by the consent of the father, and after his death of the mother, if living, but, if the minor is a widow or widower, the above-mentioned persons have no authority to consent to the marriage. See (1823) 4 Geo. IV, c. 76, s. 16; Halsbury, "Laws of England," XVII. 57, note (g). The Muhammadan law, however, does not give the privilege to a woman who, without consumma-

tion of the marriage, is divorced, or becomes a widow. See the next footnote.

<sup>4</sup> The reason is stated as follows: "An adult virgin [is] the same as an infant with respect to marriage, since the former cannot be acquainted with the nature of marriage any more than the latter as being equally uninformed with respect to the matrimonial state, whence it is that the father of such an one is empowered to make seizure of her dower without her consent": Hed. 34.

<sup>5</sup> *Muhammad Ibrahim v. Gulam Ahmad* (1864) 1 Bom. H. C. R. 236, (1. 44, 66, 67, below.

<sup>6</sup> She is never a guardian for marriage under Shiah law (see s. 64), and the texts naturally do not contemplate her being appointed an agent for marriage.

**SECTION 17B.** authorities are also agreed that a woman who has attained (i) puberty (ii) and discretion,<sup>1</sup> and (iii) who is a 'thayyaba,'<sup>2</sup> is competent so to contract; (c) with respect to a virgin who (i) has attained puberty and (ii) is "discreet,"<sup>1</sup> the authorities are agreed that, if her father and grandfather should refuse to marry her to an equal when desired by her so to do, she may contract herself in marriage,—even against the will of both; *but*, (d) as regards the competence of such a virgin, where there is no such refusal on the part of her father or grandfather, the following four views are expressed, *viz.*, (i) that she is competent to contract herself either in a permanent marriage or a 'mut'a' (this view is stated in the 'Sharaya'-ul-Islam' to be in accordance with the most generally approved tradition); (ii) that she is competent to contract herself only in a permanent marriage; (iii) that she is competent only to enter into a 'mut'a' contract; (iv) that her father and grandfather have a partnership in the authority, so that it would not be lawful for them to act separately from her in the contract.<sup>3</sup>

(d) With reference to the Shiah Isma'ili law, the 'Da'ayam-ul-Islam' seems to state it in agreement with the Shafi'i and Maliki law.<sup>4</sup>

See the comment to s. 17A. above, for the distinction between capacity to be married and competence to contract marriage.

<sup>1</sup> Bail. II. 7. With reference to being 'discreet,'—“This is a matter which does not readily admit of ascertainment,” Hed. 47. A statement of Shafi'i's which may not ordinarily seem to call for any dissent: nevertheless, in the development of Muhammadan law the expression “discreet” seems to have acquired in this connection a fairly definite signification: it seems to refer to those girls who are capable of taking care of their person and possessions and need not be under any inhibition from the Qazi: that officer having a jurisdiction to place “prodigals” under inhibition, and that being discreet or having discretion implies a certain amount of intelligence, independence of character and sense of responsibility.

<sup>2</sup> Bail II. 7. *Thayyaba*=a woman who has had sexual intercourse with a man (presumably,

between virgins, and girls who are not virgins, has a parallel in the English law relating to the marriage of a person under the age of 21 years, which ordinarily may be contracted by the consent of the father, and after his death of the mother, if living, but, if the minor is a widow or widower, the above mentioned persons have no authority to consent to the marriage. See (1823) 4 Geo. IV. c. 76, s. 16; Halbury, “Laws of England” XVII. 57, note (g). The Muhammadan law, however, does not give the privilege to a woman, who, without consummation of the marriage, is divorced, or becomes a widow.

<sup>3</sup> Bail. II. 7, 8. The complications of Shiah law do not however end here. Closely connected with this topic is the rule contained in s. 641 *id.* (3) below.

<sup>4</sup> *Da'ayam-ul-Islam*,—Shaikh Faizullahul's



## 3.—Form of Contract of Marriage.

## SECTION 18.

18. (1) A contract of marriage must be in unequivocal terms, the agreement being contained in a declaration and acceptance, in accordance with s. 23, below.<sup>1</sup>

Form of contract of marriage "declaration and acceptance."

(2) In Hanafi law such consent may be expressed in words implying a sale ('bai'), or gift ('hiba,') or transfer of ownership ('tamlik,') or any other expression implying a permanent union;<sup>2</sup> but words implying a mere hiring or lending or permitting, do not give rise to a valid marriage.<sup>3</sup>

In Hanafi law.

(3) In accordance with Shiah Itina 'Ashari<sup>4</sup> and Shafi'i law it is necessary that the declaration and acceptance of a contract of marriage<sup>5</sup> should be made by the use of the Arabic word 'tazwij' or 'nikah,'<sup>6</sup> meaning marriage, unless the parties are unable to use the Arabic words, in which case, equivalent words in the language of the parties are necessary.<sup>7</sup>

In Shiah Itina Ashari and Shafi'i law

(4) Words implying marriage at a future time, or depending on an uncertain future event or condition, do not

Future, condition, or contingency, void.

<sup>1</sup> Bail. I. 237; and see Hed. 38, 87; "declaration" (or, to use the terminology of the Indian Contract Act "proposal") is the English for *ijab*; and acceptance of *qubul*; cf. the definition of "proposal" and "promise" in the Indian Contract Act, s. 2, clauses (a) and (b).

<sup>2</sup> Bail. I. 25; Hed., 26.

<sup>3</sup> Bail. I. 16.

<sup>4</sup> The *Da'ayan-ul-Islam*, (notes—see p. 23, above) does not mention the use of Arabic words.

<sup>5</sup> See s. 16, (clause (2), above).

<sup>6</sup> (*Sheik*) *Monerooddeen v. Ramdhus Bajekur* (1872); 18 W. R. Cr., 23, speaks of the "nikah form of marriage." The term *nikah*, according to a footnote in Bail. I. 1, "is in Bengal restricted to what is deemed an inferior kind of marriage in opposition to *Shadee*, which properly means joy or festivity, but is commonly applied to the first or principal marriage, usually celebrated with festivities and a good deal of expense." In Bombay the term *shadi* includes both the *nikah*, or actual contract, and the celebration of it, at the same time the word *nikah* is sometimes used to denote the nuptial ceremony, distinguishing it from the accompanying festivities, which are referred to as *shadi*. The *nikah* is also spoken of as the 'aqd, which means "contract."

In the case of a widower remarrying, it is usual to dispense with the celebrations. The expression "*nikah* marriage" is sometimes used (even by the Privy Council, in *Shahant Singh v. Jaji Rabi* (1914) 17 Bom. L. R. 11, 13 All. L. J., 113, 21 Cal. L. J.; 4; 1 L. W. 965) as if *nikah* referred only to a permanent marriage, and as if that word served to exclude the relation arising from a *muta* contract. This, it is submitted, is erroneous, both etymologically, and in the language of legal art: *nikah* literally means conjugal intercourse (see dictionary, s. v. *nikah*), and the root word *nakh*. *Nikah* is one of the specified expressions by use of which a *muta* must be contracted: see s. 23 (2) below; cf. Bail. II. 39 (*nikah* to be "I have made *nikah* with thee"); Bail I. 181 f. 1. refers to a *nikah-i-mootah* = *nikah* by way of *muta*, or a marriage of enjoyment (*muta* meaning, enjoyment).

<sup>7</sup> Bail. II, 1-3; Hed. 26; *Shah-i-Viqayah*, Vol. II., Book on *Nikah* (ad *nih.*). It is clear, therefore, that in Shiah and Shafi'i law the use of expressions implying sale or gift are not enough, nor, it seems, would any other expressions which do not specifically import marriage suffice.

## SECTION 18. constitute a valid marriage according to any school of law. <sup>1</sup>

### Illustration

If one of the parties to a marriage stipulates that the other is free from blindness or paralysis, the stipulation is void, and the marriage valid absolutely. But a stipulation that the husband should not be impotent is unnecessary, and would be valid, if expressed.<sup>2</sup>

### 1. NATURE OF MARRIAGE IN MUHAMMADAN LAW.

Marriage purely a civil contract in Muhammadan law. Significance of agency in marriage.

Marriage in Muhammadan law, is a purely civil contract.<sup>3</sup> The significance of the fact that agency is so freely recognised for purposes of marriage and divorce, is well illustrated by the remarks of Dr. Hunter in connection with the characteristic absence of agency from every department of ancient Roman law: after showing that this absence was partly owing to the fact that, in informal transactions, it was not necessary, he proceeds: "It is not difficult to understand how the idea of agency or representation should appear incongruous in respect of formal transactions. The old forms of 'mancipatio,' 'cessio in iure,' 'stipulatio,' 'legis actiones' were highly solemn and dramatic. They possessed, in the eyes of the Romans, a species of sacramental efficacy. How, then, could the benefit of one of these ceremonies be given to a person who had taken no part in them, had repeated none of the sacred words, nor performed a single act in the ceremony?"<sup>4</sup>

Roman law.

### 2. LAW OF STATES WHERE MARRIAGE IS CIVIL CONTRACT

United States

In some of the United States of America, marriage is a civil contract requiring no ceremony or special formality. The following "note" on the "Requisites and Proof of Common Law Marriages," in the *Harvard Law Review*,<sup>5</sup> is full of interest, and may be suggestive in the decision of questions arising under Muhammadan Law:—

No formality necessary, mere contract enough.

"From early times, it has not always been clear what acts were necessary to the validity of a marriage.<sup>6</sup> According to early civil law the consent of the parties was sufficient;<sup>7</sup> but, it seems doubtful, whether

<sup>1</sup> Ital. l. 17, 11, 5 ("fourth").

<sup>2</sup> Ind. l. 21, 317; Il. 60, 61, see also s. 24, below.

<sup>3</sup> The statement of Boulton, J., in *Notroz Ali v. (Musummat) Aziz Bibi* (1876) 11 P. R. No. 124, pp. 253, 259, that "the legal mode of establishing the status of marriage is connected with a religious ceremony," and a similar statement by Lord Parker of Waddington delivering the opinion of the Privy Council in *Shoharat Singh v. Jyoti Bibi* (1914) 17 Bom.

L. R. 13, 13 All. L. J. 113; 21 Cal. L. J. 4;

<sup>4</sup> L. W. 963, that a *nikaḥ* marriage is a religious ceremony, are, perhaps, not quite accurate with reference to strict Muhammadan law; but see the comment to s. 23, below.

<sup>5</sup> Hunter's "Roman Law," 610.

<sup>6</sup> Harvard Law Review, Vol. 27, pp. 387, 390.

<sup>7</sup> Citing Dryce, *Studies in History and Jurisprudence*, 811 *et. seq.*

<sup>8</sup> Ibid. 812.

under the early English common law<sup>1</sup> a marriage without a minister was valid.<sup>2</sup> In this country, however, many States have adopted the view that a marriage may be valid even without a ceremony before third parties.<sup>3</sup> The rule is usually stated to be that an agreement to be married henceforth, followed by cohabitation, constitutes the so-called common-law marriage.<sup>4</sup> But, both on principle and authority, it would seem that the agreement alone is sufficient to consummate a common-law marriage, and that the subsequent cohabitation is important only as evidence of the agreement.

Cohabitation,  
evidence  
of contract.

"Moreover, it is clear on the authorities, in the States where formal solemnization is not necessary, that although there is no proof of an actual written or oral contract, the agreement necessary to the formation of a common-law marriage may be inferred solely from the conduct of the parties." The article then goes on to consider what are referred to as four rather common situations which are mentioned below with some condensation: (1) Where the only evidence of the agreement is that the parties have lived together as husband and wife, from which a common-law marriage is often inferred, even without proof of an express agreement, an implied agreement being sufficient. (2) Where the parties have purported to contract a marriage and lived together, but the agreement at the time it is entered into is void because of some disability unknown to both parties. If, subsequently, the disability is removed, a new contract is in strictness necessary. If, however, the parties having been ignorant of the existence and removal of the disability simply live on as before, a new agreement to be man and wife is implied by law from the cohabitation, with the same matrimonial intent that the parties had at the time when the marriage was originally purported to be contracted. (3) Where the parties marry, both knowing of a disability, or simply live together meretriciously, matrimonial intent cannot be inferred from past conduct; hence affirmative proof of mutual consent to marriage, after

Presumption  
of marriage  
from  
cohabitation.

<sup>1</sup> *Ibid.*, 817-818; Rodgers, Domestic Relations, § 85.

<sup>2</sup> "By statute, in England, a ceremony is now required: 26 Geo. II. c. 33. But it can be before a Civil officer: 6 & 7 William IV. c. 85. In Scotland an agreement to be married henceforth is sufficient: *Dalrymple v. Dalrymple* 2 Hag. Con. 51."

<sup>3</sup> "Shorter v. Judd, 60 Kan., 73, 55, Pac., 286; *Hutchinson v. Hutchinson* 196, Ill. 132, 63 N. E. 1023; *Chamberlain v. Chamberlain*, 48 N. J. Eq. 411, 59 At. 813; *Turt v. Negus*, 127 Ala. 301; 28 So. 713; *In re Hulett's Estate*, 68 Minn. 327; 49 N. W. 31; *Contra*, *Dunkerton v. Franklin*, 19 N. H. 257. Some states, by statute, have declared common-law

marriage invalid. *Morrill v. Palmer* 68; Vt. 1, 33; Atl. 829. See *Com. v. Munson* 127 Mass., 150-160. Other states have declared marriage a contract, and in such states a contract is usually sufficient: *State v. Bittel*, 103, Mo. 183; 15 S. W. 325. It is generally held that statutes setting forth the ceremony for marriage are only directory, and even in these states common-law marriages are good: *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 531."

<sup>4</sup> "The disability usually consists in one party having a spouse living and undivorced; but any disability, such as slavery, that makes the marriage absolutely void, would be sufficient: *Renfrow v. Renfrow*, 60 Kan. 277; 56 Pac. 531."

SECTION 18. the disability is removed, is necessary. (4) Where only one party knows of the disability at the time of the contract of marriage, some courts hold that the mere continuance of cohabitation after the removal of the disability is insufficient evidence of the requisite agreement. Other courts consider the fraudulent party to be estopped from proving that he did not consent. "On the analogy of ordinary contract principles, it may be argued that there is a valid agreement as soon as the difficulty is removed, since there is apparent mutual consent which is ordinarily sufficient."<sup>1</sup>

### 3. DEVELOPMENT OF NOTION OF MARRIAGE IN CHRISTIAN CHURCH.

Christian  
Marriages—  
"Consensus  
facit matrimo-  
nium."

The following words of Professor Holland may be appropriately quoted here:<sup>2</sup> "The Christian Church, adopting from Roman law the maxim that 'consensus facit matrimonium,' though it stigmatised such marriages as irregular, because not made in 'facie ecclesiæ,' nevertheless upheld them as valid till the Council of Trent declared all marriages to be void unless made in the presence of a priest and witnesses. Before the time of the Council, and, after it, in countries such as France and England, where the decree in question was not received, either of the parties to a clandestine marriage 'per verba de presenti,' could compel the other, by a suit in the ecclesiastical court, to solemnise it in due form. It has been judicially stated that the English common law never recognized a contract 'per verba de presenti,'<sup>3</sup> as a valid marriage, till it had been duly solemnised, although it recognised it under the name of 'pre-contract of marriage,' a term which covered also promises 'per verba de futuro' down to the middle of last century,<sup>4</sup> as giving either of the parties a right to sue for a celebration, and as impeding his or her marriage with a stranger to the contract."

### 4. MARRIAGE IN ENGLISH LAW.

Marriage  
with English-  
woman in  
English,—  
(1) In Muslim form

In a case<sup>5</sup> before the English Courts, where the Nawab Nazim of Bengal, having other wives, had married an Englishwoman in the

<sup>1</sup> The article (27 Haw. L. R. 387) concludes: "An interesting case, recently decided in Illinois, would seem incorrect. *People v. Shaw* 102 N. E. 1031. The defendant married a woman in New York, neither knowing of a disability. They moved to Illinois, where there was no disability, and continued to live as man and wife. The defendant then deserted this woman, and married another, and was held not guilty of bigamy. As the evidence showed that neither party doubted the validity of the original ceremony in New

York, there was real consent by both to be married when the parties lived in Illinois thinking themselves man and wife. It is submitted, therefore, that a common-law marriage was there contracted, and that the defendant was guilty of bigamy."

<sup>2</sup> Holland's "Jurisprudence," 257-258.

<sup>3</sup> *R. v. Milla* (1843) 10 Cl. & Fin. 534, 865.

<sup>4</sup> These consequences were removed by 26 Geo. II. c. 33.

<sup>5</sup> *Re Ullee: the Nawab Nazim of Bengal's Infants* (1885) 53 L. T. 711, affirmed L. T. 54 286.

Islamic form of marriage, Chitty, J., observed that "such a marriage was SECTION 18. not binding on any spouse of English domicile, the reason being that it was not intended to be a marriage; for the notion of 'marriage' in England implies a monogamous connection."

A marriage solemnized in England between a Christian woman and a Muslim domiciled in India, cannot be dissolved by the husband handing to the wife a writing of divorce.<sup>1</sup> (n) in English form

The requisites of a valid marriage according to the law of England are: (1) that each of the parties should, as regards age, mental capacity, and otherwise be capable of contracting marriage; (2) that they should not, by reason of kindred, or infirmity, be prohibited from marrying one another; (3) that there should not be a valid subsisting marriage of either of the parties, with any other person; (4) that the parties, understanding the nature of the contract, should freely consent to marry one another; (5) that certain forms and ceremonies should be observed.<sup>2</sup> Requisites of marriage under English law.

19. An illegal condition in a marriage contract is void, and does not invalidate, or otherwise affect, the marriage.<sup>3</sup> Illegal condition in marriage.

### (3). Consent of Parties to Contract of Marriage.

20. (1) The consent to the marriage of a person competent, under s. 17B, above, to enter into a contract of marriage, must be expressed<sup>4</sup> either by himself or his duly authorized agent or proxy.<sup>6</sup> Persons who must consent. (1) If parties are sui juris (a) they themselves or (b) their proxies. (2) If not sui juris: guardians for marriage.

(2) The consent to the marriage of a person not competent to enter into a contract of marriage under s. 17B, above, must, subject to the said section, be expressed<sup>7</sup> by his or her guardian for marriage<sup>8</sup> or by the duly authorized agent or proxy of such guardian.<sup>9</sup>

<sup>1</sup> *Rez v. Hammersmith, Superintendent Registrar of Marriages; ex-parte Mir Amarruddin*, [1917] 1 K. B. 631.

<sup>2</sup> This is taken from Halsbury's "Laws of England," XIV. 279, n. 512.

<sup>3</sup> *Bail. I.* 19, 79, II.; See also the Indian Contract Act, s. 3.

<sup>4</sup> For the form in which the consent to a marriage contract has to be expressed, see ss. 18, 22, 23, below.

<sup>5</sup> The singular includes the plural, and the

masculine the feminine.

<sup>6</sup> *Bail. I.*, 16, 50; II. 1, 6, 8, 10, *Shah-i-Fiqaya Nisab*, Ch. II.

<sup>7</sup> See ss. 54-58, below, as regards agents or proxies for marriage.

<sup>8</sup> See ss. 60-68, below, as regards guardians for marriage.

<sup>9</sup> *Bail. I.* 18, 50; II. 4, 6, 8, 10; *Shah-i-Fiqaya Nisab*, Ch. II: "On Wali and Equality" (*ad init.*). On guardians for marriages, see below, ss. 59, 60.

## SECTION 20.

*Illustrations.*

(1) H says, in the presence of A and B: "I have married myself to W," who is absent. On the information reaching W, she says: "I have accepted." This does not constitute a lawful marriage, even though A and B be present when W accepts. <sup>1</sup>

(2) H sends a messenger, or writes a letter to W, offering her marriage. W receives the messenger, or reads the letter, in the presence of two witnesses, and declares her acceptance of the offer, in their presence. This constitutes a lawful marriage. <sup>2</sup>

(3) H appoints A his agent for marriage, who contracts a marriage on behalf of H with some woman. Then there is a doubt as to whether H was married to W, or to another woman, but H and W both say and believe that they were married. The marriage between H and W is established. <sup>3</sup>

Puberty and majority in Muhammadan law.

The word "minor" is liable to be interpreted in the sense laid down by the Indian Majority Act; but when it occurs in connection with the Muhammadan law of marriage, it must be remembered that attainment of puberty with soundness of mind, is enough for competence to marry. <sup>4</sup>

Lax use of terms.

In the words of a very learned judge, "We must be careful of the phraseology we employ in the discussion of the question. One of the fruitful sources causing confusion in a discussion like the present is a lax use of terms. Terms which in one system of law embody one set of ideas, are sought to be applied to a quite different system having very slight, if any, correspondence. The result is that all the incidents of a relation constituted by the former by means of those terms are insensibly assumed to follow as a matter of course in the latter." <sup>5</sup>

In the 'Fatawa 'Alamgiri' it is stated that "understanding, puberty, and freedom in the parties" are requisite for a marriage contract, and the translator explains, "puberty, which is majority, according to Moohummudan law," <sup>6</sup> and in the 'Sharaya'-ul-Islam' it is stated: "When a child has attained puberty and discretion, the powers of the parents are at an end." <sup>7</sup> The 'Sharh-i-Viqaya' <sup>8</sup> implies the same with reference to the marriage of a 'baligha,' i.e., a girl who has attained puberty. <sup>9</sup>

<sup>1</sup> Ball. I. 10. The messenger need not be of full age, nor a Muslim.

<sup>2</sup> Ball. I. 11.

<sup>3</sup> Ball. I. 83-84: "And this case is a precedent that marriage is established by mutual belief." And cf. s. 81, *first proviso*, below.

<sup>4</sup> See s. 5A, above, and comment thereto.

<sup>5</sup> *Chhetri Zamindar v. Ranasoori Dhora* (1899) 23 Mad. 318, 323.

<sup>6</sup> Ball. I. 4, note 5; Hed. 529, footnote by the translator.

<sup>7</sup> Ball. II. 96. This is said in connection with the custody of infants.

<sup>8</sup> Book on *Nikah*, ch. I, last 3 lines; and see Ball. I. 434.

<sup>9</sup> See also footnote in Ball., II. 96; and Hed. 529, (Book XXV, ch. 2).

**21.** Where the question is whether or not, for the purpose of s. 20, above, a person has attained puberty, or as to the time when he or she has done so,—

SECTION 21  
Age of  
competence to  
marry.

(1) According to Hanafi law (a) no male is held to have attained puberty under the age of twelve years, and no female under the age of nine years; <sup>1</sup> and, (b) in the absence of direct evidence, it is presumed that persons of either sex attain puberty at the age of fifteen years.

(2) In Shiah law it is presumed that males attain puberty at the age of fifteen years, and females at the age of nine years. <sup>1</sup>

(3) *Quære*, whether the rules contained in this section are rules of evidence, and, as such, repealed by the Indian Evidence Act. <sup>2</sup>

**22.** According to Hanafi law a contract of marriage is effectual, even though it has been made under compulsion, or the declaration or acceptance is pronounced without any intention to contract a marriage. *Quære*, whether the said rule will be enforced in British India, or be held to be opposed to public policy. <sup>3</sup>

Consent under  
compulsion.

The rule of Hanafi law is purported to be based on the following tradition: "The Apostle of God said: 'There are three things, which, whether done in joke or earnest, shall be considered as serious and effectual; one; marriage; the second, divorce; and the third, taking back.'"<sup>4</sup> But

<sup>1</sup> Bull. II. 96, citing Sir William Jones' "Imamian Digest," *Sharaf-ul-Islam* 193; *Kafi*, as cited in the *Kifaya*, III. 845, and adopted in the *Fatawa 'Alamgiri*, V. 93. "Macnaghten, p. 62 seems, therefore, to be mistaken in fixing the age of majority at the end of the sixteenth year."

<sup>2</sup> See s. 96, below.

<sup>3</sup> A similar rule prevails in regard to divorce under compulsion. See s. 123, below, and *Ibrahim Moolia v. Enayet-ur-Rukman* (1860), 12 W. R. 460; 4 Beng. L.R. (A.C.) 13 (divorce under compulsion held good). In *Ameer Ali's Mahomedan Law*, II. 419 it is suggested that a Hanafi husband having been coerced to divorce his wife, should declare himself a Shafi'i, and, that thus the divorce would be invalidated. As to this suggestion, it is true that a Sunni can change the sect to which he belongs without any

difficulty (see *Muhammad Ibrahim v. Gulam Ahmed* (1864), 1 Bom. H. C. R. 236), but would it alter rights created before the change?—And assuming, as this suggestion does, that a divorce pronounced under compulsion is held to be otherwise valid would not such a change be what the Privy Council calls a fraud on the law, in *Skinner v. Skinner* (1897), 25 Cal. 537, 546; and see *Skinner v. Orde* (1171, 14 Moo. T. A. 309, and comment to s. 9, above. The Court would, no doubt, be astute to declare against a marriage brought about by compulsion.

<sup>4</sup> *Ma'ath-ul-Ma'athib*, Book XIII. ch. 12, part 2. (Matthew's transl., I. 119). So, according to the common law of England, a man was bound by his seal, although it was affixed against his will: Holmes's "Common Law," 272; citing Britton, Glanvilles etc.

SECTION 22. there is also a tradition: "A'isha said: 'I have heard the Prophet of God say there is no divorce and no emancipating by compulsion;' that is to say, for one man to say to another, free your slave and divorce your wife." <sup>1</sup>

Dissent against  
the rule of  
Hanafi law.

"The Hanafis are, on this point, opposed by a formidable array of great jurists like Shafi'i, Malik, Hanbal, 'Umar ibn 'Abdul 'Aziz, Ibn 'Umar and Qadi Shuraih." <sup>2</sup> So also in Shiah law there must be an intention to marry, and it must be demonstrated without any sort of ambiguity. <sup>3</sup>

Marriage by  
fraud.

22A. Where the marriage contract has been brought about fraudulently, it is void, and no 'mahr' will be due unless it has subsequently been ratified by consummation or otherwise. <sup>4</sup>

### (5) *Form of the Contract of Marriage: Witnesses.*

Witnesses to  
marriage  
contract.

23. (1) The contract of marriage must be in the form of a declaration and acceptance, expressed at one meeting, <sup>5</sup> and uttered <sup>6</sup> by the parties entering into the contract <sup>7</sup> (either for themselves, or as proxies, or as guardians).—(a) in the presence and hearing of each other, <sup>8</sup> and (b) according to Hanafi and Shafi'i law in the presence and hearing <sup>9</sup> of two witnesses simultaneously present <sup>10</sup> who satisfy the requirements of sub-section (2), below.

Qualifications  
of Witnesses to  
a marriage  
contract.

(2) Witnesses to a contract of marriage,—(a) must be sane, of full age and followers of Islam; <sup>11</sup> and (b) according to Hanafi law (i) they must include at least one male; and

<sup>1</sup> *Mishcat-ul-Manazih*, XIII., xii, 2.

<sup>2</sup> *Abdur Rahim*, "Muhammadian Jurisprudence," 397; citing *Hidaya* III. 344; *Fathul-Qadir* III. 344. So also the *Da'ayam-ul-Islam*

<sup>3</sup> *Bail*, II. 1.

<sup>4</sup> *Abdul Latif Khan v. Niyaz Ahmad Khan* (1909) 6 All. L. J. 423: It was concealed that the woman was suffering from an illness that prevented consummation, and subsequently resulted in her death.

<sup>5</sup> The contract may be made by *stans* in the case of dumb persons, *Bail*, I. 14; but not by merely writing the words in the case of persons who are able to speak (*Bail*, I. 15.) ('I. the decision under the Indian Limitation Act, ss. 19, 20, that there is no valid acknowledgement when a person who can write merely signs an

endorsement written by another: *Santrahuwa Mahanta v. Lakshikanta Mahanta* (1908), 35 Cal 813. A divorce may, under Hanafi law, be given either orally or in writing: see s. 143, below.

<sup>6</sup> Who need not be the parties intermarrying: see s. 20, above.

<sup>7</sup> *Aklemannessa Bibi v. Mahomed Hatim* (1904) 31 Cal. 819, 856; *Sachbi Bibi v. Kamaruddin Sarkar* (1911) 15 Cal. W. N. 991.

<sup>8</sup> The *Minkaj* goes so far as to say that the marriage is not legally binding if the offer is separated from the acceptance, by a long religious ceremony: *Minkaj*, 283 (Bk. 33, s. 2

<sup>9</sup> Hence deaf persons cannot be wit

*Bail*, I. 7.

<sup>10</sup> *Bail*, I. 5.

<sup>11</sup> *Bail*, I. 6.



(ii) if only one witness is a male, then there must be two female witnesses besides him ; <sup>1</sup> (c) according to Shafi'i law females cannot be witnesses to a marriage, and both witnesses must be males. <sup>2</sup>

(3) Under Shiah and Maliki law, witnesses are not necessary for the validity of the marriage contract. <sup>3</sup> According to Imam Malik it seems necessary that the marriage should be made known, <sup>4</sup> but according to the Shiah law even a positive injunction to secrecy does not invalidate the contract of marriage. <sup>5</sup>

Witnesses to marriage not required by Shiah and Maliki Law.

In a case decided by the Calcutta High Court, <sup>6</sup> "What happened was that the 'majlis' assembled in the khuli' court yard. The defendant [the alleged bride, who was adult and a widow] was said to have been somewhere in the inner apartments, with other ladies, but in the same 'bar.' The plaintiff's story was that five men [who were not Vakils of the bride] were sent to obtain the bride's consent, and that they returned announcing that they had obtained it. The [mulla] then performed the remainder of the marriage ceremony. He admitted that he did not hear the bride give her consent. The plaintiff stated that afterwards he went into the inner apartments, when the bride's mother put the bride's hand in his. The marriage did not appear to have been consummated, and the defendant who had, according to custom, returned the following day to her father's house, never came back to the plaintiff. *Held*, that it is essential that the words of proposal and acceptance must be uttered by the contracting parties <sup>7</sup> in each others' presence and hearing, and in the presence of two male, or one male and two female, witnesses who must be sane and adult Muslims; and the whole transaction must be completed at one meeting. That this not having been done, marriage was not validly contracted. <sup>8</sup>

Illustration.

<sup>1</sup> Bail. I. 6, 7.

<sup>2</sup> Bail. I. 7.

<sup>3</sup> Bail. II. 1-5. The *Du-ayam ul-Islam* (Notes—see p. 33, above) is to the same effect, but strongly recommends the presence of a *Qazi* and his benediction.

<sup>4</sup> *Shari' i-Viqaya*, Vol. II. Book on *Nikah*, Ch. I.

<sup>5</sup> Bail. II. 5.

<sup>6</sup> *Sahabi Bibi v. Kamaruddin Sarker* (1911) 7 Cal. W. N. 991. The Munsif had decided against the validity of the marriage, but the

decision was reversed by the District Judge; the High Court restored the Munsif's decree. The defendant, shortly after the Munsif's decree, had contracted another marriage, and had got a child. The marriage would have been validly contracted, if the five men had been authorised by the defendant to contract her in marriage.

<sup>7</sup> The contracting parties are not necessarily the parties married, but may be the guardians or agents of the bride and bridegroom, see, s. 20, and s. 23, subs. (1), above.

## SECTION 23.

Section 600, below, may also have some bearing on the contract of marriage; see also s. 641, illustration (3).

Presence of  
Mulla or  
Qazi at the  
marriage.

It is usual in India for a 'Mulla' or 'Qazi' to be present for officiating at the marriage contract, and to recite benedictions, etc.; and it may be an interesting question, whether custom has altered, or added to, the simple requirements of pure Muhammadan law on the points.<sup>1</sup> In any case, a marriage not performed in the usual mode, would have to be more strictly proved.

Registration of  
marriages and  
divorces.

Certain Acts of the Indian Legislature that have, or had, the effect of partially regulating the formalities and ceremonies, or preserving evidence, of a Muslim marriage, may be conveniently referred to here:—

1. Bengal Act I. of 1876, provides for the voluntary registration of Muhammadan marriages and divorces. It extends to districts to which the Lieutenant-Governor may, by his order, extend it.<sup>2</sup>

Bombay regu-  
lation XXVI  
of 1827  
relating to  
Qazis.

2. Bombay Regulation XXVI. of 1827 (repealed by Act XI. of 1864), was passed "for the appointment and removal of Kazees,<sup>3</sup> and ensuring an efficient and regular discharge of the functions of their office." Its object was to establish rules for the "Kazees authenticating, and recording marriages, attesting divorces, assisting in religious rites and ceremonies amongst Mussulmans, furnishing means of settling questions of inheritance": Preamble. The 'Kazee' was to be appointed by the Governor-in-Council, and was to have a 'munnd' <sup>3</sup> and a seal: s. 1. Misconduct and vacancies were to be reported to Government by the 'Zilla Judge' with recommendations: ss. 2 and 3. The 'Kazees' then acting under competent authority were to be considered as duly appointed: s. 4. The 'Kazees' might appoint and remove 'naibs' (assistants): s. 5. "The duties of the Kazees comprised: the attending, presiding at, or performing such ceremonies or forms relating to marriage and divorce and to doctrinal and religious rites, as may be inculcated by Mahomedan law": s. 6. They were entitled to fees fixed by the 'Zilla Judge' with the sanction of the 'Suddur Adawlat': s. 7. They had to record in a book, under penalty, marriages and divorces. "On the death or dismissal of a Kazee the said book shall be delivered by him, or his heirs to the Superintendent of the Registrar of the Zilla for the purpose of being deposited with the general register."

Act XI of  
1865.

3. Act XI of 1864 repealed the said regulation,<sup>4</sup> but s. 2, thereof was as follows: "Nothing contained in this Act shall be construed so

<sup>1</sup> See *Batal Awar v. Q.-E.* (1870), 19 Cal. 79, 81; *Atouddin v. R.* (1906), 10 Cal. W. N. 982, 984.

<sup>2</sup> Act VII. of 1905.

<sup>3</sup> Here, as in all quotations cited in this work, the original spelling has been preserved:

this accounts for the same word being spelt in different ways.

<sup>4</sup> It also repealed Regulation II. of 1827, which provided for the appointment of Hindu and Muhammadan Law Officers.

as to prevent a Caze-e-ool-Coozat<sup>1</sup> or other Cazees from performing, when SECTION 23, required to do so, any duty or ceremonies by the Mahomedan law.”<sup>2</sup>

4. The ‘Kazis’ Act, XII of 1880,<sup>3</sup> provides: “Whenever it appears to the Local Government that any considerable number of the Muhammadans residing in any local area, desire that one or more Kazis should be appointed for such local area, the local Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area”: s. 2, par. 1. The decision of the local Government is conclusive as to whether or not, any person has been rightly appointed; Kazis may be removed, or suspended, for misconduct, absence, insolvency or on his own application, or refusal, or unfitness, or incapacity: s. 2. Kazis may appoint ‘naibs’: s. 3.

Kazis' Act  
XII of 1880.

Section 4 is as follows:—“Nothing herein contained, and no appointment made hereunder, shall be deemed—

- (a) to confer any judicial or administrative powers on any Kazi or Naib-Kazi appointed hereunder; or
- (b) to render the presence of a Kazi or the Naib-Kazi necessary at the celebration of any marriage, or the performing of any rite, or ceremony; or
- (c) to prevent any person discharging any of the functions of a Kazi.”

Kazis have no  
judicial or  
administrative  
powers: their  
presence not  
necessary at  
marriage: no  
exclusive right  
to discharge any  
function.

### § 3.—Legal Effects of a Contract of Marriage.

24. The legal effects arising from a contract of marriage are mentioned below: <sup>4</sup>

Legal effects  
of marriage:

(1) Sexual intercourse,<sup>5</sup> and the procreation of children becomes lawful.<sup>6</sup> In the case of a wife who has not attained puberty,<sup>7</sup> it is a question of fact, to be decided by the Court, whether she has reached an age at which the husband should be permitted to consummate marriage.<sup>8</sup>

Intercourse.

<sup>1</sup> Here, as in all quotations cited in this work, the original spelling has been preserved: this accounts for the same word being spelt in different ways.

<sup>2</sup> Act XI of 1864 was itself repealed by Act VII of 1868. See *Muhammad Yussuf v. Sayad Ahmad* (1861), 1, Bom. B. C. R. APPX. p. xviii.

<sup>3</sup> The Act extended, in the first instance, only to the territories administered by the Governor of Fort St. George in Council, but has been extended to the Bombay Presidency, Sind and various other places. See Acts of Governor-in Council (4th Ed.) II, 106.

<sup>4</sup> *Shoharat Singh v. Jafar Bibi* (1914) 17

Bom. L. R. 13; 13 All. L. J. 113; 1 L. W. 965 (P. C.); *Asha Bibi v. Kadir Ibrahim Roster* (1910) 33 Mad. 22, 24, 25; *Said Saib v. Meeran Bee*, (1910) 20 Mad. L. J. 12.

<sup>5</sup> The husband does not become entitled to have sexual intercourse until the rights of the wife to *mahr* are satisfied; see ss. 106, 107 below. So again during *iddat* the right to intercourse is suspended: if *iddat* is intercourse, the divorce is revoked: s. 151, below.

<sup>6</sup> Ball. I. 4, 10; II. 88.

<sup>7</sup> Cf. The Age of Consent Act, X, of 1891.

<sup>8</sup> Ball. I. 64.

## SECTION 24.

Restraint by  
husband :  
'parda' or  
'goshu.'

(2) In the absence of an agreement to the contrary, the husband has the right to guide his wife's movements<sup>1</sup> and, in a reasonable manner, to restrain her from going out, and showing herself in public;<sup>2</sup> but he has no authority to prevent her seeing her parents or other relations within the prohibited degrees.<sup>3</sup>

'Mahr.'

(3) The obligation of giving 'mahr' (or dower) to the wife is imposed upon the husband,—in accordance with Hanafi law even though she has expressly agreed to marry without 'mahr.'<sup>4</sup>

Maintenance

(4) The wife becomes entitled<sup>5</sup> to maintenance from the husband.<sup>6</sup>

Inheritance

(5) Mutual rights of inheritance are acquired.<sup>7</sup>

Prohibitions by  
affinity

(6) Each is prohibited from marrying any of the relations of the other within the degrees of prohibited affinity<sup>8</sup>; and the wife from re-marrying after dissolution of the marriage during the period of 'iddat.'<sup>9</sup>

Agreed terms.

(7) Such other rights and duties arise between the husband and wife, as may have been agreed to between the parties, at the time of the marriage<sup>10</sup> (or subsequently thereto [for a valid consideration]),<sup>11</sup> provided that the terms are not inconsistent with any rule of law or of public policy, and in particular with this section,<sup>12</sup> or s. 17, above.<sup>13</sup>

<sup>1</sup> Bail. I. 149-150; II. 83, 85, and see the third head of the comment to s. 21 et. s. 291, below, and illustrations thereto.

<sup>2</sup> With reference to the observance of *pardah* or *goshu*, see *Gulab Prasad v. Radhu* (1888) 10 All. 358; *Jamshuddin v. Abdul Mujeed* (1915) 13 All. L. J. 380.

<sup>3</sup> Bail. I. 149-150. Her parents may visit her on Fridays, other relations once a month. Hed. 144, is more general; about the applicability of these details, see the comment to s. 287, below, and s. 291, below.

<sup>4</sup> Bail. I. 91.

<sup>5</sup> Even though she purports to release the husband from the liability; Bail. I. 116; but see the Criminal Procedure Code, s. 188; and chapter VIII of the present work on Maintenance.

<sup>6</sup> Bail. II. 83-85; cf. s. 88, below; and the rules relating to Alimony under Indian Divorce Act, IV, of 1869; ss. 36-38.

<sup>7</sup> See, however, s. 611, *id.* (3), s. 600, *id.* (8) or Bail. II. 44 II. 9-10: "Inheritance is not established except by the law."

<sup>8</sup> Bail. I. 13.

<sup>9</sup> On 'iddat see ss. 36-40, below.

<sup>10</sup> *Asha Bibi v. Kadir Hashim* (1909) 33 Mad. 22, 23, 25; *Toofoo Bibi v. Feroz Baksh* (1871) 15 Beng. L. R. app., p. 5. *Hamidulla v. Fazannissa* (1882) 8 Cal. 327. *Jannat Ali Shah v. Mir Muhammad* (1916) 51 Punj. Rep. 171, 175, (No. 119). Breach of such terms does not *ipso facto* give the wife a right to be divorced; *Radwanissa v. Mafatulla* (1871) 15 W. R. 555, (Shah) *Mahabir v. Mymunissa* (1863) Mac-h. 301.

<sup>11</sup> Hence there cannot be an option to cancel the marriage nor, unless the marriage is in the form of a *mulla* (which is valid amongst *Ithari Ashari* Shi'ah only) can persons be married for a fixed term only.

(8) A woman does not change her status by being married; <sup>1</sup> in particular a married woman may (a) dispose of her own property by gift, sale or lease, without the consent of her husband; <sup>2</sup> and (b) be convicted of the theft of her husband's property. <sup>3</sup>

SECTION 24.  
Woman's status  
not altered.

(9) It has been held that an agreement that the wife shall be at liberty to live with her parents is void; <sup>4</sup> and *quære*. <sup>5</sup> It is submitted that the Court must consider the whole of the particular agreement, to decide whether it operates so as to contravene clause (7) above.

Wife's place of  
residence.

#### 1. WIFE'S STATUS IN MUHAMMADAN LAW

It will be observed that the Muhammadan law recognises no equivalent of the 'manus' of Roman law or the merger of the wife's personality in the husband's. <sup>6</sup> Previous to Islam women were in no better condition than slaves; see s. 611, below, and the comment to it. The Quranic <sup>7</sup> alterations in the law, however, gave women the privileges that the Married Women's Property and similar Acts gave, in England, and in British India, to women governed by English law. <sup>8</sup> Hence, for instance, the rule of English law that in divorce proceedings the husband is prima facie liable for the costs of the wife (except when she has sufficient property of her own, does not apply to Muslims. <sup>9</sup>

Wife's personality  
not merged in  
husband's.

It has been stated that "a girl on her marriage passes over to her husband's family under the Muhammadan law." <sup>10</sup> Presumably, what was meant was that the wife goes to live in the husband's family, and in his house: the remark might have been necessary, as, in Malabar, the husband

Not does she pass  
out of her natural  
family.

<sup>1</sup> In other words, a married woman has generally the same power to do all juristic acts (i. e., acts recognised by the law as affecting rights and liabilities), as if she were not married, except, of course, in respect of matters in regard to which the contract of marriage itself enhances her rights or liabilities.

<sup>2</sup> *Nichhabhai Prangji v. Isee Khan Abdul Khatib* (1866) 2 Bom. H. C. R. 297.

<sup>3</sup> *R. v. Khatibai* (1869) 6 Bom. H. C. R. (Cr. Ca.) 9.

<sup>4</sup> *Abdul Prinj Khan v. Hussaini* (1901) 6 Bom. L.R. 728; *Imam Ali Patwari v. Arfadnassan* (1913) 18 Cal. W. N. 693.

<sup>5</sup> See comment to this section.

<sup>6</sup> *Nichhabhai Prangji v. Isee Khan Haji Abdul Khan* (1866) 2 Bom. H. C. R., 297, (wife has power to dispose of her own property by gift, sale, or lease without consent of husband); *R. v. Khatibai* (1869) 6 Bom. H. C. R., (Cr. Ca.) 9.

(wife may be convicted of theft of her husband's property.) *Hamidunnesa Bibi v. Sherif* (1890, 17 Cal. 670; the Hindu case of *Pelant Mon Mohan Samudra v. Batmala Kaur Singh* (1901) 28 Cal. 751, contains an elaborate judgment referring to several points of general applicability, though it must be remembered that in Muhammadan law marriage is a pure contract; in Hindu law it is a sacrament.

<sup>7</sup> See Quran, Sura IV, v. 34.

<sup>8</sup> Act III of 1871; Indian Divorce Act, IV, of 1869, ss. 21, 25, 31, 33 & 34; Act, c. 93, 15 & 16 Viet. c. 72.

<sup>9</sup> See *A. v. R.* (1896) 21 Bom. 77. *Contra*, where parties are governed by English law; *Mayhew v. Mayhew* (1896) 21 Bom. 77; cf. s. 202, below.

<sup>10</sup> *Pakrichi v. Kunhaba* (1911) 36 Mad. 385. *Benson & Sundara Ajar, JJ.*

**SECTION 24.** frequently goes to live in the family (tarwad) of the wife. Muhammadan law, certainly, contemplates no such "passing over to the husband's family" as to sever the natural relation between the wife and the family in which she is born (cf. s. 225, below), nor does marriage create any "family" ties except the marital relation: the wife is a "stranger" (so far as legal relations are concerned) to her husband's nearest kinsmen (cf. e.g., ss. 343, 344, 611, 641, below); any severance of the natural ties of kinship is jealously protected. Another observation in the same judgment is not perhaps capable of being explained away: To say that "there is no obligation on the members of her natural family to maintain her after her marriage, even if she is divorced,"<sup>1</sup> is to overlook the theory of the Muhammadan law of marriage, divorce and maintenance. These remarks were made in a case that was heard 'ex parte.' The decision (which was against the absent respondent), turned upon whether, under Muhammadan law, a gift to a person by his wife's sister and mother becomes void, if the husband divorces the wife, and then dies.

Nor lose her right to maintenance from her blood relations.

## 2. MATRIMONIAL INTERCOURSE.

*Matrimonial Intercourse.*

Strict equality must be observed by the husband amongst the wives, if he has more wives than one.<sup>2</sup>

The texts contain various other rules regulating matrimonial intercourse, to which it is not necessary to refer in detail, as they are not likely to come before the Courts. They will be found in Hamilton's 'Hedaya,' and Baillie's Digest.<sup>3</sup>

Question of wife's attaining puberty, how determined: observation by judge: examination by women experts.

When it has to be determined whether or not the wife has attained puberty in connection with the question whether the father or other guardian of the girl ought to be compelled to part with her to the husband, the 'Fatawa 'Alamgiri' suggests, that, if the girl goes abroad, the Judge should compel her to appear before himself, and determine himself as to her competency,—but if not, he should direct women in whom he can confide, to inspect her.<sup>4</sup>

Sir Roland Wilson remarks on this: "It seems, however, that this course cannot be taken in British India, it having been laid down by the High Court of Calcutta that no Court or Magistrate in British India has any right to order the medical examination of a (female) witness, and

<sup>1</sup> *Potluri v. Kumbhachari* (1911) 36 Mad. 383, Benon & Sumilara Aiyar, JJ.

<sup>2</sup> *Ball*, II. 85, etc.

<sup>3</sup> Referring to these Sir R. Wilson says "Such treatises as the Hedaya or Shara'ya-ul-Islam were intended quite as much to serve the purpose of what a Romanist would call manuals for the confessional, as of guides to

forensic practice. . . . Thus . . . one should compare them not with an English treatise on the law of husband and wife, but, rather, with such as book as that of the Jesuit Sanchez, *De Sancto Matrimonio Sacramento*, and they will not suffer by comparison: "Anglo-Muhammadan Law, 25.

• *Ball*, I. 54; cf. *Ball*, I. 345 last 3 lines.

that such an examination is an illegal and unjustifiable assault, for SECTION 24 which damages may be recovered: 'Q. E. v. Juran Charan Dusadah' (not reported, but referred to by Sir Andrew Scoble in his speech in the Legislative Council on the Age of Consent Bill, 1891).''<sup>1</sup>

With great respect to the learned author, it is submitted, in the first place, that the 'Fatawa 'Alamgiri' does not refer to any such inspection as could come under the denomination of "medical examination," or of an illegal or unjustifiable assault; all that it suggests is, presumably, the same kind of inspection that every witness undergoes when the Judge is watching his demeanour in the box. It cannot be supposed that the Muhamadan law could empower a Judge to hold a "medical examination of a female," and it will be observed that the 'Fatawa 'Alamgiri' mentions the inspection by women, as an alternative, in cases where the wife does not "go abroad." The rule in the 'Fatawa 'Alamgiri' is in effect a counterpart of the Civil Procedure Code, s. 132, and O XXVI., r. 1, and the Lunacy Acts, XXXIV and XXXV of 1853, s. 6, in the case of 'pardanashin' women. "the women in whom the 'Qazi' can confide," take the place of the jury of matrons in English law, in regard to the writ 'de ventre inspiciendo,' and the reprieve 'in favorem prolis.'<sup>2</sup> So that the adjective law of British India appears to be practically the same as that laid down in the 'Fatawa 'Alamgiri.' For, in a case where, in the opinion of the Judge, medical examination is necessary or desirable, and the girl refuses to be examined by lady doctors, the point would have to be decided by the Court on the materials before it, and it would, no doubt, take into consideration the Indian Evidence Act, s. 114, and illustration 9, thereto.<sup>3</sup> If she does not so refuse, no doubt, "the women in whom the Judge can confide" would consist of lady doctors, and their opinion would be the evidence of experts under the said Act.

### 3. RESTRAINT OF WIFE'S MOVEMENTS.

The right of restraining the wife's movements is an extension of the marital right 'in rem' of the husband (as it is styled in the common law of England) not to be deprived of his wife's society,<sup>4</sup> and to be able to prevent any person being criminally intimate with her; with which again the interdiction 'de uxore exhibenda et ducenda,'<sup>5</sup> of Roman law may be compared.<sup>5</sup> This right of the Muslim husband does not come into conflict with the

Husband's  
right to restrain  
wife's move-  
ments.

<sup>1</sup> "Anglo-Muhamadan Law," 170.

<sup>2</sup> Stephen's "Commentaries," 1886, (10th Ed.), II. 307; IV. 482.

<sup>3</sup> Which is as follows: "the Court may presume . . . that evidence which could be, and is not, produced, would, if produced, be un-

favourable to the person who withholds it."

<sup>4</sup> In the United States the abduction of husband from the wife has been recognised as a actionable wrong: Holland's "Jurisprudence," 154, citing decisions.

<sup>5</sup> Digest, XLIII., 30, 2.

SECTION 24. criminal law of British India relating to false imprisonment;<sup>1</sup> for the Muhammadan law entitles the husband only to direct and guide his wife's movements with reference to visiting strangers, and showing herself in public.<sup>2</sup> The husband's "right of restraint" does not include magisterial powers of inflicting imprisonment, should she disobey him, or disregard his lawful directions.<sup>3</sup> On the other hand, the wife does not, in the absence of a provision to that effect, become entitled to a divorce by the very fact that the conditions incorporated in the contract of marriage are broken by the husband.<sup>4</sup>

Husband's  
right to  
chastise wife.

In accordance, however, with the Quran<sup>5</sup> and the 'Sunna'<sup>6</sup> and the Muslim law books,<sup>7</sup> for repeated acts of disobedience the husband is allowed (after warning the wife) to chastise her moderately.<sup>8</sup> That privilege is, however, not to be exercised in British India except with great circumspection; for he would be liable to be prosecuted for voluntarily causing hurt, or grievous hurt, under s. 319, or 323, of the Indian Penal Code; and then he would have the onus of proving that he was "justified by law" under s. 79 of the Code, or, in the Presidency towns, he may undertake the invidious task of showing that such a right to cause hurt or grievous hurt, is included amongst the rights and authorities of fathers of families and masters of families, which are safeguarded by the statute applicable to the High Courts in their original jurisdiction.<sup>9</sup> But such "rights and authorities" might carry the husband a much shorter distance than he may be inclined to claim, and the distance would depend "on all the circumstances of the case",--including the discretion of the magistrate.

English law

It will be remembered that the common law of England gave the husband the right to chastise his wife. The English Courts decided quite recently against the husband's right to restrain the personal liberty of the wife.<sup>10</sup>

<sup>1</sup> Indian Penal Code, ss. 339, 312, Bail. I 119-50; II. 83-85.

<sup>2</sup> With reference to the observance of *pardah* or *gosh*, see *Gokul Prasad v. Radhu* (1888) 10 All 538, *Jamuluddin v. Abdul Majid* (1915) 13 All. L. J. 360.

<sup>3</sup> See, however, the next following paragraph.

<sup>4</sup> *Beharunnessa Biber v. Mafatulla* (1871) Beng. L. R. 412, 15 W. R. 555. (*Chit*) *Mohabbath Ally v. Sureemally Mymounnessa* (1863) Mauldaff, 361.

<sup>5</sup> "But those whose perverseness ye fear admonish them, and remove them into bed chambers and chastise them." Quran IV. 30, 33. On the other hand the Prophet said: "Those who beat their wives do not behave well," and

that "he is of the most perfect Muslims whose disposition is most liked by his family." *Mishkat-ul-Masabih*, XIII, xi, 2.

<sup>6</sup> "Admonish your wives with kindness, for women were created out of a crooked rib of Adam, and, therefore, if ye wish to straighten it, ye will break it, and if you let it alone it will always be crooked." *Mishkat-ul-Masabih*, XIII, xi, 1.

<sup>7</sup> Bail. II. 87-88.

<sup>8</sup> Cf. *Abba Bibi v. Kadir Ibrahim* (1909.) 33 Mad. 22, 25.

<sup>9</sup> See s. 2, above. 21 Geo. III. c. 70, s. 18; 37 Geo. III. c. 112, s. 13, set out in table preceding Chapter II.

<sup>10</sup> *R. v. Jackson* [1891] 1 Q. B. 671.



## 4. VALIDITY OF AGREEMENT THAT WIFE MAY LIVE WITH HER PARENTS. SECTION 24.

"There is some good authority," it has been said,<sup>1</sup> "for the statement that the condition that the wife shall be at liberty to live with her parents, is void." We may, for this, refer to Wilson's Digest of Anglo-Muhammadian law, s. 56, Abdur Rahim's<sup>2</sup> Institutes of Mussulman law Art. No. 7, par. 3; and to the decision in the case of Abdul Piroj Khan v. Husseinbi.<sup>3</sup> In the latter case it is barely said that Muhammadan law declares an agreement of this character void. It is submitted, on the authorities, and for the reasons stated below, that the law is not correctly stated in these two decisions; that an agreement between the husband and wife at the time of the marriage must be upheld, unless it contravenes any specific rule of law or of public policy; and that an agreement that the wife shall reside in any particular place does not necessarily infringe any specific rule of law, though it may occasionally prevent the husband from having the wife's society; but presumably when the man at the time of the marriage has agreed that the wife may live with her parents, it is implied that he too should live there, or be a frequent visitor, there. The law is quite sufficiently partial to the husband, and, it is submitted, that the Court should not be astute to enhance the burden on wives.

The authorities (which are referred to below) were cited in an earlier Calcutta decision,<sup>4</sup> where (it is submitted) the law is more accurately stated. With reference even to the last cited decision, it seems desirable, however, to advert to two considerations. (i) The bearing of the following from the 'Fatawa 'Alamgiri': "And there is no objection to marrying a woman as a 'Nuhuriyyah', that is on the terms of sitting with her by day, and not by night."<sup>5</sup> (So that it would appear that a stipulation even contravening s. 24 (1) may be valid). (ii) Secondly, the passage from the 'Hidaya,'<sup>6</sup> cited in the decision<sup>4</sup> referred to has been interpreted by the Court as showing that such a stipulation "is not generally considered to be absolutely binding, though any infringement of it may entitle the wife to a larger amount as her dower than that agreed upon." It is submitted that this interpretation is based on

Agreement that wife may live with her parents.

Examination of texts

<sup>1</sup> *Imam Ali Patwari v. Arfatunnissa* (1913) 18 Cal. W. N. 693 (Stephen & Mullick, JJ).

<sup>2</sup> *Sic*, for Abdur Rehman. Mr. Justice Abdur Rahim's book is styled "Muhammadian Jurisprudence" and is an original work. Mr. Abdur Rehman's book is a translation of the Egyptian code and is of no direct authority in India.

<sup>3</sup> (1904) 6 Bom. L. R. 728 (Jenkins, C. J. & Batchelor, J.).

<sup>4</sup> *Hamidunnissa Bibi v. Sheikh* (1890) 17 Cal.

670, 673; the Hindu case of *Tekad Mon Mohini Jamadai v. Basanta Kumar Singh* (1901) 28 Cal. 751 contains an elaborate judgment referring to several points of general applicability, though it must be remembered that in Muhammadan law marriage is a pure contract; in Hindu law it is a sacrament.

<sup>5</sup> *Bail. I.* 19, ll. 15-17.

<sup>6</sup> *Hed.* 49, Cal. I, par. 2, with the rubric: "cases of stipulation in behalf of the wife."

**SECTION 24.** some misapprehension. When the passages from the 'Hidaya,' immediately preceding and following, are read, it appears that the text-writer is dealing with the results, upon the agreement fixing the 'mahr,' of a breach of the other terms of the marriage contract,—and not with the question whether the stipulation is "absolutely binding." The argument in the text seems to be to the following effect: The husband having broken his part of the contract (*viz.*, not to carry her out of her native city) cannot ask the wife to abide by her part of the contract (*viz.*, to ask for no higher dower than that agreed upon); and the wife may validly claim that her agreement to marry on the stipulated dower, was subject to conditions that have been broken, entitling her to claim any higher rights that the general law may give her, beyond those under the contract, *viz.*, if her "proper dower" is higher,<sup>1</sup> to claim that higher amount; in other words that the husband having broken the specific agreement and having claimed his rights under the general law, the wife too may disregard the specific contract and claim her dower in accordance with the general law.

Texts hold agreement not to take the wife out of her native city, valid.

It would seem, therefore, that the 'Hidaya' assumes the validity of an agreement not to take the wife out of her native city. The fact that the 'Hidaya' contemplates that the husband may infringe the contract by "carrying the wife out of her native city" apparently against her desire, surely cannot affect the rights of the parties in British India, where the husband may not be able to do so without coming within the clutches of the criminal law: see the earlier portion of this comment. Moreover, the question here is not what would follow on a breach of the agreement, but whether the agreement is void. With regard to this latter question, inasmuch as, by the breach of this stipulation, the rights of the parties are altered, as stated in the 'Hidaya,'—and altered to the detriment of the person guilty of the breach—it would seem to follow that the stipulation was not void. For the rights of the parties cannot be altered by failure to give effect to a void agreement. Indeed it is not easy to discover the principle of jurisprudence or of reasoning by which, from the fact that the non-performance of an agreement brings about an enhanced liability, the conclusion can be drawn that the obligation to perform the agreement, is "not absolutely binding."

Such contracts and public policy.

The fact that an agreement not to take the wife out of her native town is referred to as not being necessarily invalid, it may be contended, does not furnish a conclusive solution of the question, and that such an

<sup>1</sup> See the second footnote to Hed. 49.

agreement may be attacked on the ground that it is opposed to public policy. But, it is submitted, that the courts cannot lightly take upon themselves to declare agreements to be void on the ground of public policy: a great authority has stated that public policy is an unruly horse to ride. If it is difficult to guide the animal on level ground, it is still more difficult to make him leap over a stile on which a great master of equity has affixed the device: "It is the highest policy of the law that contracts should be enforced."<sup>1</sup> And, where a stipulation, favouring the wife in a marriage contract, is sought to be disregarded by the husband, on the ground of public policy, the court should pause before taking as a guide to high moral purposes, a husband, who was willing to contract in derogation of those purposes, and who is apparently unwilling to release, by pronouncing a divorce, his rights under an agreement so obtained. If the highest policy of the law is that contracts should be enforced, an agreement of this nature which the husband can dissolve at will, but by which the wife is bound down for all time, may be considered to be clothed with something like sanctity.

Necessity of holding husband to his word

#### 5. BREACH OF CONDITIONS CONTAINED IN MARRIAGE CONTRACT.

The breach of a valid condition in a marriage contract will not necessarily give the wife a right to be divorced; <sup>2</sup> nor, except by the Shafii law, his inability to maintain her; <sup>3</sup> and a separation ordered by the court on the ground of such inability on the part of the husband, is not valid. <sup>3</sup> But the breach of a condition may raise the amount of the 'mahr' to the "proper dower," though a lower sum may have been fixed upon by the original agreement; <sup>4</sup> conversely, the specified 'mahr' may be decreased when a stipulation in favour of the husband has been broken by the wife; <sup>5</sup> or where the wife is discovered to have been unchaste before marriage. <sup>6</sup> A breach of such a condition may be pleaded as a defence to a suit for restitution of conjugal rights. <sup>7</sup> The marriage contract may reserve an option to the wife to divorce herself. <sup>8</sup> The provision that the breach of any specified condition (e.g., not to marry a second wife) will 'ipso facto' operate as a cancellation of the marriage is considered later. <sup>9</sup>

Rights arising through marriage contract :- effect of their breach.

Where the husband has stipulated not to marry a second wife, is the agreement to be deemed to be in restraint of marriage, and thus void,

Avoidance of marriage 'ipso facto,'—If second wife taken.

<sup>1</sup> Jessel, M. B., in *Printing Company v. Sampson* (1875) 19 Eq. 405.

<sup>2</sup> (*Sheikh*) *Mohabuth Ally v. Mymonisset* (1862) Mar. 361.

<sup>3</sup> Hed. 142; Ball. I. 443.

<sup>4</sup> Hed. 49.

<sup>5</sup> Ball. II. 65, (par. 2).

<sup>6</sup> Ball. II. 35 (second).

<sup>7</sup> *Buzloor Ruheem v. Shumsoonnissa* (1867)

11 Moo. L. A. 551, 615.

<sup>8</sup> *Badarunnissa Bibee v. Mafiatalla* (1871) 7

Beng. L. R. 442, and see ss. 128, sqq., below.

<sup>9</sup> See ss. 125 & 144, below, and comment.

**SECTION 25.** *contracted 'mut'a,' unless it has been expressly stipulated for in the 'mut'a' contract.*<sup>1</sup>

'Mut'a' and permanent marriages. No 'Mut'a' marriages amongst Isma'ilis, Usulis and Mu'tazalis.

For a comparison of some of the incidents of 'mut'a' with those of a permanent marriage, see s. 51, below, and comment thereto.

'Mut'a' is not recognised amongst the 'Isma'ili' Shiah Mussulmans, to which school the Khojas and Bohras<sup>2</sup> of Bombay belong.<sup>3</sup>

Syed Ameer Ali mentions that the 'Usuli' and 'Mu'tazala' Shiahs agree with the Sunnis in permitting a "permanent" marriage with a non-Muslim, —from which it would appear that those schools of Shiah law recognise 'mut'a' marriages.<sup>4</sup> See s. 51, below. No cases seem to have been decided by the Courts with reference to the 'Usulis' and 'Mu'tazalas' in which their own texts have been produced.

Probationary marriage of Egyptians

Amongst the ancient Egyptians (who were strictly monogamous), the woman seems regularly to have been taken on probation for a year: after which she was "established as a wife."<sup>5</sup> The temporary marriage of the 'Ithna'Ashari' Shiahs is not in the nature of a marriage on approval.

Origin of 'mut'a' marriage.

Amongst the Arabs before Islam, one form of recognised relation between the sexes, consisted in the woman entertaining the man in her own tent: by her doing so, neither party acquired any right over the other; she could dismiss the man at any time she chose; and the children belonged to her.<sup>6</sup> There was thus entire freedom on either side to terminate the relation (if such it may be called) at any time. 'Mut'a' differs from this pre-Islamic institution in the following main points: (1) the period of the term must be fixed at the time that 'mut'a' is contracted, and the dissolution of the tie within the period is not originally contemplated;<sup>7</sup> (2) there must be a 'mahr' fixed in the contract. On the other hand the features of the old relation are preserved in that (1) no rights of inheritance arise from 'mut'a'; (3) little formality is required for disclaiming the parentage of the child; (4) originally the woman entertained the man in her own tent, in the midst of her own tribe, and did not go to live with the man, so, the woman contracting 'mut'a' cannot claim maintenance; (5) the restriction in the man's power to terminate the relation is, no doubt, a survival of

Compared with permanent marriage.

<sup>1</sup> Bail. II. 97. See *in the matter of the Petition of Ludden Sahiba* (1882) 8 Cal. 736, and *Mahomed Abid Ali Kumar Kader v. Ludden Sahiba* (1886) 14 Cal. 276, where the Court held that the husband may be ordered, under the Criminal Procedure Code, s. 488, to give maintenance to his *mut'a* wife, unless he had validly released her of the term by a *khul-i-muddat*, i. e., gift of the term. See s. 288, below.

<sup>2</sup> On the word *bohra*, see Index.

<sup>3</sup> The *Da'ayim-ul-Islam* (Notes) characterizes *mut'a* as *zina*.

<sup>4</sup> *Mahommedan Law*, II. 320 (1908, third edition).

<sup>5</sup> Holland's "Jurisprudence," 155, citing Revillout's *Chrestomathie Demotique* (1880) 155.

<sup>6</sup> Prof. W. Robertson Smith's "Kinship and Marriage in Early Arabia," (New Ed., 1907), 87.

<sup>7</sup> But see s. 25, sub-s. (4).

the fact that the man had less power over a woman whom he could not bring to his own tent. SECTION 26.

§ 5.—Persons Prohibited from Intermarrying.

26. Muslims are prohibited from intermarrying with each other for reasons (hereinafter more fully considered) depending on (1) consanguinity,<sup>1</sup> (2) affinity, (3) unlawful conjunction, (4) fosterage, (5) 'iddat,' (6) divorce, (7) religion of the parties,<sup>2</sup> (8) supervening illegality, (9) pilgrimage.

See also ss. 58, and 79, below, which contain qualified restrictions on certain persons intermarrying with each other.

(1) Prohibition by Consanguinity

27. Prohibition by consanguinity makes it unlawful for a Muslim<sup>3</sup> to marry the following of his<sup>3</sup> blood relations:—

- (1) his<sup>3</sup> own ascendants how-high-soever, or descendants how-low-soever; 1. Ascendants or descendants.
- (2) his<sup>3</sup> father's or mother's descendants how-low-soever; 2. Brothers or sisters and nephews or nieces.
- (3) the sisters or brothers of any ascendant how-high-soever.<sup>1</sup> 3. Uncles or aunts.

(2) Prohibition by Affinity

28. Except as provided below, prohibition by affinity makes it unlawful for a Muslim<sup>5</sup> to marry the following classes of persons:—

- (1) ascendants or descendants of his<sup>3</sup> wife,<sup>6</sup>— 1. spouse's ascendants or descendants.
- (2) the wife<sup>3</sup> of any ascendant or descendant; with the following exceptions: (a) According to Sunni law, 2. spouse of ascendant or descendant.

<sup>1</sup> The expression "relation by blood" might have been preferable to "consanguinity" as the latter word has acquired in the Muhammadan law of succession, the more restricted meaning of relation through males. It has, however, been considered inadvisable to alter a familiar term. The Parsi Marriage and Divorce Act, s. 3, and the Marriage Act III of 1872, s. 2, both speak of consanguinity as synonymous with blood relation.

<sup>2</sup> These are not cases of Muslims intermarrying with each other, but have been included here for convenience.

<sup>3</sup> The masculine includes the feminine and the singular the plural in this context.

<sup>4</sup> Hed. 27, Bail. I. 23-24, II. 13-14.

<sup>5</sup> Where the person concerned is a woman, "husband" should be read instead of "wife" in the rules contained in s. 28.

<sup>6</sup> Bail I. 24, II. 22, c. g., a man is prohibited from marrying the mother of his wife, though the marriage with the daughter may have been dissolved without consummation: *Karim Bakhsh v. Mussammat Mukabe and others* (1917) 52 Punj. Rev., 58 (No. 66.)

**SECTION 28.** marriage is lawful with the descendant<sup>1</sup> of a wife,<sup>2</sup> with whom the marriage has not been actually consummated.<sup>3</sup>  
*Exception.* (b) According to Shiah law a man may intermarry with the descendants of a woman who is, or has been, his wife, but with whom he has not consummated marriage, but (a) he may not marry her ascendants, nor (b) may she marry either his descendants or ascendants.

*Explanation I.*—Marriage is prohibited with a woman who has been the wife of a son,<sup>4</sup> though the son has not consummated his marriage with her.<sup>5</sup>

*Explanation II.*—In Sunni law an irregular marriage, which has not been consummated, does not, for establishing prohibition by affinity, make the parties husband and wife.

Acts having same effect for establishing prohibition as consummation of marriage:

1. illicit intercourse,
2. undue familiarity.

**29.** (1) According to the Hanafi, Hanbali and Shiah (but not Shafi'i) law illicit intercourse has the same effect for the purpose of establishing prohibition by affinity as the consummation of a lawful marriage.<sup>6</sup>

(2) According to the Hanafi and Hanbali law, but not according to Maliki, Shafi'i or Shiah<sup>7</sup> law, acts of undue familiarity,<sup>8</sup> whether lawful or unlawful, has also the same effect.

(3) The Shiah authorities are divided as to the effects of such acts<sup>8</sup>;—(a) according to the majority of the Shiah authorities, such acts<sup>3</sup> render marriage abominable,

<sup>1</sup> But marriage is not lawful with the ascendants of a husband or wife. Ball, I. 24 (where only the daughter is mentioned), and Ball, I. 322, (II. 22-24). The Shiah law is more explicit on the point.

<sup>2</sup> When the person concerned is a woman "husband" should be read instead of "wife" in the rules contained in s. 28.

<sup>3</sup> Ball, I. 21, 322. For this purpose "valid retirement" is not equivalent to consummation; see the comment to s. 82, below.

<sup>4</sup> I. e. after the marriage with the son has been dissolved by death or divorce, etc.

<sup>5</sup> Ball, I. 21. The reason for this is that the suggested marriage is between a woman and her quondam father-in-law, and the exceptions do not refer to such a case.

<sup>6</sup> Ball, II. 23; and see s. 52, below. It would perhaps be more correct to say that in Sunni

law unlawful conjunction establishes irregularity of marriage, and not prohibition to marry. See s. 83, below. Malik and Shafi'i do not consider illicit intercourse as having any effect in establishing prohibition. *Shari'at-Fiqah* Book on *Nikah*, ch. II (*ad ind.*)

<sup>7</sup> As to which see clause (3) of s. 29.

<sup>8</sup> ILTUDUE FAMILIARITY is explained, as touching, with the hand, any part of the person of one of the opposite sex, even inadvertently, or kissing him or her, or looking on his or her nakedness, or lying together, or embracing,—provided that neither of the parties is below the age when desire first arises, and that the act is done with desire on the part of one of them: Ball, I. 25, 26, II. 21. Touching implies that there is no cloth or other substance between the parties of sufficient thickness to prevent the warmth of the body being felt: Ball, I. 26,

but do not (like the consummation of a valid marriage) SECTION 29 establish prohibition to intermarry; (b) according to a minority of Shiah authorities, such acts establish (i) prohibition to marry (and not mere abomination) between the woman and the father or the son of the man; but (ii) only abomination (and not prohibition to marry) as regards all relatives of the woman, and all the relatives of the man, other than the son and father.<sup>1</sup>

(4) [A statement by a person to the effect that he or she has himself or herself done an act which establishes prohibition by affinity—even though the statement be subsequently retracted—has also the same effect.]<sup>2</sup>

(5) In Sunni law valid retirement has also the same effect.<sup>3</sup>

(6) In Shiah law, an unnatural offence between two males, has also the same effect.<sup>4</sup>

### (3) Prohibition by Unlawful Conjunction.

30. The prohibitions contained in this section are referred to as prohibitions by unlawful conjunction:—

(1) A Muslim may not, at the same time, be lawfully the husband of more wives than four,<sup>5</sup> nor the wife of more husbands than one.<sup>6</sup> *Quære*, whether the 'Mu'tazala' Shiah law prohibits a man from having at the same time more wives than one.<sup>7</sup>

(2) According to Sunni law, a man may not lawfully

<sup>1</sup> Bail. II, 21 The *Da'agari-ut-Shari* is silent (Notes).

<sup>2</sup> *Quære* whether this is a rule merely of evidence. The strict Muhammadan law so strongly abhorred such marriages, that it did not permit a statement of this nature to be made even in jest without the same consequences as would result if the statement was true: Bail. I, 26. Cf. the effect of acknowledgment of marriage, s. 81, below. See also comment to s. 5 B above.

<sup>3</sup> See s. 82 below. "Valid retirement" pre-supposes a marriage between the parties.

<sup>4</sup> Bail. II, 27.

<sup>5</sup> Hed. 31, Bail. I, 30-31, II, 27, 28.

<sup>6</sup> *Engel Ali v. Karim-un-nissa* (1893) 15 All. 396, *Ram Kumari in re*, (1891) 18 Cal. 261 Cf. the *Fatawa 'Alauddin*, Vol. II., Book on *Nikah*, Ch. III, on the 4th class of prohibitions, citing *Muht-i-Sarakhsi*, and adding that if a woman marries two men in one contract, and one of the men has already four wives, then the marriage is valid as to the other husband. Cf. *Budansa v. Fatima* (1911) 26 Mad. L. J. 260.

<sup>7</sup> See Syed Ameer Ali, "Mohammedan Law," II, 21, 158; cited and commented upon by Sir R. Wilson, "Anglo-Muhammadan Law," s. 19.

<sup>1</sup> Statements.

<sup>3</sup> Valid retirement.

<sup>5</sup> Unnatural offence.

Prohibition by unlawful conjunction.

<sup>1</sup> Number.

<sup>2</sup> Relationship between co-wives.

SECTION 30 be the husband, at the same time, of women who are so related to each other by consanguinity, affinity<sup>1</sup> or fosterage, that they could not lawfully have intermarried with each other, if they had been of different sexes.<sup>2</sup>

Wife's sister.  
Wife's niece.  
Wife's aunt.

(3) According to Shiah law, (a) a man may not lawfully be the husband at the same time of two women who are sisters; (b) nor may he lawfully marry, without his wife's permission, his wife's niece;<sup>1,3</sup> (some Shiah authorities are of opinion that such a marriage without permission, is not void, but voidable at the option of the first wife: the better opinion seems to be that it is void);<sup>3</sup> (c) but he may lawfully marry, without such permission, his wife's aunt.<sup>3</sup>

*Explanation.*—For the purposes of determining whether unlawful conjunction is established deceased wives are not taken into consideration; nor wives who have been divorced, and whose 'iddat' for divorce<sup>4</sup> has elapsed;<sup>5</sup> nor (according to Shafi'i and Shiah law) wives who have been divorced irrevocably, notwithstanding that the period of 'iddat' has not elapsed.<sup>6</sup>

*Illustrations.*

(1) H, having one wife, purports to marry four more by one contract. The whole of the latter contract is void.<sup>7</sup>

(2) H, cannot lawfully be the husband, at the same time, of W, and of W's sister, or (where H is a Sunni.) W's paternal or maternal aunt.<sup>8</sup>

(3) A Shiah may lawfully be the husband, at the same time, of W, and of D, the daughter of W's former husband (as the prohibition between D and W is by affinity, and not consanguinity or fosterage).<sup>8</sup>

Contract not to marry second wife.

It is stated in the 'Sharaya-ul-Islam'<sup>9</sup> that a stipulation in the marriage contract "that the husband shall not marry another wife

<sup>1</sup> Bail. I, 31 does not mention affinity, but affinity is expressly mentioned in Hed. 29. It would be extraordinary if affinity between two women within the prohibited degrees, were not enough to make the conjunction unlawful, for under prohibitions by fosterage is included a prohibition against intermarriage with persons treating foster relations by marriage.

<sup>2</sup> Hed. 28, 29, Bail. I, 31.

<sup>3</sup> Bail. II, 23, 40 (par. 3).

<sup>4</sup> See ss. 36, 38 below.

<sup>5</sup> Bail. I, 32, 34.

<sup>6</sup> Hed. 30, Bail. II, 28, see Bail. II, 42.

<sup>7</sup> When a man absent from his wife has repudi-

ated her, and desires to marry her sister, or a fourth wife, he must wait for nine months, for the possibility of her being pregnant." Some doctors recommend waiting for a full year.

"But if he knew that she was not pregnant at the time of repudiation, three courses and three months are sufficient." (Cf. Bail. II, 162 (par. 1).)

<sup>8</sup> Bail. I, 31.

<sup>9</sup> *Sharafunnisa v. Khizroonnisa* (1823) 3 S. D. A. 210. *Azunnissa Khatoun v. Kari-Munnissa Khatoun* (1895) 23 Cal. 130; *Tajib v. Moide Khan* (1917) 41 Bom. 485.

<sup>9</sup> Bail. II, 76. See also the *Du'agum-ul-Islam* (Nolde).



during the lifetime of the party with whom the contract is made, nor SECTION 30 privately entertain a woman as his concubine," is void, inasmuch as it is contrary to the law that the husband may marry four wives. But, no doubt, the British Courts would lean in favour of such a stipulation.

Assuming that the Court would be desirous of upholding a contract restricting bigamy or polygamy, would the Indian Contract Act, s. 26, <sup>1</sup> prevent the Court from doing so? The question involves three conflicting considerations: first, the principle underlying the said section that marriages should not be restrained; secondly, the general recognition of the fact that polygamy should be restricted as far as possible; and, thirdly, the fact that the rule of Muhammadan law permitting polygamy, has never been challenged in the Courts.

Such stipulations were set up in two cases.<sup>2</sup> In the earlier case, nominal damages were awarded to the wife. The passage from the 'Sharaya-ul-Islam,' referred to above, does not appear to have been cited, and, if the parties were Sunnis, as was probably the case, it would not have been of authority binding on them. All that the Court decided, however, was that the breach of such a contract did not entitle the wife to a divorce. But, of course, the wife may, by contract, have an option reserved to herself, to pronounce a divorce, and such an option may be conditioned on the husband taking another wife,<sup>3</sup> or it may be unconditional.

31. The whole of a contract, infringing the rules against unlawful conjunction,<sup>4</sup> is void,<sup>5</sup> but a marriage, contracted previous to the contract by which unlawful conjunction is established, remains valid. Where it cannot be determined which of two contracts of marriage was the earlier, and the two conjointly have the effect of establishing unlawful conjunction, both are void.<sup>6</sup>

It is unusual, nowadays, to come across a person in British India with more wives than one, unless there are special reasons for marrying a second wife, such as illness, or barrenness of the first. It is still rarer,

<sup>1</sup> Which is as follows: "Every agreement in restraint of the marriage of any person other than a minor is void."

<sup>2</sup> (*Bebee Hurron v. Sheik Khurroallah* (1878) Fulton, 361; (*Sheik Mohabuth Ally v. Mymanussah* (1862) Marsh. 361.

<sup>3</sup> As was the case in *Budharinussah Bebee v. Mafiatulla* (1871) 7 Beng. L. R. 112, and in *Poono Bibi v. Faez Buksh* (1871) 15 Beng. L. R.

(APPX) 5. See *Bebee Hurron v. Sheik Khurroallah* (1878) Fulton, 361, (*Shaukh Mohabuth Ally v. Mymanussah* (1862) Marsh. 361.

<sup>4</sup> Bail I. 31.

<sup>5</sup> According to Hanafi Law "irregular" rather than void - see s. 84, below.

<sup>6</sup> *Hed.* 28-29; Bail. I. 31-27; II. 24-25, 28 (PAR 3).

restraint of  
polygamy  
and public  
policy.

Effect of  
contract  
establishing  
unlawful  
conjunction.

SECTION 31. of course, for a man to marry more wives than one by the same contract. A contract by which more wives than one are married, it may be mentioned as a point of academic interest, does not become wholly invalid where the man is prohibited from marrying one of the women for a cause other than unlawful conjunction : as, for instance, if one of them is already married.<sup>1</sup>

(4) *Prohibition by Fosterage.*

Foster children  
and foster  
parents  
defined

32. Where a child, under the age of two years, has been nursed by a woman other than its mother, in accordance with the conditions mentioned in s. 33, below, it is called the "foster-child" of the woman : she is called its "foster-mother;"<sup>2</sup> and the husband of the foster-mother is called the "foster-father" of the foster-child.<sup>3</sup>

What  
constitutes  
fosterage in  
Hanafi law.

33. The following conditions must respectively be fulfilled for establishing the foster relations mentioned in s. 32, above:—

(1) According to Hanafi law the milk from the breast of the woman must reach the stomach<sup>4</sup> of a child : the quantity of the milk, makes no difference, nor, whether it is taken by the child direct from the breast, or it is poured down its throat, or administered medicinally, nor whether the woman is living or dead at the time that milk is taken from her breast.<sup>5</sup>

In Shafi'i law.

(2) According to Shafi'i law the child must be suckled not less than five times from the breast of a living woman.<sup>6</sup>

In Shiah law.

(3) According to Shiah law (a) the milk by which the child is nursed must not have proceeded from illicit intercourse,<sup>7</sup> (b) the child must be nursed direct from the breast

<sup>1</sup> Bail I. 35, 36.

<sup>2</sup> It is considered possible, by the Muslim authors, that an unmarried virgin should have sufficient milk in her breasts to suckle a child, and that a woman might have milk by intercourse, without bearing a child ; and the rule stated in strict accordance with the authorities, would be as follows. "Where milk is produced in the breast of the foster mother by intercourse with a man, and she has borne a child to that man he is called the

foster-father."

<sup>3</sup> Bail I. 193, 195, (par. 3), 196 (par. 2), Bail II. 17.

<sup>4</sup> If it is poured through the ear, or other cavities, it does not establish nursing ; nor, (Imam Muhammad dissentiente) if administered through a clyster : Bail. I. 169.

<sup>5</sup> Bail. I. 193, 196.

<sup>6</sup> Hed. 67, 70.

<sup>7</sup> Bail. II. 12.

of the same woman, either fifteen times<sup>1</sup> or during one whole day and night : in either case without being suckled during the same period by any other woman; (c) all the acts of suckling must be completed before the child has attained to two years, and during the lifetime of the nurse and (d) the milk must be in its natural state, and not diluted, even in the mouth of the child.<sup>2</sup>

Whether or not the foster relation is established, depends upon two main circumstances: (1) the age of the child (2) the mode in, and period during, which the child is nourished by the milk of the woman. As to the first, the age during which the relation can arise is fixed at two years by Abu Yusuf, Imam Muhammad, Shafi'i and the Shiah lawyers. Abu Hanifa, however, fixes the age at 30 months.<sup>3</sup>

"The Prophet said, in the presence of all his women, 'the rules of suckling the same women are in infancy, and not in those of riper years.'"<sup>4</sup> The reason of the rule, is referred to in the following: "prohibition is not established by any fosterage, except such as is the cause of growth and increase which are obtained only by the fosterage within its proper period; since a grown-up person would not find any effectual nourishment from suckling."<sup>5</sup>

34. Where a divorced woman [or a widow]<sup>6</sup> nurses a child, her former husband is in law the foster-father of the child, unless she has borne a child to a second husband after the dissolution of her marriage with her former husband.<sup>7</sup>

35. Prohibition by fosterage makes it unlawful for a Muslim to marry any of the following persons:—

- (1) His or her foster-mother or foster-father;
- (2) The foster descendants of his or her (a) father.<sup>8</sup> or
- (b) mother,<sup>8</sup> or (c) stepfather.<sup>8</sup> or (d) stepmother;<sup>9</sup>

<sup>1</sup> According to some Shiah authorities, ten times is enough; Bail II. 15; and that is the view followed by the author of the *Dar'at-ul-Islam* according to whom suckling ten times successively, or though one whole day, suffices.

<sup>2</sup> Bail. II. 15-17.

<sup>3</sup> Hed. 68; Bail. I. 193; II. 17.

<sup>4</sup> *Musht-ul-Masabih*, XIII. v. I. (Matthew; I. 92).

<sup>5</sup> Hed. 68-69.

<sup>6</sup> The authorities refer only to a divorced wife.

<sup>7</sup> Bail. I. 195 (par. 2), II. 15.

<sup>8</sup> Relation by blood must be understood in s. 35, unless the epithet "foster" or an expression implying fosterage qualifies the terms.

<sup>9</sup> Bail. II. 18-19.

Foster father when foster mother is divorced (or widow).

Prohibition by age begins when adopted.

- SECTION 31. (3) His or her foster-father's *or* foster-mother's ascendants *or* descendants <sup>1</sup> with the *exception* that in Shiah law prohibition is not established between foster-children of the same foster-mother unless their foster-father is also the same person : <sup>2</sup>

[ *Explanation.*—Under neither the Sunni nor the Shiah law is it lawful for a person to marry his or her foster-mother's child ; <sup>3</sup> ]

(4) The sister <sup>4</sup> *or* brother <sup>4</sup> of any foster-ascendant <sup>5</sup> with the *exception* that where the milk is ascribed to the foster-mother as the result of illicit intercourse, the foster-child may lawfully marry the paternal and maternal uncles *or* aunts of his or her (illegitimate) foster-father ; <sup>6</sup>

(5) The foster-ascendants <sup>1</sup> *or* foster-descendants <sup>1</sup> of his wife *or* of her husband ; <sup>7</sup>

(6) The wife *or* husband of a foster-parent *or* a foster-child ; <sup>8</sup>

(7) In accordance with, Shiah law, <sup>9</sup>—(a) the child *or* foster-child of his or her own child's <sup>10</sup> foster-father ; <sup>11</sup> and (b) the child *or* foster-child of the foster-mother of his or her mother. <sup>10</sup>

<sup>1</sup> It has been the practice amongst the writers on Muhammadan law in English, to add the expressions "how high soever" and "how low soever" after the mention of ascendants and descendants. This practice was followed in the first edition of the present work, but as it seems to be tautologous, it has been departed from in the present edition.

<sup>2</sup> Rail. II, 17, 18. The reasons of this exception seem to be that prohibition by fosterage is based on the ground that fosterage "gives increase to the flesh and bones" (Rail. II, 15); that persons who have participated in such increase from the same source, bear to each other a physical relation analogous to that of persons natural, descended from the same parents, and that the milk is to be ascribed entirely to the man intercourse with whom has produced it. See the next footnote, and the paragraph of the comment headed, "Reason for prohibition by fosterage."

<sup>3</sup> Rail. II, 17. In accordance with the theory referred to in the last footnote, the prohibi-

tion should be restricted, amongst Shiabs, to intermarriage between A and B when B is a natural born child of A's foster-mother, as well as of A's foster-father.

<sup>4</sup> I.e., by blood.

<sup>5</sup> I.e., (a) the ascendant by blood of a foster-father *or* foster-mother, *or* (b) the foster-father *or* mother of an ascendant by blood.

<sup>6</sup> In Shiah law fosterage is not established when the milk proceeds from illicit intercourse. See s. 33, (3) (a), above.

<sup>7</sup> Hed. 70.

<sup>8</sup> Hed. 69. Rail. I, 194-195.

<sup>9</sup> It will be noticed that this is the only case where the prohibition by fosterage is established between persons neither of whom is the foster-child, not a legal ascendant *or* descendant, of the foster-child.

<sup>10</sup> Relation by blood must be understood s. 33 unless the epithet "foster," or an expression implying fosterage, qualifies the terms.

<sup>11</sup> Rail. II, 18.

Persons<sup>1</sup> not coming within the rule of prohibition by fosterage, who would be prohibited from intermarrying if they bore a similar relation through blood or affinity:—

Sections and clauses of this work **SECTION 35.**  
under which prohibition would be *Illustrations.*  
established if the relation were by blood or affinity, instead of fosterage:—

1. Sister's foster-mother . . . . }	s. 27 (1), or s. 28 (2).
2. Foster-sister's mother . . . }	
3. Foster-mother's foster-sister..	s. 27 (1), or s. 28 (1).
4. Foster-son's sister . . . . . }	s. 27 (1), or s. 28 (2)
5. Brother's foster-mother , . . }	
6. Foster-brother's mother : . . }	
7. Foster-brother's foster-mother. }	s. 27 (2), or s. 28 (2).
8. Mother of paternal foster-uncle . . . . . }	
9. Mother of maternal foster-uncle . . . . . }	s. 27 (1), or s. 28 (2).
10. Nephew's foster-mother . . }	[Not prohibited, she would be a brother's wife.]
11. Foster-child's grandmother . .	s. 27 (1), or s. 28 (2)
12. Foster-child's aunt . . . . .	s. 27 (3).
13. Son's foster-sister's mother . .	[This would be his own wife.]
14. Of child's foster-brother's daughter . . . . . }	s. 27 (1), or s. 28 (1).
15. Sister's foster-father . . . . .	s. 27 (1), or s. 28 (2)
16. Sons' foster-brother . . . . .	s. 27 (1), or s. 28 (1)
17. Niece's foster-father . . . . }	s. 27 (2), or if he is either brother's or sister's husband, no prohibition arises.
18. Child's foster-grandfather . .	s. 27 (1), or s. 28 (1).
19. Child's maternal uncle . . . .	s. 27 (1).

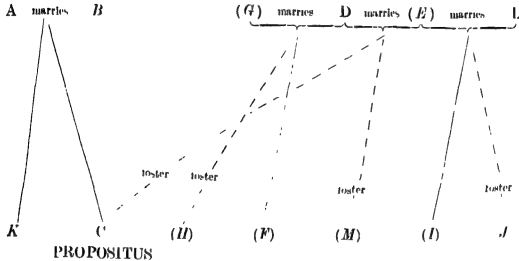
*N.B.* In the table, below, *Italic* letters refer to females. Letters *Illustrations.*  
in parentheses refer to persons who are prohibited from *Explanation*  
marrying C' at the genealogical table.

- (1) C and K are natural-born son and daughter of A and B.
- (2) C has been nursed by E, on milk produced by intercourse with D; therefore E is the foster-mother, and D is the foster-father, of C.

<sup>1</sup> Bail. L., 191 *et seq.*

## SECTION 35.

- (3) D has another wife *G*, who has borne to him a daughter *F*.  
 (4) *G* has nursed a girl *H* on milk produced by intercourse with *D*.  
 (5) *E* also has married another husband, *L*,—  
 (6) and has borne to him a girl, *I*, and,—  
 (7) has nursed a girl *J* on *L*'s milk.  
 (8) *M* is the foster-daughter of *D* and *E*.



Prohibitions  
by fosterage.

*C* cannot marry,

- (1) *E*, his foster-mother : [s. 35 (1)]
- (2) nor the mother of *D*, his foster-father : [s. 35 (3)]
- (3) nor the mother of *E*, his foster-mother : [s. 35 (3)]
- (4) nor *F*, his foster-father's real child : [s. 35 (3)]
- (5) nor *I*, his foster-mother's real child : [s. 35 (3)]
- (6) nor *H*, his foster-father's foster-child by another woman : [s. 35 (3)]
- (7) nor *M*, his foster-father's foster-child by his foster-mother : [s. 35 (3)]

According to Shiah (but not Hanafi) law,—*C* may marry *J*,  
 his foster-mother's foster-child by another husband :  
 [s. 35 (3), *exception*]

- (8) nor the sister of *D*, his foster-father : [s. 35 (4)]
- (9) nor the sister of *E*, his foster-mother : [s. 35 (4)]

(But *C* may marry the sister of *L* or *G*, i.e., the sister of the  
 husband or wife of his foster-mother or foster-father) :

- (10) nor the foster-mother, or foster-daughter of his wife : [s. 35 (5)]
- (11) nor *G*, the wife of his foster-father : [s. 35 (6)]
- (12) nor any foster-child of his own : [s. 35 (5)]
- (13) nor any foster-child of his wife : [s. 35 (5)]

(14) nor the wife of any foster-child of his own : [s. 35 (6)]

SECTION 35.

(15) nor the wife of any foster-child of his wife : [s. 35 (6)]

In addition to the above, according to Shiah law,—

(16) A<sup>1</sup>, the father of the foster-child C, cannot marry H, nor M,  
the children of C's foster-father : [s. 35 (7)]

(17) nor can A<sup>1</sup> marry I, the natural-born child of his son's foster-mother.

According to Sunni law A<sup>1</sup> may marry H, F, M, I or J.<sup>2</sup>

A<sup>1</sup> may marry J by either school of law.

See also the illustrations to s. 52, below.

The Muhammadan law differs from most other systems in the prominence it gives to fosterage as a cause establishing prohibition to marry.<sup>3</sup>

The reason for the prohibition by fosterage is thus stated in the *Hidaya* : " Prohibition by fosterage is founded solely in an apprehension of a participation of blood (or rather of bodily substance, causing two persons to partake of one nature) on account of the growth and increasing bulk of the body ; moreover, it occurs in traditions that fosterage is the source of a child's growth." <sup>4</sup> Allusions are made more than once in the ' *Hidaya* ' and the ' *Fatawa 'Alamgiri* ' to the same reasons, in order to elucidate the rules of law relating to prohibition by fosterage, and in considering the validity of dissenting opinions.

The rules of prohibition by fosterage are based on the effect given to the verse of the *Quran* <sup>5</sup> which deals with prohibitions, and which so far as material at present, is as follows :

" Unlawful for you are your mothers . . . and your foster-mothers, and your foster-sisters and your wives' mothers, and your step-daughters." *Quran*, VI. 27.

In interpreting this verse, <sup>6</sup>—(i) the expression " foster-mothers " is generalised, and taken to include all ascendants, so that foster-parents of all degrees are prohibited ; thus we get s. 35, clause (1) ; and part of clause (3). Similarly, (ii) the prohibition against the foster-sister in the *Quran* includes the prohibition against the foster-brother, thus covering the portion of s. 35, clause (3) not already covered, and the

<sup>1</sup> Note that we are now referring to the foster-father, and not to C, the propitius.

<sup>2</sup> *Bail*. I. 194 ; II. 18.

<sup>3</sup> Fosterage, as distinguished from adoption.

I. 191), but had apparently no other legal effects.

<sup>4</sup> *Ibid*. 68, see also *Bail*. II. 15 : and the footnote to s. 35 (2), above.

<sup>5</sup> The traditions on the subject are, according

Reason for prohibition by fosterage.

Quranic foundation of prohibition by fosterage.

SECTION 35. whole of clause (4). Finally, (iii) in the expression "your wives' mothers," the term "mothers" is interpreted to mean both classes of mothers mentioned in the verse, *i.e.*, including foster-mothers: hence arises the rule stated in clause (5); and, by analogy from clause (5), clause (6).<sup>1</sup>

Tradition.  
Quantity of milk  
required to be  
suckled.

There is a tradition that the Prophet said that if the child has sucked once or twice, it is not thereby prohibited to the nurse.<sup>2</sup> This tradition (in so far as it refers to the quantity of the milk required to establish fosterage) is held by Abu Hanifa to be superseded by the verse of the Quran (IV. 27) which speaks of "the mother that has given you suck" without any reference to the quantity of the milk. Shafi'i and the Shiahs, on the other hand, give effect to the tradition. Hence arises the difference between the schools as to that which the law requires to establish fosterage.<sup>3</sup>

The 'Hidaya'  
on fosterage.

The following definition of 'riza,' or fosterage, is given in the 'Hidaya': "A child sucking milk from the breast of a woman for a certain time, which is termed the period of fosterage." The general statement that "whatever is prohibited by consanguinity, is so likewise by fosterage," comprehensively includes clauses (1), (2), (3) and (4) of s. 35, which correspond with prohibitions by blood. In other respects the 'Hidaya' corresponds with the 'Fatawa 'Alamgiri' in which the statements of a general nature about the prohibitions by fosterage are very short, and may be given in full, with the omissions of the examples and discussions:

'Fatawa  
'Alamgiri.'

"It is not lawful for a man to marry his mother<sup>1</sup> by fosterage, nor his sister by fosterage.<sup>2</sup> . . . Illegality is induced by suckling . . . provided it takes place within the proper period . . . (which) the two disciples have said . . . does not extend beyond two years . . . when the full period has expired, the illegality by fosterage is not established by suckling after it.<sup>3</sup> Illegality by fosterage is also established on the part of the father.<sup>4</sup> To the suckling, both his foster-parents, and their ascendants and descendants, either by natural descent or fosterage, are all prohibited<sup>5</sup> . . . : and the brother and sister of

<sup>1</sup> See pp. 19, 20, above, as to of the Quran and *Qiyas* or *An-Nikah*.  
<sup>2</sup> *Mishkat-ul-Ma'arif*, book (Matthew's translation, I. 92).

<sup>3</sup> Cf. also *Baill.* II. 17: "I am after the age of weaning."

<sup>4</sup> See *tion* 35 (1), above.

children of the foster-father become the child's foster-brothers and -sisters, and are therefore prohibited. No instances are mentioned of the foster-children of the foster-mother, but these are included in the statement immediately preceding that "descendants of foster-parents by fosterage are prohibited to the foster-child." It will be observed that, in accordance with the Shiah law, the foster-children of the foster-mother (by another foster-father) are not prohibited,



the man (i.e. of the foster-father) would be his paternal uncle and aunt, and the brother and sister of the nurse would be his maternal uncle and aunt; and in like manner as to his grandfather and grandmother<sup>1</sup> . . . The illegality of affinity is also established by fosterage, so that the man's (i.e. the foster-father's) wife would be unlawful to the suckling, and the wife of the latter (i.e. the foster-child) would be unlawful to the man and by the same analogy, in all cases<sup>2</sup> except two: " [These two exceptions consist of the first four cases tabulated on p. 123, above.]

Observe that the words " When the full period has expired, the illegality by fosterage is not established by suckling after it," immediately follow the prohibition against marrying the foster-mother as well as the foster-sister, and cannot be taken to refer only to the sister by blood;<sup>3</sup> so that the rule of the law is that unless the suckling takes place under the age of 2 (or 2½) years, it does not create any foster relation at all.

Sir R. Wilson<sup>4</sup> has, it is submitted, given to the rule of prohibitions by fosterage undue extension by saying that " the act of suckling in all cases takes the place of an act of procreation." A reference to the authorities that he cites for the proposition<sup>5</sup> and, especially, to what he terms " the general statement,"<sup>6</sup> viz., " To the suckling both his foster-parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited," suggests that Sir Roland has, apparently, not realised that the " general statement " merely involves the propositions in clauses (1), (2) and (3) of s. 35, and that under the said statement prohibition can only be established where one of the parties is the foster-child. The instances that Sir Roland gives as " recognised exceptions to the general rule of prohibition," are in no way exceptions to the rules formulated in the 'Hidaya' and 'Fatawa'Alangiri.' The instances are given in those books as examples, to show the difference between the incidence of the very similar rules applying respectively in the case of blood-relation and of fosterage. In order to show that this is the case, all the cases mentioned in the books, and quoted by Sir Roland as exceptions, have been tabulated above. It will be found on examination that none of them comes within any of the first six clauses of s. 35 of this work. With reference to the first two cases the following passage is important :

<sup>1</sup> Section 35 (4); Ball. I. 194.

<sup>2</sup> Section 35 (5), (6).

<sup>3</sup> Sir Roland Wilson in the *explanation* to s.37

prohibition between the foster-brother and sister,

\* "Anglo-Muhammadan Law," s. 37.

<sup>5</sup> Viz., Ball. I. 193—203; Hed. 67—72.

Relation  
by fo-terage  
arises if the  
nursing is  
under 2 (or  
2½) years.

Fosterage does  
not take the  
place of  
procreations  
for prohibitions  
to marry.

## SECTION 35.

"It is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage, for the former must be either his own daughter or his step-daughter while the latter is neither,"<sup>1</sup> and then an instance is given which can only occur where slavery is recognised; *viz.*, when a sister (by consanguinity) of a man's son is neither his own daughter, nor his step-daughter,<sup>2</sup> in which case it would be lawful for him to marry the girl.

(5) *Prohibition by 'Iddat*

Prohibition to  
marry during  
'iddat.'

**36.** (1) Prohibition by 'iddat'<sup>3</sup> makes the marriage of a widow, or divorced woman or the marriage of a woman who is pregnant by illicit intercourse unlawful<sup>4</sup> during the periods mentioned in s. 39, (or clause (2) of s. 38), below.

(2) The expression "to observe 'iddat'" means to refrain from remarrying (or marrying), as above referred to.

'Iddat'  
explained.

Subject to s. 38 (2) below, 'iddat' may also be described as the period during which a woman is under a prohibition from marrying again after dissolution of her marriage; or as the period during which a previously existing marriage is considered to be undissolved for certain purposes, notwithstanding that the husband has died or pronounced a divorce. The most important of the incidents for which the marriage is considered to subsist during 'iddat' have reference to (1) the right of the woman to remarry, ss. 38, 39; (2) the claim to maintenance, s. 300; (3) rights of inheritance, s. 154; (4) prohibition to marry by unlawful conjunction: s. 36; (5) the woman is also required during 'iddat' to observe 'hidat', *i.e.* mourning, by abstinence from rich clothes, perfumes, and other objects for beautifying her person.<sup>5</sup> According to Shafi'i and the Shiah authorities 'hidat' is not incumbent on a divorced woman.<sup>6</sup> No legal results follow from the observance or breach of the rules as to 'hidat';<sup>7</sup> they are therefore, not stated in any of the sections of this work.

Prohibition by 'iddat', it will be observed, is a temporary

prohibition : it lasts only during the period that 'iddat' lasts.

SECTION. 36

The original object of 'iddat' is to "ascertain the state of the 'womb,'<sup>1</sup> i.e., to ascertain whether the woman be pregnant."<sup>2</sup>

parallel to  
'iddat' in  
Civil and  
English law.

'Iddat' primarily affects the right of the woman to marry; but the husband may not marry a fifth wife, while one of his four wives is observing her 'iddat' for divorce, nor may he, during the said period, marry that wife's sister.<sup>3</sup>

The Civil Law ordained that no widow should marry 'inter annum luctus,'<sup>4</sup> and the rule was established in England under the Saxon and Danish Governments,<sup>5</sup> but it seems to have fallen into desuetude by the time of Coke.<sup>6</sup>

37. According to Shiah law, if a man knows that a woman is under an obligation to observe 'iddat,' and purports to marry her, the marriage is void; if, thereafter, they have sexual intercourse with each other, they can never lawfully intermarry; but if they do not have such intercourse they may lawfully intermarry after the woman has completed her 'iddat.'<sup>7</sup>

Parallel  
prohibition in  
Shiah law.

There seems to be no similar provision in the Sunni law.

38. (1) 'Iddat' is incumbent on a woman<sup>8</sup> after the dissolution of a rightful or a semblable marriage, followed by consummation, or the death of the husband.<sup>9</sup>

who must  
observe  
'iddat'

(2) According to Shiah law 'iddat' is also incumbent upon a woman during her pregnancy by illicit intercourse. According to Hanafi law 'iddat' is not incumbent on such a woman, but the man marrying her must refrain from intercourse with her till delivery.<sup>10</sup>

<sup>1</sup> Bail. I. 350.

<sup>2</sup> Hed. 128.

<sup>3</sup> *Syed Sahib v. Mirzan Beg*, (1910) 20 M. L. J. 12. See the last footnote to s. 31, above.

<sup>4</sup> *Cod. V. 19, § 2.*

<sup>5</sup> *Silvanus coluit cum matris duodecim menses*, Wilk., Leg. Anglo-Sax. II. Ethel. A. D. 1008, LL. Canut. c. 71 quoted Stephen's Comment. (10th Ed. 1886) II. 308.

<sup>6</sup> Co. Litt. 8a. *ibid.*

<sup>7</sup> Bail II. 26 (first), 27 (third). *Du'aman-u, Idam* (Notes).

<sup>8</sup> *I.e.*, she is under our obligation to refrain from marrying—see s. 38 (1).

<sup>9</sup> Hed. 128, Bail. I. 37-38, 150-151, Bail

II. 161 (par. 2), 165. (par. 13). The *Shah re-Yaqut* (a Hanafi authority) explains that according to Abu Yusuf the persons who have themselves been guilty of illicit intercourse may intermarry, while the woman is pregnant. The Shiah authorities do not permit it if the woman is observing the 'iddat' of divorce or widowhood. Bail. II. 164 165.

<sup>10</sup> Bail. I. 37 (par. 1), 38 (II. 1, 2), 350 (par. 2). This is the view of Imam Abu Hanifa, and Imam Muhammad in accordance with which the *fatra* is given. Bail. I. 38. Abu Yusuf holds marriage during pregnancy to be irregular, *i.e.*, he is of opinion that 'iddat' is incumbent.

## SECTION. 38

*Illustrations.*

(1) H. contracts marriage with *W* and divorces her without consummation: *W* need not observe 'iddat' whether the marriage was regular or irregular.<sup>1</sup>

(2) *W*, is married regularly<sup>2</sup> to H. On the death of H., 'iddat' is incumbent on *W* for 4 months and 10 days, whether or not the marriage has been consummated. If, at the expiration of the period of 'iddat' she is found to be pregnant, the 'iddat' is prolonged till delivery.<sup>3</sup>

(3) H contracts a regular marriage with *W*: the marriage is consummated (where the parties are governed by Hanafi law, valid retirement is equivalent to consummation): H then<sup>4</sup> dies, or divorces *W* *W* must observe 'iddat.'

(4) H marries *W*, but the marriage is irregular, the parties being governed by Hanafi law,—

(a) they validly retire but do not consummate; they are then separated by an order of the Court:<sup>5</sup> *W* need not observe 'iddat';<sup>6</sup>

(b) they consummate marriage, and are then separated by an order of the Court: *W* must observe 'iddat.'

(5) H is the husband of *W*; X purports to marry *W*, knowing her to be the wife of H, and has intercourse with her. In this case there is no semblance of marriage,<sup>7</sup> and should X die or purport to divorce *W*, no 'iddat' is necessary.<sup>8</sup>

(6) *W*, a Hanafi woman, is pregnant. She must observe 'iddat' at least until she is delivered; unless she is pregnant by illicit intercourse, in which case (a) according to Abu Yusuf she must observe 'iddat,' and marriage with her is "irregular;" (b) according to Abu Hanifa and Imam Muhammad (whose view is accepted) she need not observe 'iddat' and may validly marry, but must not have intercourse until delivery.<sup>9</sup>

*Effect of the law.*

The effect of the law is therefore, that (a) if the husband dies, 'iddat' is incumbent on the widow whether or not there has been consummation; (b) if there is a divorce, then 'iddat' is incumbent only if there has been consummation.

*Illicit intercourse.*

Abu Yusuf's exposition of Hanafi law also makes it incumbent on a woman, pregnant by illicit intercourse, to refrain from marrying until

<sup>1</sup> Bail. I. 350, 351.

<sup>2</sup> It will be remembered that under Shiah law there is nothing like an irregular marriage. There is either a lawful marriage, or no marriage at all.

<sup>3</sup> Bail. I. 353.

<sup>4</sup> On valid retirement see s. 82 below.

<sup>5</sup> See ss. 84-86, below. Not having been con-

summated, the marriage can be put an end to without any order of Court, at the mere desire of either party.

<sup>6</sup> Bail. I. 350.

<sup>7</sup> See s. 14, above, and comment thereto.

<sup>8</sup> Bail. I. 37, and s. 1.

<sup>9</sup> Bail. I. 17-19, 153 (H. 4-12, 18-20).

delivery;<sup>1</sup> but his view of Hanafi law is opposed to that of Abu Hanifa SECTION. 38 and Imam Muhammad,<sup>1</sup> and the 'fatwa' is against Abu Yusuf.<sup>2</sup>

39. "Iddat" must be observed<sup>3</sup> during the periods mentioned below :—

Duration of  
"iddat."  
1. for a widow,

(1) A widow who has been regularly married must observe "iddat" for four months and ten days from the death of her husband; and, if at the end of the said period, she be pregnant, the "iddat" extends in her case until she is delivered of the child.<sup>4</sup>

(2) In either of the following cases, viz., when

(a) the marriage between the parties was regular, and it has been consummated, or valid retirement has taken place;<sup>5</sup> and it has been dissolved by a divorce; or

2. for divorced wife or widow by irregular marriage

(b) the marriage between the parties was irregular,<sup>6</sup> and the husband has died,

(a) if subject to menstruation.

(b) If pregnant.

the period of the "iddat," is as follows :—

(c) If not subject to menstruation.

(i) if she is subject to menstruation, (a) in Hanafi law, the "iddat" lasts until three monthly courses expire; (b) in Shiah law until the expiration of three 'tuhrs' or periods of purity after menstruation);<sup>7</sup>

(ii) if she is pregnant,—then until she is delivered;

(iii) if she is not subject to menstruation for some reason other than pregnancy,—then, (a) in Hanafi law the "iddat" lasts for three lunar months; (b) in Shiah law, subject to subsection (4) below, for 78 complete days.

<sup>1</sup> Ball. I. 37-38 : 350-357.

<sup>2</sup> See s. 36 (2) above.

<sup>3</sup> Hed. 128-129; Ball. I. 157, 350-355, II. 164-165. Delivery of a child by a pregnant widow does not terminate the 'iddat' before four months and ten days are over: *Ukbia v. Imam Din* (1906) Punt. Rec. 77, (Civ. Case 29) *Nathu v. Must. Bibo* (1887) 22 Punt. Rec. 81, (No. 38).

<sup>4</sup> Ball. I. 101. The Shiah do not recognise "valid retirement" as equivalent to consummation; but it is said that where retirement has

taken place, if the husband states on oath that the marriage was consummated, his statement will be presumed to be true. Ball. II. 160, cf. s. 5 B, above.

<sup>5</sup> Dissolution of an invalid marriage, though brought about by the death of the husband, is put upon the same level as separation caused by a divorce pronounced by the husband, or by the Court.

<sup>6</sup> Ball. I. 351; Hed. 128.

<sup>7</sup> Ball. II. 161; *Da'ayan-at-Islam* (Notes) cf. s. 31; above.

## SECTION 39

(3) If husband  
dies during  
'iddat' or  
divorce

(3) In the following case,<sup>1</sup> viz.,—

(a) when the husband has divorced his wife, and,—

(b) he has died before her 'iddat' has expired,—she must observe a fresh 'iddat' from the husband's death, for the period that would have been obligatory on her if she had been an undivorced widow,—but subject as follows,—

(i) if the divorce was irrevocable or triple, then, the period of the said fresh 'iddat' must, according to Abu Hanifa and Imam Muhammad include three menstrual courses (if she is liable to them), and if necessary, the period of the 'iddat' must be prolonged so as to include them; according to Abu Yusuf it must consist of three courses but has not to be prolonged beyond them;

(ii) if the divorce was revocable or pronounced by the husband in his death illness, then, the requirements contained in clause (i), above, need not be observed.<sup>2</sup>

(4) In Shiah law, according to the more generally received tradition, if menstruation is irregular or absent owing to a woman being past the age of child bearing, or her not having attained puberty, 'iddat' need not be observed.<sup>3</sup>

*Explanation.*—The reckoning of the period of 'iddat' must be either by months or by courses, and the two cannot be combined, nor can a period during which there has been menstruation, be reckoned as part of the three months.<sup>4</sup>

*Illustrations.*

(1) H divorces his wife *W*, before she has reached puberty. One day before the three months elapse, *W* begins to menstruate. The 'iddat' will require three menstrual courses for its completion.<sup>5</sup>

(2) H gives a revocable divorce to *W*. *W* has observed the 'iddat' for three courses except one day, and then H dies. The 'iddat' is prolonged to four months and ten days from the death of H.<sup>5</sup>

(3) H divorces his wife *W* who observes 'iddat' during two courses and then they absolutely cease. She must observe a fresh 'iddat' during three months.<sup>5</sup>

<sup>1</sup> The present subs. (3) of s. 39 was s. 40 in the first edition.

<sup>2</sup> Ball. I. 351 (*H*, 20-23): 352 (*H*, 25-28).

<sup>3</sup> Ball. II. 162.

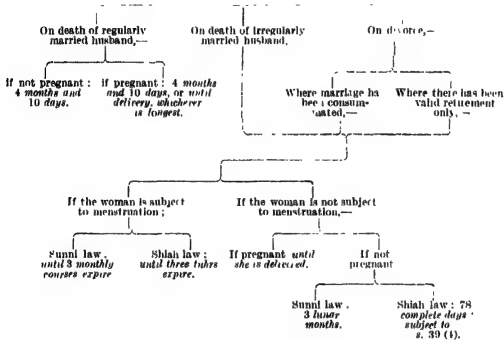
<sup>4</sup> Ball. I. 27 350-355; *Hed.* 128. 129.

<sup>5</sup> Ball. I. 355.

According to Abu Yusuf a woman who is pregnant by illicit inter-  
course may not lawfully marry during her pregnancy any person other  
than the person who has caused her to be pregnant. Abu Hanifa and  
Imam Muhammad permit marriage with any person, but forbid inter-  
course during pregnancy (except, *semble*, where the person causing the  
woman to be pregnant, marries her). See s. 38 (2), above. For 'iddat'  
in case of 'mut'a,' see s. 25, above.

5. 'Iddat' after illicit intercourse.

#### Duration of period of 'iddat'



Section 40 of the first edition appears in this edition as s. 39. (3)

#### (6) Prohibition by Divorce.

41. Where the husband has pronounced three divorces <sup>1</sup> against his wife, their marriage is irrevocably dissolved; <sup>2</sup> marital co-habitation by them is then illegal, <sup>3</sup> and prohibition is established against their re-marriage; the said prohibition is not removed until, (a) the woman has been lawfully married to <sup>4</sup> a second husband, <sup>5</sup> (b) the marriage with the

<sup>1</sup> Three divorced wife.

<sup>2</sup> prohibition how removed.

<sup>1</sup> The first seven words of the section might be "After the husband has uttered three pronouncements of divorce against his wife." See comment.

<sup>2</sup> This would be so notwithstanding that the first two pronouncements of divorce may not

have been followed by any cessation of marital life, see s. 121, below.

<sup>3</sup> See s. 13, above; and s. 153, below.

<sup>4</sup> Ball, II, 182.

<sup>5</sup> Permanently, not by *mut'a* Ball, II, 124.

SECTION 41. second husband has been actually<sup>1</sup> consummated,<sup>2</sup> and (c) it has, after such consummation, been lawfully dissolved.

*Illustrations.*

(1) In 1900 H divorces his wife, *W*, twice. In 1901, *W* marries a second husband, *HA*, and is divorced by *HA*. In 1902 *W* re-marries her first husband, *H*, and is again divorced by him twice in 1903. The two divorces pronounced by *H* in 1900, (before *W* had married *HA*) are not to be added to the divorces, by *H* to *W* in 1903, and so after the two divorces of 1903, *H* and *W* may remarry, without *W* marrying another husband.<sup>3</sup>

(2) *H* divorces his wife, *W*, and then revokes the divorce by resuming cohabitation (or by remarrying her), and then divorces her a second time, and again revokes the second divorce, and re-marries her; and then divorces her a third time. The third divorce cannot be revoked; and there can be no fresh marriage between *H* and *W*, till *W* has married another husband, *HA*, and *W* and *HA*'s marriage has been consummated.<sup>4</sup> If the same process goes on till there are nine divorces of which the 1st, 2nd, 4th, 5th, 7th, and 8th, have been revoked by *A*'s resuming cohabitation, then *H* and *W* are, in Shiah law, perpetually prohibited from remarrying. But such perpetual prohibition does not take place where after the last mentioned six divorces, *W*'s periods of 'iddat' have been allowed to expire, and *H* and *W* have been re-married each time.<sup>5</sup>

The word "divorce" is ambiguous. It is used by writers on Muhammadan law to denote sometimes the dissolution of marriage,<sup>6</sup> at other times the formula in which the pronouncement of divorce is made, viz., the words that are uttered, or written, for the purpose of effecting a dissolution of marriage. Such words may be validly uttered, and thus effective; or their utterance may be ineffectual for want of some legal requirement; or, thirdly they may be recalled before the dissolution of marriage is effectuated, by which act the divorce is "revoked," and hence no actual dissolution of marriage may take place, notwithstanding that the pronouncement has been made. When, however, it is said that a man is not permitted,<sup>7</sup> to remarry his thrice-divorced wife, what is meant is that

By "three divorces" is meant three (or triple) pronouncements of divorce not necessarily three dissolutions of marriage.

<sup>1</sup> *I. e.*, not by mere valid retirement; and lawfully, *e. g.*, not during a pilgrimage or an obligatory fast. *Bail. II. 128.*

<sup>2</sup> *Bail. I. 43, 44, 205, 200, 292; II. 124; Barkat Bibi v. Jalal Din* (1908) 45 *Punj. Rec.* 459 (No. 97). *Cl. Akhtaroonissa v. Shariudoolah Chowdhry* (1887) 7 *W. R.* 268, where it is stated that from the fact of remarriage with the first husband the Court will not presume that all the requirements of the law (*i. e.* marriage and consummation with another husband) have been fulfilled;

*and quare*; see s. 49, below, and footnote thereto.

<sup>3</sup> *Bail. II. 124.*

<sup>4</sup> *Bail. II. 119.*

<sup>5</sup> *Bail. II. 220 (first).*

<sup>6</sup> It may also be used either to denote one special method of dissolving marriage, *i. e. talak*, or all dissolutions of marriage, viz., including, *e. g.*, *zhar*, *li'an*, *etc.*

<sup>7</sup> *Viz.*, unless the wife marries a second husband immediately.



after he has uttered three pronouncements of divorce, re-marriage is not permissible.<sup>1</sup> It is not meant that there should be three actual dissolutions of marriage, nor three occasions when the wife ceases to be such and leaves the husband's society. For instance, the husband may (under Hanafi law) utter the three pronouncements in one breath, in which case between the first and subsequent pronouncements, there is no time for any separation to take place. In such circumstances the moment after the three pronouncements have been made, the bar against the parties re-marrying comes into effect. While again, there may be two single pronouncements of divorce, each allowed to remain unrevoked, so as to cause a dissolution of marriage, and each followed by a complete severance of the relation of husband and wife, and still the parties, if they choose, may re-marry immediately after the second dissolution of marriage.

In this work the expression "pronouncement of divorce" refers to the formula; "dissolution of marriage" refers comprehensively to all dissolutions: 'talaq' (translated "divorce") is one particular mode of dissolving marriage.

The justification for the rule of Muhammiadan law in the present section cannot be understood, unless it is remembered that it did away with a great engine of oppression in the hands of the pre Islamic Arabs, who could keep their wives in a species of perpetual bondage, pretending to take them back after repeated divorces, merely for the purpose of preventing the wives from re-marrying and from seeking the then much needed protection of a husband.

Merely "valid retirement," without consummation with the second husband, does not suffice to legalise remarriage with the first husband: s. 41. As the husband must be adult to be able to divorce, where the second marriage has taken place with a boy over ten years old, but under puberty, it must await his arriving at puberty before it can be dissolved; see ss. 48 and 124, below.

42. (1) According to Shafi'i law a 'khuḷ' or 'mubaraat' is not reckoned as a pronouncement of divorce, for the purpose of establishing prohibition<sup>2</sup> by divorce under s. 41, above.<sup>3</sup>

(2) The Shiah authorities are divided on the question whether or not a 'khuḷ' or 'mubaraat' must be so reckoned.<sup>4</sup>

<sup>1</sup> Viz., unless the wife marries a second husband immediately.

<sup>2</sup> See s. 41, above.

<sup>3</sup> *Sharḥ-ul-Viqaya, Nikah*, chapter on *khuḷ*, *ad mod.*

<sup>4</sup> *Ball. II. 120.*

"Divorce" is its two meanings.

Object of the rule in s. 41.

The second marriage must be consummated.

Whether 'khuḷ' is a divorce within s. 41.

## SECTION 43.

(Shiah law)  
cancellation of  
marriage not  
divorce.

After zihar,  
expiation  
necessary.

43. According to Shiah law the cancellation of a marriage for a physical blemish<sup>1</sup> does not count as a pronouncement of divorce for the purpose of establishing prohibition by divorce under s. 41.<sup>2</sup>

44. Where a man has made 'zihar'<sup>3</sup> with reference to his wife, and the marriage has been subsequently dissolved, they cannot again lawfully intermarry<sup>4</sup> with each other, until the man has made expiation.<sup>5</sup>

(Shiah law)  
after 'li'an'  
marriage pro-  
hibited.

45. According to Shiah law where a man has made 'li'an'<sup>6</sup> against his wife, and they have accordingly been separated, prohibition to marry is perpetually established between them.<sup>6</sup>

(Shiah law)  
persons be-  
tween whom  
nine divorces  
have taken  
place cannot  
intermarry.

46. According to Shiah law, if a woman is divorced nine times by one husband (being twice intermediately married to another, or others) the prohibition to remarry the husband who has divorced her nine times, becomes absolute, and incapable of being ever removed.<sup>7</sup>

(Shiah law)  
second mar-  
riage with  
stipulation that  
it is valid only  
for legalising  
remarriage,  
void.

47. According to Shiah law, where a marriage is contracted with the second husband, on the express understanding that it is contracted merely for the purpose of legalising (in accordance with s. 41, above) the remarriage of the wife with the first husband (who has divorced the wife three times) and with a stipulation that the second marriage shall be effectual only for the said purpose, then both the second marriage and the stipulation are void.<sup>8</sup>

Age of second  
husband.

48. For the purposes of s. 41, above, the second husband must, according to Sunni law, be at least ten years

<sup>1</sup> See ss. 191—199, below.

<sup>2</sup> Bail. II. 61; *Da'ayan* (Notes): see p. 33, above.

<sup>3</sup> *Zihar* is practically a statement by the husband that he will not touch his wife, because she is like a mother to him: ss 178—181, below.

<sup>4</sup> It would be more accurate to say that they may intermarry, but cannot have conjugal intercourse: Bail. I. 242.

<sup>5</sup> *Li'an* is an accusation of adultery in a special form: ss. 182—184, below. Bail. II. 28 35-36, 119, 120; *Da'ayan* (Notes): see p. 33, above.

<sup>6</sup> Bail. II. 20, *Da'ayan* (Notes).

<sup>7</sup> Bail. II. 28, 35, 86, 119, 120; s. 41, *ill.* (2) above; *Da'ayan* (Notes).

<sup>8</sup> Bail. II. 36. Neither will a mere *mut'a* do: Bail. II 121; *Da'ayan* (Notes).

old; and according to Shiah law he must have attained SECTION 48. puberty before the marriage with him can be dissolved. He need not be of sound mind.<sup>1</sup>

49. Where the question is, whether or not, the second marriage referred to in s. 41, above, has been consummated, the assertion or denial of the wife will be presumed to be correct.<sup>2</sup>

Presumption as to consummation with second husband.

(7) *Prohibition by Difference of Religion.*

50. In accordance with Sunni Hanafi law,—

(a) a man may not lawfully<sup>3</sup> marry a fire-worshipping, or idolatrous, woman;<sup>4</sup> but he may lawfully marry a 'kitabia,' i.e., a woman who believes in a heavenly or revealed religion with a 'kitab,' or book that has come down to the followers of that religion;<sup>5</sup> (b) a woman may not lawfully<sup>3</sup> marry a non-Muslim<sup>6</sup> even though he is a 'kitabi,' i.e., a believer in such a religion as is referred to in clause (a).

Male may not marry fire-worshipper nor idolatress.

*Explanation.*—A woman who does not herself profess to be a fire-worshipper or idolatress, will be considered a 'kitabia,' if one of her parents is a 'kitabi' or 'kitabia,' notwithstanding that the other parent is a fire-worshipper or idolater.<sup>7</sup>

Believing in the Book of Abraham, or of Seth, or the Psalms of David,

<sup>1</sup> Ball. I. 290; II. 124; *Du'ayam (Notes)*.

<sup>2</sup> Ball. I. 291. On presumptions of this nature see s. 59, above, and comment thereto; and cf. *Akhtarbannasa v. Shariutoolah Chowdhry* (1867) 7 W. R. 268. There the Court refused to order restitution of conjugal rights at the suit of the husband, who merely proved the second marriage after the three divorces. There was no evidence of an intermediate marriage of the wife with another husband, and the Court refused to presume it in favour of the husband—*sed quære*.

<sup>3</sup> In Hanafi law it would be more accurate to say "regularly" rather than "lawfully." See ss. 83 sqq. below.

<sup>4</sup> Hed. 30; Ball. I. 40.

<sup>5</sup> In such a case, of course, the law by which the woman is governed in British India would also have to be considered: s. 9, Act XV. of 1872 for Christian women, which requires that when either of the parties is a Christian

the marriage shall be solemnised in accordance with s. 5 of the said Act, otherwise it is void. Cf. *Re Uth* (1885) 35 L. T. 711, noted in the comment to s. 18, above. See also the Special Marriage Act, III. of 1872 which required a renunciation of Islam before a marriage can take place in accordance with its provisions. A bill for the removal of that requirement was introduced in the Legislative Council, but it did not become law.

<sup>6</sup> Ball. I. 41, 42; *Erasmot Bahadur v. Shaheb Zadi Begum* (1870) 14 W. R. 123; affirming on Review, S. C., (1866) 12 W. R. 512; 4 Beng. L. R., A. C., 108; *Bekhabhi Kishen Prasad v. Thakur Das* (1893) 19 All. 375 (holding that a Christian cannot marry a Shiah woman).

<sup>7</sup> Ball. I. 41 *Quære* whether Buddhism is a *kitabia* religion: In *Abdul Razak v. Aus Mahomed* (1893) 21 Cal. 666, 21 L. A., 56 the P. C. held that the question was taken at too late a stage in that appeal, and did not decide it.

SECTION 50. makes a person a 'kitabi,' hence a Jew or a Christian is a 'kitabi.' The question has been raised whether a Buddhist is a 'kitabi', but has been left undecided.<sup>1</sup>

Who is a  
'kitabi.'

Apostasy  
'Nowroz Ali  
v. Aziz Bitt.'

It has been held that the use of blasphemous language against the Prophet by a Mussulman husband amounts to apostasy, and dissolves the marriage;<sup>2</sup> and in another case, between Hindu parties, it was said that "it would be extreme violence to the religious opinions and social feelings of a wife" to force her to live in the society of a husband who had renounced her religion, and that in such cases the Court may refuse to order restitution of conjugal rights.<sup>3</sup>

(Shiah law)  
marriage with  
'kitabia' wife.

51. According to Shiah law marriage with the follower of a religion other than Islam is unlawful. The majority of the 'Ithna 'Ashari' authorities hold that a male Muslim may contract 'mut'a' with a 'kitabia.'<sup>4</sup>

'Isma'ili'  
Shihs.

The 'Isma'ili' Shihs do not recognise 'mut'a,'<sup>5</sup> and their law agrees with that of the Sunnis, see ss. 25 and 50, above.

'Usuli' and  
'Mu'tazala'  
Shihs permit  
permanent  
marriage with  
'kitabia'.  
*Quere* even  
about 'Ithna  
'Ashari.

Syed Ameer 'Ali mentions that the Usuli Shihs and 'Mu'tazalas' agree with the Sunnis in permitting a Mussulman to marry permanently a wife who is not a Mussulman but a 'kitabia.'<sup>6</sup>

Even as regards the 'Ithna 'Asharis' the rule is not free from doubt; for though the 'Sharaya'-ul-Islam'<sup>7</sup> mentions the view referred to in the second sentence of this section as the most notorious, or generally received opinion, still, in other places, the author of that book seems to contemplate that a Shiah may be permanently married to a 'kitabia' wife; and opinions are referred to in accordance with which a marriage "even though the contract were a permanent one" can be cancelled (subject to certain conditions) if the husband learns that the wife is not a Muslima but only a 'kitabia'.<sup>8</sup>

Mrs. Meer  
'Hassan 'Ali'  
instance.

Sir R. Wilson considers that proof is furnished of the fact that some Indian Shihs take the view that a Shiah may marry a 'kitabia' wife permanently, by the case of Mrs. Meer Hassan 'Ali, the authoress of

<sup>1</sup> Bull. I. 41 *Quere* whether Buddhism is a *Kitabi* religion; in *Abdul Razak v. Awa Mahomed* (1893) 21 Cal. 666, 21. I.A., 56 the P. C. held that the question was taken at too late a stage in that appeal, and did not decide it.

<sup>2</sup> *Nowroz Ali v. (Musummat) Aziz Bibi* (1870)

11 P. R. 258, (No. 124); see as to apostasy having the effect of cancelling the marriage of its own force *ib.*, pp. 253-257, 263, 264; cf. *(Bai) Jina v. Kharsa Jina* (1907) 31 Bom. 306 (excommunication of husband sufficient

defence to wife in husband's suit for restitution of conjugal rights).

<sup>3</sup> *Muchoo v. Arzoon Sahoo* (1866) 5 W.R. 235.

<sup>4</sup> Bull. II. 20.

<sup>5</sup> See s. 25, above.

<sup>6</sup> Ameer 'Ali's "Mahommedan Law," (3rd Ed. 1908), II. 320.

<sup>7</sup> Bull. II. 99.

<sup>8</sup> Bull. II. 65, (par. 3).

"Observations among the Mussulmans of India," (first published SECTION 51. in 1832) "who lived for 12 years with a Shiah husband in Oudh, then a protected Native State, all the time openly professing the Christian religion; unless indeed we assume her to have been a mere 'mut'a' wife which the general tone of her narrative renders very unlikely."<sup>1</sup>

Surmises with reference to the case of Mrs. Meer Hassan 'Ali are not very helpful. For, even if she had contracted merely a 'mut'a,' there is no reason to suppose that her external relations would indicate that fact, or the term for which she had been married, any more than they would indicate any other condition that may have been included in the marriage contract. As has been pointed out in the comment on s. 25, 'mut'a' has its origin in a connection that was characterized by greater freedom and power in the woman than the ordinary marriage gives her. From that point of view 'mut'a' may be considered a less desirable form for the husband; but Mrs. Meer Hassan 'Ali (if she ever considered the matter and was in a position to dictate her terms) could hardly have objected to a marriage in this form, on the ground that her husband would have so much less power over her. Apart from this consideration, it may appear as a very adaptable form of marriage, for, if the term is fixed at, say, 100 years, the marriage is as good as permanent, and it cannot be dissolved, like the ordinary marriage, by divorce, at the will of the husband,<sup>2</sup> and as regards maintenance, inheritance, etc., the parties can agree to the terms that they choose. In regard to inheritance, even apart from agreement, the husband might provide for the lady by his will.

Some incidents of 'mut'a' marriage compared with those of permanent marriage.

### (8) Prohibition by Supervenient Illegality.

52. Supervenient prohibition<sup>3</sup> invalidates the marriage of persons already married, where, after marriage, the parties come to acquire a foster relation<sup>4</sup> within the prohibited degree, or one of them becomes a fire-worshipper,<sup>5</sup> or

Prohibition supervening by fosterage, change of religion, etc.

<sup>1</sup> "Anglo-Muhammadan Law," 426.

<sup>2</sup> See, however, foot-notes to s. 25 (8). The power of the husband to release the term may be restricted by agreement.

<sup>3</sup> As to illegality supervening in England, after a contract has been made, see: *Bentley v. De Crepigny* (1800) L. R. 4 Q. B. 180; *Nearby v. Sharpe* (1878) 8 Ch. D. 39, 49, 52. Persons have been convicted in England of what was made an offence only after the act was done, by a subsequent Act of Parliament; as Acts of Parliament used to have effect from the first day

of the Sessions in which they were passed—that rule is altered now; *Luttrell v. Holmes* (1792) 4 T. R. 660; *R. v. Thurston* (1863) Lev. 91. Cf. *R. v. Bailey* (1800) Russ. & Ryan's Cr. Cas. 1.

<sup>4</sup> This can only happen, of course, if one of the parties is within the period of suckling, i. e. less than two years old according to opinion of the majority of lawyers, (or two and a half years according to Abu Hanifa) see ss. 32, 33, above.

<sup>5</sup> Ball, II. 18,

SECTION 52. an idolator:<sup>1</sup> provided that in the Courts of British India no person can be held to have forfeited any rights or property, or to have his right to inheritance impaired, or affected, by reason of his or her renouncing, or having been excluded from, the communion of any religion.<sup>2</sup>

*Illustrations.*

(1) F and FB are brothers, and their infant children H, and W, are married to each other. H is then suckled by FM, the mother of F and FB; and, thus H becomes the foster-son of FM: consequently prohibition is established between the marriage of H and W under s. 35 (3), above, since W is the descendant of H's foster-mother.<sup>3</sup>

(2) In the last illustration, if H had been suckled by W's mother, or sister, or by FB's wife, or by the wife of W's brother, prohibition would have been equally established.<sup>4</sup>

(3) Where a person has two wives, and one of them, being an infant, is suckled by the other,<sup>5</sup> prohibition is established, if the marriage has been consummated, between the husband and both wives; otherwise only between him and the adult wife.<sup>6</sup>

(4) H marries two infant wives, and they are both suckled by a stranger N. Prohibition is established by unlawful conjunction against H being the husband of both the infants, but he may remarry either of them at pleasure.<sup>7</sup>

*Illicit intercourse*

Illicit intercourse with a relation of the husband or wife does not render the existing marriage unlawful, though where such illicit intercourse has already taken place before the marriage, it has for establishing prohibition by consanguinity the same effect as consummation of a marriage.<sup>8</sup>

(9) *Prohibition during Pilgrimage.*

(Shiah and  
Shaf'i law)  
Prohibition  
during pilgrim-  
age.

53. According to Shiah and Shaf'i law, after a man has come within the sacred territory on a pilgrimage to Mecca, and put on the pilgrim's dress,<sup>9</sup> he cannot lawfully

<sup>1</sup> Ball. I. 41; II. 30.

<sup>2</sup> Caste Disabilities Removal Act, XXI. of 1850; and see comment to s. 1, above. Ball. I. 41, II. 18, 30, 41; *Nouroz Ali v. (Musummat) Aziz Bibi* (1876) 11 P. R. 253 (No. 124); (*Bai Jina v. Kharua Jina* (1907) 31, Bom. 386

<sup>3</sup> Ball. II. 19.

<sup>4</sup> Ball. I. 198; II. 18, 19.

<sup>5</sup> Even though the adult wife has been divorced, provided, according to Shiah law,

that the milk on which she has nursed the other wife proceeds from the first husband: Ball. II. 15, 20. According to Sunni law, it does not matter from whom the milk proceeds: Ball. I. 200.

<sup>6</sup> Ball. I. 198; II. 10.

<sup>7</sup> Ball. I. 198 (II. 10-12).

<sup>8</sup> Ball. II. 23. Cf. s. 29, above.

<sup>9</sup> The pilgrim's dress is called *ihram*, in Arabic, and the pilgrim dressed in it, *muhrim*,

enter into a contract of marriage; and, in Shiah law, if he enters into a contract of marriage under such conditions, knowing<sup>1</sup> that it is unlawful for him to do so, then absolute prohibition is established between him and the woman whom he has purported so to marry, and the two can never lawfully become husband and wife.<sup>2</sup>

Compare the perpetual prohibition that the Shiah law inflicts on persons who marry when the woman is known by the husband to be in her 'iddat,' and after nine divorces ss. 37, 41, above. According to the Hanafis the abovementioned circumstances merely forbid intercourse.<sup>3</sup>

#### § 6.—*Agents or Proxies for Marriage.*

**54.** A person who has not attained puberty, or is of unsound mind, cannot validly act as agent or proxy for marriage; and in Shafi'i and Maliki law, no woman can validly act as such agent or proxy.<sup>4</sup>

The age of competence for this kind of agency is not affected by the Indian Majority Act, by reason of s. 2 thereof, which is as follows: "Nothing herein contained shall affect (a) the capacity of any person to act in the following matters (namely), Marriage, Divorce, Dower, and Adoption . . ." See comment to s. 5A, above.

**55.** An agent or proxy may be authorized to contract a marriage, with a specified person only; or with a person answering to a specified description; or generally, with any person whatever.<sup>5</sup>

An agent for marriage must be authorised before he acts as such, and the present section does not apply to a 'fuzuli,'<sup>6</sup> i.e., an unauthorised person purporting to act on behalf of another without the knowledge or authority of that other: see s. 57, below, and the illustration to it.

<sup>1</sup> If he is not aware that the marriage is unlawful, the marriage is nevertheless void; but prohibition between the parties is not established unless he is aware.

*Nikah.*

<sup>2</sup> *Bail. I.* 133.

<sup>3</sup> *Bail. I.* 10, 46; *II.* 4; *Hed.*, 43 (ed. i.)

<sup>4</sup> *Fuzuli* means "busybody, meddler, impertinent fellow."

<sup>5</sup> *Bail. I.* 373, 78; *Hed.*, 43.

Who may be agents for marriage.

Nature of authority.

'Fuzuli' or unauthorised person.

## SECTION 56.

One person  
representing  
both sides.

56. The same person may have, or be given, authority to act in a marriage contract as proxy or guardian for both parties; or as proxy or guardian for one party, and principal on his own behalf; or as proxy for one party, and guardian for the other.<sup>1</sup>

Ratification of  
marriage by  
unauthorized  
person.

57. (1) Where a marriage is purported to be contracted by one person on behalf of another, without the knowledge or authority of that other, the latter may, except under Shafi'i and Shiah law,<sup>2</sup> elect either to ratify or to disown the marriage. The ratification may be express or implied,<sup>3</sup> provided that it takes place before the death of the other party to the marriage.<sup>4</sup> After ratification the same effects follow as if the marriage had been initially contracted by the authority of the person ratifying.<sup>5</sup>

(2) According to Shafi'i law a marriage so purported to be contracted is null and void.<sup>6</sup>

(3) The Shiah authorities are not unanimous on this point: according to some, such an unauthorized contract is void and cannot be ratified; but the view of the majority is that it may be validly ratified.

## Illustration

F purports to contract his daughter, *D*, who is of age, in marriage to *H*, and it is not determined till the death of *H*, whether *D* assented to, or rejected the marriage. *H*'s heirs allege that there was no assent, and that *D* is not *H*'s widow. If *D* alleges that she had authorized *F* to contract the marriage, she can inherit, but not if she alleges that the marriage was contracted without her authority, and that she ratified it.<sup>7</sup>

Agent must be  
expressly  
authorised to  
marry principal  
to himself or  
his ward.

58. An agent or proxy for marriage cannot, unless he<sup>8</sup> is expressly authorized to do so,<sup>9</sup> contract his<sup>8</sup> principal in marriage either with himself,<sup>8</sup> or with any person who is his ward for marriage; nor, where the principal is a woman,

<sup>1</sup> Bail. I. 184, Hed. 42.

<sup>2</sup> Hed. 42.

<sup>3</sup> As to sale by *fuzuli*, see Hed. 206, and Indian Contract Act, ss. 9, 107.

<sup>4</sup> Bail. I., 60, 85.

<sup>5</sup> Hed. 42; Bail. I. 76, 85, 87; II. 8.

<sup>6</sup> Hed. 42.

<sup>7</sup> Bail. I. 60; see (*News*) *Mulka Jehan*

*Sahiba v. Mahomed Uskerree Khan* (1873) L. R. I. A., Sup. Vol., 192, 26. W. R. 20. The ratification must be before the death of either party: hence the last clause of the illustration.

<sup>8</sup> The masculine includes the feminine gender in s. 58.

<sup>9</sup> Bail. I. 76, 77; II. 9; see also Hed. 388 (col. i.).



with a person not her equal in respect of the matters **SECTION 56** mentioned in s. 80, below.

There is difference of opinion on this point amongst the Shiah authorities, but according to the 'Sharaya'-ul-Islam' the more approved doctrine agrees with the Sunni law.<sup>1</sup>

In the 'Da'ayam-ul-Islam' (a Shiah Isma'ili text) it is provided that the authorization should be in the presence of two witnesses. A nice question might arise whether this rule is one of evidence, or is sufficiently attracted by the rule contained in s. 23, above, into substantive law.<sup>2</sup>

### § 7.—Guardians for Marriage.

#### (1) Qualifications for Guardianship for Marriage.

**59.** A guardian for marriage is a person who <sup>Guardians for marriage defined.</sup> is authorized by law<sup>3</sup> to make a valid contract of marriage<sup>4</sup> on behalf of a minor, or of a person of unsound mind.

The expression "guardian for marriage" is generally used to translate the Arabic word 'wali,' which seems to have a wide connotation, ranging between, and partly including, the notions of guardianship and of agency.<sup>5</sup>

As to the powers of a guardian of the person or of property, with reference to marriage, see s. 230 and comment to s. 232A, below, and *Monijan Bibi v. District Judge of Birbhum*.<sup>6</sup>

"Guardians for marriage" would be what Prof. Sohn calls "tutelage<sup>Tutelage representation</sup> representatives" in Roman law, i.e., where the principal himself is incapable of performing the juristic act in question.<sup>7</sup>

It has been held<sup>8</sup> that a suit may be brought by a minor wife on an agreement between her father and the father of her husband, to the effect that she would be paid a specified sum as soon as she entered her husband's house, and that the principle that one who is not a party to an agreement<sup>4</sup> cannot sue on it<sup>8</sup> has no application to such a case. <sup>'Tweddle v. Atkinson.'</sup>

<sup>1</sup> Ball. II. 9 (first).

<sup>2</sup> *Da'ayam* (Notes); see p. 38, above.

<sup>3</sup> Guardians for marriage cannot be appointed by will (s. 68, below). *Quære*, whether the appointment of a guardian by the Court under the Guardians and Wards Act affects the right of the guardian for marriage, see ss. 251, 254, below.

<sup>4</sup> (*Nasab*) *Khwaja Muhammad v. (Nasab) Husaini Begum* (1910) 32 All. 410; 3 IL A. 152. 12 Bom. L. R. 638 (P. C.) Attention may be

drawn to *Kullan v. Mussamat Piari* (1879) 14 Punj. Rec. 446, (No. 157) for a discussion of this topic.

<sup>5</sup> Cf. Indian Limitation Act, s. 21 (1), by which a guardian, committee, or manager of a person, is included in the terms "agent duly authorized."

<sup>6</sup> (1914) 20 Cal. L. J. 91.

<sup>7</sup> Institutionen, s. 32, Transl. p. 145, referred to in Holland's "Jurisprudence," 108.

<sup>8</sup> *Tweddle v. Atkinson* (1861) 1 B. & S. 392.

## SECTION 60

Who may be  
guardian for  
marriage.

*Illustration*

The 'Durr-ul-  
Mukhtar' on  
guardian for  
marriage.

Exclusion of  
minors,  
lunatics, and  
non-Muslims.

General rule

Absence of  
genuine  
traditions

60. No person who is under the age of puberty, or of unsound mind, or who does not profess Islam as a religion,<sup>1</sup> can be a guardian for the marriage of a Mussulman.<sup>2</sup>

A Muhammadan female is married in her infancy by her mother, against the consent of her father, who has become a Jew; held that the marriage is valid, and the husband may sue for restitution of conjugal rights.<sup>3</sup>

The following are translations of extracts from the 'Durr-ul-Mukhtar', a book of authority on Hanafi law:

"From the definition of a guardian, it follows that a minor, an insane person and an executor<sup>4</sup> are absolutely excluded. Unless a minor or insane person ceases to be under the disqualification of minority or insanity, and unless an executor is also an heir, he cannot be a guardian for marriage, whether or not the father has appointed him guardian by his will. And, since it is necessary for the guardian to be an heir, so a non-Muslim and a slave also cannot be guardians for marriage. . . . Guardianship for marriage may arise in four ways. (1) by 'qarabat' (i.e., blood relationship); as a father may contract his daughter in marriage, (2) by ownership: as a man may contract his slave in marriage, (3) by the 'wila' of emancipation; (4) by 'imnat': as the ruler or the Qazi may contract one who has no heirs for marriage."<sup>5</sup>

"The general rule is that the person who can deal with his own property, can deal with his person; and one that cannot deal with his own property, cannot deal with his person, hence, as a sane woman, who is of age, can deal with her property, she can also deal with her person by way of marriage."<sup>6</sup>

"Bukhari and Yahya ibn Mu'ayyan have said that on this point, that is, on the conditions of guardianship, not a single tradition is correct."<sup>6</sup>

The absence of authentic traditions on the point will explain the striking divergence amongst the four Sunni schools, and even amongst the three exponents of the Hanafi school—not to mention the difference between the Sunnis and Shu'abis—see ss. 61, 64, 65, 66, below.

<sup>1</sup> Cf. *Munir ul-Bihar v. District Judge of Bahawalpur* (1914) 20 Cal. L. J. 91, 97.

<sup>2</sup> *Ibid.* L. 17, 19, 11, 10.

<sup>3</sup> *In the matter of Mahon Bibi* (1871) 13 Beng. L. R. 160 (1). *Erskine v. Mubaz* (1887) 24 Pind. Rev. 126 (No. 11), see, however, cases cited in the footnotes to the comment to this section.

<sup>4</sup> With reference to the executor, it would be

more accurate to say that he has no right by virtue of his being an executor. The Arabic rhym expresses that sense, which is made clear, by the next sentence.

<sup>5</sup> *Durr-ul-Mukhtar*, Book on *Nikah*, Chapter on *Wala' ad-din*.

<sup>6</sup> *Ibid.*

The Caste Disabilities Removal Act, XXI. of 1850, refers to those who have "renounced or have been excluded from the communion of any religion." Will it therefore entitle a person to act as guardian for marriage, though, having been a Muslim, he has apostatized? If it is held that prevention from being a guardian for marriage, is "a forfeiture of a right," the Act will apply, and will remove the disqualification imposed by Muhammadan law. It has been held that the appointment of a guardian to a minor even for general purposes, is not a matter of such a private right, as can be the subject of arbitration.<sup>1</sup> On the other hand, a Hindu mother,<sup>2</sup> and (following that decision,) a Mussulman father<sup>3</sup> have been held not to have forfeited, by change of religion, their right to the custody and education of their children. But the right to custody is more likely to be held as a class of right contemplated by Act XXI of 1850 than the power to act as representatives for marriages; for the latter "authority" is given, as was said by Imam Abu Hanifa, "out of regard for the interest of the child" words that might have been taken out of our law reports of to-day.<sup>4</sup> Besides, in many such cases, the difficult question is involved relating to the religion in which the child should be brought up.<sup>5</sup> In a Bombay case<sup>7</sup> a convert to Islam from Hinduism was held not to have lost his authority to give his son in adoption to a Hindu, and it was assumed that the authority to give in adoption was a right within Act XXI of 1850,—the only question that was considered being whether adoption was in its nature such an act as could be performed only by a Hindu. The last cited case seems to have some bearing on the present question; if the power to give in adoption is held to be a right falling within the Act, it would seem to follow that the power to give in marriage would also be so held. Still, the Courts would, no doubt, consider the present question on its own merits, and would probably prefer to decide each case on a consideration of all the circumstances, without fettering their discretion.

The Caste Disabilities Removal Act does not apply, of course to a person who has never been a Mussulman; and, as, by Muhammadan law, such a person cannot be a guardian for marriage, apparently that rule of Muhammadan law is enforceable in British India. The question may arise where the minor has been converted to Islam from another religion;

Effect of Caste Disabilities Removal Act, 1. on claim to act as guardian for marriage made by a convert from Islam.

made by one who is not and has never been a Muslim.

<sup>1</sup> *Mahadeo Prasad v. Budeghri Prasad* (1908) 30 All. 137.

<sup>2</sup> *Murcho v. Arzoon* (1860) 5 W. R. 215.

<sup>3</sup> *Gul Mahomed v. Mussummat Wazir Begam* (1901), 36 P. R. 191, (No. 60), see *contra*, illustration to this section.

<sup>4</sup> *Ibid.* 30.

<sup>5</sup> *E.g., Mahadeo Prasad v. Budeghri Prasad*

(1908) 30. All. 137.

<sup>6</sup> See *Re Sathri, Jampo v. Abram* (1891) 16 Bom. 306, *Re Jashu Aram* (1897) 23 Cal. 290, *Makomed Lal Sirooh v. Nobodip Chunder Sirooh* (1898), 25 Cal. 881.

<sup>7</sup> *Shamsing v. Saitabai* (1901), 25 Bom. 551, 554.

**SECTION 60.** in which case its relations would be non-Muslims, but Muhammadan law would apparently be applicable to the child.

Neglect of duty  
by guardian  
for marriage.

Where the person who is entitled to act as guardian, neglects his duty wilfully or otherwise, and refuses a good offer of marriage, the Muhammadan law seems to indicate proceedings similar to what would probably be the easiest course in British India, namely an application for the appointment of a guardian to the minor, under the Guardians and Wards Act, s. 7.<sup>1</sup> The proceeding may have to be in the form of an application to remove the existing guardian on the ground of his refusal to accept the offer of marriage, or a suit may have to be filed for the purpose.

*(2) Persons Entitled to be Guardians for Marriage.*

*(a) Hanafi Law.*

Order in which  
persons are  
entitled to be  
guardians for  
marriages in  
(Hanafi law)

1. male agnate  
descendants,
2. ascendants,
3. collaterals,
4. cognates  
and female  
agnates

**61.** According to Hanafi law the following persons are entitled, in the order of precedence in which they are mentioned below, to act as guardians for marriage of a minor or insane person; provided, that (except to the extent that the subject or context, shows a contrary intention,) where more persons than one are included in a group, the nearer excludes the remoter: and, proximity for this purpose being reckoned in the same manner as for inheritance:—<sup>2</sup>

(1) Male agnates;<sup>3</sup>

(2) According to Abu Hanifa (and contrary to the opinion of Imam Muhammad<sup>4</sup>) cognates and female agnates in the following order, *viz.*, —

(a) the mother ;

(b) [*semble*, ascendants, descendants and collaterals, SECTION 61.

respectively, other than male agnates;<sup>1</sup> but so that (i) a female agnate is preferred to a female cognate in the same line: and (ii) amongst collaterals, a male is preferred to a female;<sup>2</sup> but provided that (iii) no collateral is entitled to be such guardian, who is not within the degrees of relation establishing prohibition to marry.<sup>3</sup>]

(3) According to Imam Muhammad, 'in the absence of male agnates, and according to Abu Hanifa in the absence of all relations by blood, the 'maula,'<sup>4</sup> or successor by contract, as defined in s. 634 (2), below, is the person entitled to be such guardian.<sup>5</sup>

(4) 'The person next entitled as such guardian is the Sultan or ruler, and then the judge,'<sup>6</sup> and a person appointed by him.<sup>7</sup>

<sup>4</sup> Maula.  
<sup>6</sup> Ruling authority of Court.

#### GUARDIANS FOR MARRIAGE UNDER HANAFI LAW.

The following is an enumeration of the persons entitled to be guardians for marriage under Hanafi law. —

(1) (i) Son, (ii) Son's son; (iii) Son's son's son; (iv) *other male agnate descendants*;

(2) (i) Father, (ii) Father's father, (iii) Father's father's father (iv) *Other agnate male ascendants*;

(3) (i) Full brother, (ii) Consanguine half-brother, (iii) Son of full brother; (iv) Son of consanguine half-brother, and (v) *So on how-low-soever*.<sup>8</sup> (vi) Full uncle, (vii) Half uncle by the father's side, (viii) Son

<sup>1</sup> Male agnates come higher up in the order of precedence: see s. 61, clause (1).

<sup>2</sup> Bul. I. 15-16, *Sharke-e-Viqaya*, Chapter II *ad fin.*

<sup>3</sup> So in Hed. 38. This prudent limitation does not seem to be contained in the *Fatawa 'Alaungiri*, *Durr-ul-Mukhtar* or *Sharke-e-Viqaya*, nor does it seem to apply to agnates, and see s. 251, below.

<sup>4</sup> See s. 634 (2), below. He is also called more explicitly the "maula of friendship," to distinguish him from the emancipator of a slave, who is referred to as the "maula of emancipation."

<sup>5</sup> Hed. 39.

<sup>6</sup> It is stated in Bul. I. 17, and the *Sharke-e-Viqaya*, that the judge has no authority, unless

he is specially authorised in that behalf, but the "Sultan's" authority would probably come within the inherent jurisdiction of the Courts in British India, even without any such provision of the Mu-Im law. Cf. *Mahadeo Prasad v. Budechri Prasad* (1908) 30 All. 137, 139 per Karanath Hussain, J. See also *Gurdeo Singh v. Chandrilal Singh* (1907) 26 Cal. 193, 203, sqq.; *Hakumchand Baid v. Kamalchand Singh* (1905) 33 Cal. 927, 931. *Re H.'s Settlement, H. v. H.* [1909] 2 Ch. 260.

<sup>7</sup> Bul. I. 46-7; Hed. 39.

<sup>8</sup> Thus (a) the full brother is preferred to the half-brother, and (b) the son of the father's full brother, to the son of the father's half-brother.

SECTION 61.  
Guardians for  
marriage

of the full uncle; (ix) Son of the half-uncle by the father, and (x) *Their descendants*: (xi) Father's full paternal uncle; (xii) Father's paternal half-uncle by the father's side; (xiii) and (xiv) sons of (xi) and (xii) *in the same order*, (xv) Grandfather's full paternal uncle. (xvi) Grandfather's paternal half-uncle by the father's side; (xvii) and (xviii) the sons of (xv) and (xvi) *in the same order*.

(4) According to Imam Abu Hanifa but not Imam Abu Yusuf, —

(a) Mother.

(b) (i) Mother's father, *and* Father's mother; *and* Mother's mother; &c., (see table under s. 616, below, omitting P, FF, and FFF and FFFF); *and* (ii) *other cognate ascendants*.

(c) (i) Daughter; (ii) Son's daughter. (iii) Daughter's daughter; *and* Daughter's son; (iv) Son's son's daughter; (v) Son's daughter's daughter, daughter's son's daughter, daughter's daughter's daughter, son's daughter's son, daughter's son's son, and daughter's daughter's son; (vi) *and other cognates and female agnates from the descendants*.

(d) *FIRST descendants of father and mother*. (i) Full sister, (ii) Consanguine sister, (iii) Uterine sister, (iv) Son of full sister; (v) Daughter of full brother, *and* daughter of full sister, (vi) Son of consanguine sister; (vii) Daughter of consanguine mother *and* daughter of consanguine sister; (viii) Son of uterine brother, (ix) Daughter of uterine brother, son of uterine sister, *and* daughter of uterine sister *and so on*. **SECONDLY** *descendants of grand parents (in the same order as in above, adding the words "of the father or mother" (e. g., "full sister of the father or "full sister of the mother"); the father's relations apparently having priority in each grade.]*

(5) The "successor by contract," is defined in s. 634 (2), below,

(6) The Court, or any person appointed by the Court.

It will be seen from s. 61, that the three exponents of Hanafi law are unanimously of opinion that male agnates are entitled in the first instance to be the guardians of minors.

When, however, there are no male agnates, and the question is who are next entitled, then out of the three exponents two differ one from the other, and the view of the third is not known. Abu Hanifa's view is, that, in the absence of the male agnates, the right to guardianship is in "cognates and female agnates." The expression used in the texts (e. g., in the 'Fatawa 'Alamgiri') which is translated "cognates" is 'zavil arham,' which means "persons connected through the womb," or "through females," i. e., cognates. In the law of inheritance the term 'zavil arham' is used to denote the group of persons designated "distant kindred" in

Unanimity as to male agnates being first entitled.

Difference of view between Abu Hanifa and Imam Muhammad as to females and cognates.

English books, and includes all cognates (except "true grandmothers") SECTION 61 together with all female agnates remoter than the sister. It is a misnomer to include any agnates in the term 'zavil arham.' Such a use of the term is, however, justified by convenience in treating of the law of inheritance. But the term 'zavil arham' is used more accurately in connection with guardianship for marriage, and not in the same sense as in the law of inheritance. This is obvious from the examples given in Bail. I. 46, which include the mother, daughter and son's daughter, none of whom fall within the class inaccurately designated 'zavil arham' or "distant kindred" in regard to inheritance. It may be noted that the nearest male cognate mentioned in Bail. I. 46 is the maternal uncle; but it must be a mere accident that a daughter's son, or other male cognate, nearer than a maternal uncle, is not mentioned, for it is expressly mentioned that a daughter's daughter (i. e., a female cognate from amongst the descendants) may be a guardian. The 'Shah-i Viqaya' instances both the daughter's son and grand-daughter's son, as eligible for guardianship.

Thus the rule for priority amongst those entitled to be guardians, is perfectly clear. Sir R. Wilson, however, refers to the passage in the 'Fatwa 'Alamgiri,' translated in Bail. I. 46 as "very strange," and as containing "numerous unexplained gaps." <sup>1</sup> There are no gaps, unless the fact that the case of no cognate from amongst the descendants is instanced (the nearest male cognate mentioned in the example, being the maternal uncle) be considered a gap. The list is illustrative and hypothetical, given for the purpose of explaining the order in which the right accrues; the text writers do not suggest the possibility of the existence of all or any of the persons mentioned as being entitled to be guardians. It was necessary to include descendants in it, as it is a list of those who are the guardians of insane persons as well as of minors. This point seems to have been overlooked by Sir R. Wilson, who thinks, on the other hand, that the Arabic texts inadvertently proceed on the basis that a minor could have children. This is extremely improbable. The improbability is enhanced by the fact that minority, in Muhammadan law, means an age under puberty, and the legal term for a minor most usually employed in this connection, is 'ghair baligh' (i. e., one who has not attained puberty). The authors of the old texts had to carry the law in their heads, and they were less apt to overlook points, or to make mistakes of this nature, than we are, who need the aid of books and libraries much more often than was available to them.

1 "Anglo-Muhammadan Law," (3rd edition) p. 171.

SECTION 61. In no case is caution more advisable than in finding fault with the accuracy of such text writers. They were indeed possessors of their learning, and not possessed by it.

(Hanafi law)  
Any one of  
several joint  
guardians for  
marriage may  
act.

62. Under Hanafi law, where more persons than one are equally entitled to be the guardians for marriage, of a minor or insane person, any one of the persons entitled may contract the minor or insane person in marriage.<sup>1</sup>

Or, to adopt the statement of the 'Zahir Riwayat,' if one of the guardians agrees to the marriage before it is contracted, it is as efficacious as if all had consented after the marriage.<sup>2</sup>

(Hanafi law)  
In absence of  
primary  
guardian, next  
in order may  
act.

63. Under Hanafi law, where the person primarily entitled to be guardian for marriage, is precluded<sup>3</sup> from acting as such guardian, the person next entitled may act in that capacity.

*Explanation.*—A person is considered to be so precluded who is at such a distance, or in such a place, that there is danger of a good offer of marriage being lost if his approval has to be obtained.<sup>4</sup>

(b)

(Shiah and  
Shafi'i law)  
Father and  
"true grand-  
father" alone  
are guardians.

64. According to the Shiah and Shafi'i law, the father and the agnatic grandfather are alone entitled to be guardians for marriage, either of whom may contract a valid marriage on behalf of the minor<sup>5</sup> or lunatic,<sup>6</sup> the authority of the grandfather having precedence over that of the father.<sup>7</sup>

*Illustration.*

H and W, both being minors, are contracted in marriage by their fathers or grandfathers: the marriage is valid, and if either minor dies, the other is entitled to share in the deceased's estate. If, however, the marriage had been contracted by any other person on behalf of the minors, the contract would, in Shiah law, be in suspense, and if either spouse died during minority, the other would not be entitled

<sup>1</sup> Bail. I. 49; Hed. 698.

<sup>2</sup> *Durr-ul-Mukhtar*, Book on *Nikah*, Chapter on Guardian-ship (*Hab-ul-wila*).

<sup>3</sup> (*Shari'at*) *Katwa* v. (*Shari'at*) *Gurbofah* (1468) 13 Buz. L. R. 61, note 10, W. R. 12.

<sup>4</sup> Bail. I. 49; Hed. 698.

<sup>5</sup> Bail. II. 5, 12; *Du'aurum* (Notes); See p. 33 above.

<sup>6</sup> See p. 231, below.

<sup>7</sup> Bail. II. 7, 10 (5th and 8th); Hed. 30, *Badal Aurot* v. *Q. E.* (1891) 19 Cal. 79, 82.



to inherit, unless and until, on reaching puberty, he or she ratified SECTION 64. the marriage.<sup>1</sup>

Thus by the Shiah, Shafi'i and Mahki law,<sup>2</sup> marriage contracted on behalf of a minor, by any person other than the father or grandfather, is considered an unauthorised act which requires ratifications even though it be contracted by the mother<sup>3</sup> or brother or paternal uncle.<sup>4</sup>

65. According to Shiah law, if it becomes necessary that a person who is an adult, but of unsound mind, should marry, he may be contracted in marriage by his or her father or agnatic grandfather or by the executor of either; if it is for his or her benefit to be married then by the Court.<sup>5</sup>

(Shiah Law)  
Guardian for  
the insane of  
male.

(c) *Mahki Law.*

66. According to Mahki law the father alone is entitled to be guardian for marriage.<sup>6</sup>

(Mahki Law)  
Father alone  
guardian.

(3) *Termination of Authority of Guardian for Marriage.*

67. The authority of a guardian for marriage ceases when the ward<sup>7</sup> becomes competent to contract himself or herself in marriage.<sup>8</sup>

When authority  
of guardian for  
marriage  
ceases:  
(1) puberty.  
(2) as to  
females.

(4) *No Testamentary Guardians for Marriage*

68. A father<sup>9</sup> has no power to appoint by his will a guardian for marriage of his minor children, and no appointment purported to be so made can take away the right of the persons entitled by law to be such guardians.<sup>10</sup>

No testamen-  
tary power to  
appoint guar-  
dians for  
marriage.

<sup>1</sup> Bail. II. 11.

<sup>2</sup> On which see ss. 65, and 76, below.

<sup>3</sup> Bail. II. 12.

<sup>4</sup> Bail. II. 9; and see *Mulla Jehan v. Mahomed* (1873) L. R., I. A., Suppl., 192, 26 W. R. 26.

<sup>5</sup> Bail. II. 68.

<sup>6</sup> Hed. 36, (col. 11).

<sup>7</sup> The terms "guardian" and "ward" are strictly not applicable when the authority to contract marriage has ceased. I am, however, sacrificing precision to brevity. See s. 234, below.

<sup>8</sup> See s. 17B, above, *Sobrat v. Jungli*

(1898). 2 C. W. N. 215. *Mohammed Ibrahim v. Gulam Ahmed* (1864), 1 Bom. H. C. R. 236. So in *Asker Ali v. Mahabbat Ali* (1874), 22 W. R. 403 the plaintiff failed in a suit for restitution of conjugal rights, as his alleged wife, though a major, had not consented to the marriage, her father having purported to contract her in marriage without being authorized to do so. Cf. Bail. I. 58-59.

<sup>9</sup> If a father has no such power, *a fortiori* no other person has.

<sup>10</sup> Bail. I. 17; II. 8. The Shiah and Shiah agree in this.

## SECTION 69.

§ 8.—*Avoidability of Certain Marriages.*(1) *Option to Parties to Marriage.*(a) *Options of Puberty, Sanity, Inequality, etc.*<sup>1</sup>

Option of  
puberty and  
sanity.

69. (1) According to Hanafi law, where a minor or lunatic has been contracted in marriage by a guardian who is not the son,<sup>2</sup> father, or agnatic grandfather of the minor or lunatic, he has, on attaining puberty, or recovering reason, the option of avoiding the marriage.<sup>3</sup>

(2) Where a marriage has been purported to be contracted by a person who has not reached puberty, and his guardian (who is other than the son, father or agnatic grandfather) has approved of it, the marriage is voidable, at the option of the minor, on his or her attaining puberty.

Avoiding marriages distinguished from having them declared null and void.

The rules contained in ss. 69—80 must be distinguished from those contained in ss. 201—209, below. In the latter case, the marriage contract has never had the effect of making the parties husband and wife, inasmuch as they are found to be incapable of performing one of the primary objects of marriage, *viz.*, the procreation of children: see s. 17, above.

Option where marriage negligently or fraudulently contracted.

70. The authorities of all schools of Muhammadan law are agreed that where a father or paternal grandfather fraudulently or negligently contracts his minor child or grandchild in marriage, it is voidable at the option of the minor, on his or her attaining majority.<sup>4</sup>

<sup>1</sup> The expression "option of puberty" (in Arabic *khyar-ai-bulugh*) is recognised in English books on Muhammadan law, but not "options of sanity" or "of inequality" or "of improper dowry"; for coming which an apology is due from the author to the reader.

<sup>2</sup> It is only in Hanafi law that a son can over-act on behalf of his lunatic father, for in Shafi'i, Maliki, and Hanbali law other than the Hanafi, the son is not a guardian. See ss. 64—66, above, and it is physically impossible for him to be the guardian of a "minor" father, as a minor father cannot have a son, minority being synonymous with puberty. Even if it were possible, no minor is

eligible for guardianship. See ss. 60, 61, above, and comment.

<sup>3</sup> *Id.* I. 50 53.

<sup>4</sup> *Id.* I. 74. See also *Ball. II. 63, 66* (cancellation of a marriage for deception as to one of the parties being free or slave); *Ball. II. 62* ("*let. law*"), fraud by concealing the fact that the woman is ill, so that consummation is impossible; *Abdul Latif Khan v. Niyaz Ahmad* (1835) 3 Knapp, 257—298; of duress: *Scott v. Shridhar* (1886) 12 P. D. 21. See also the Hindu case of *Shridhar v. Hirai* (1887) 12 Bom. 480, and see, for the English law on the effect of fraud on marriage: *Swift v. Kelly* (1835) 3 Knapp, 257—298; of duress: *Scott v. Shridhar* (1886) 12 P. D. 21.

71. Abu Yusuf and Imam Muhammad (the disciples of Abu Hanifa)<sup>1</sup> are of opinion that, according to Hanafi law, a marriage contracted by a father or paternal grandfather on behalf of his minor child or grandchild, is also voidable, where an improper dower<sup>2</sup> has been agreed upon, or it has been contracted with a person who is not the equal of the minor in respect of the matters mentioned in s. 80, below. Abu Hanifa's opinion is that such a marriage is not voidable under the said circumstances and his opinion is stated in the 'Fatawa 'Alamgiri' to be more sound.<sup>3</sup>

72. The more approved Shiah doctrine is that a marriage contracted by a father or paternal grandfather on behalf of his minor child or grandchild is voidable by the minor on his attaining majority if the father or grandfather has agreed to an improper dower.<sup>4</sup>

The opinion of some Shiah authorities is that though such a marriage is valid, the "dower is null and that she is entitled to the proper dower."<sup>5</sup>

(b) *Exercise of Options.*

73. The exercise of an option to avoid a marriage must be confirmed by an order of the Court, and the marriage continues in force until such confirmation.<sup>6</sup>

74. When the exercise of an option to avoid a marriage has been confirmed by the Court, the effect of such confirmation dates back to the time when the option was exercised.

75. The exercise by a wife of her option to avoid a marriage is nullified, and cannot be confirmed by the Court, if, before an application is made to the Court for its

<sup>1</sup> See ss. 11A & 11B, above, and comment thereto.

<sup>2</sup> I. e., to pay more, or to receive less, than the "proper dower," which is defined in s. 97, below.

<sup>3</sup> *Ball*, I. 73.

<sup>4</sup> *Ball*, II. 9. (2nd), 80 (2nd); see s. 97,

below. According to Shiah law no person other than the father or grandfather is guardian for marriage, see s. 61, above.

<sup>5</sup> *Ball*, I. 80.

<sup>6</sup> *Ball*, I. 50; cf. *Ball*, I. 30 (para. 2).

SECTION 71.  
(Hanafi law.)  
Option of  
inequality.

(Shiah law.)  
Option of  
improper  
dower.

Confirmation  
by Court of  
option to avoid  
marriage.

Effect of  
confirmation  
retrospective.

Exercise of  
option how  
nullified.

**SECTION 75.** confirmation, the wife permits the husband to have sexual intercourse with her.<sup>1</sup>

*Illustration*

*W*, a female minor, has been married to *H* by her guardian who is neither *W*'s father nor grandfather. If after attaining puberty, *W* permits *H* to have connection with her,<sup>2</sup> or asks him for maintenance, it amounts to assent to the marriage by implication, and *W* cannot afterwards avoid the marriage.<sup>3</sup> But if *H* consummates the marriage without *W*'s consent, this does not determine *W*'s option.<sup>4</sup>

Delay on part  
of virgin.

**76.** The option to avoid a marriage is determined, if the minor, being a virgin, does not exercise it immediately on attaining puberty.<sup>5</sup>

Steps for  
safeguarding  
option.

In a case where a minor girl who owned property yielding about Rs. 150 a month, was married to a tailor's son, (Chaudhuri, J.), took the very beneficent step of appointing a Mussulman lady as governess (on a salary of Rs. 15 a month) to stay with the minor, in order that the governess should be at hand at the time when the girl would attain puberty, so that the girl may, at the very moment, if she so desired, repudiate her marriage.<sup>6</sup> His Lordship also took an undertaking from the guardian of the minor girl that her husband would not be allowed to come to the house of the minor or to communicate with her, until she attained puberty.<sup>6</sup>

Explicit assent  
by other than  
a virgin.

**77.** If the minor was not a virgin<sup>7</sup> at the time of the marriage,<sup>8</sup> or if she arrives at puberty while living with her husband, her option is not determined unless she assents, explicitly or by implication, to the marriage.<sup>9</sup>

<sup>1</sup> Bail. I. 52. Sir Roland Wilson, "Anglo-Muhammadan Law" (3rd Ed. p. 100) expresses a doubt on this point, but he seems to have overlooked the words "unless she has intermediately surrendered her person," Bail. I. 52 (par. 3). The statement in Bail. I. 51, that "up to the actual separation by the Judge, the husband may lawfully have intercourse with his wife," only shows that a mere declaration on the part of the wife that she exercises her option of repudiation, has not (until it is confirmed by the Court) any legal effect,—except in so far as it gives her the right to apply to the Court for dissolution of the marriage. Of course, after the "actual separation by the Judge," intercourse would not be lawful even if his former wife permitted it: s. 13, above.

<sup>2</sup> Bail. I. 51, 59.

<sup>3</sup> Bail. I. 51.

<sup>4</sup> Bail. I. 59.

<sup>5</sup> Bail. I. 51; Hod. 37-38, cf. *Bakshi v. Mirbiz* (1887) 23 P. J. Rec. 126 (No. 51). See s. 78, below.

<sup>6</sup> *Re Mussamat Harnunissa Bibee* (1913) 18 Cal. W. N. 853.

<sup>7</sup> The reason for the distinction between virgins and others is referred to in the footnotes to s. 17B, above.

<sup>8</sup> A female who is a *thayyibat*, i.e., not a virgin, is competent, by schools of law, other than Hanafi, to contract marriage; and a person purporting to contract her in marriage as her guardian, would be an intermeddler (*fazuli*). See s. 17B, above.

<sup>9</sup> Bail. I. 50-51, Hod. 37. See s. 78, below.

See comment to s. 76, above.

SECTION 78.

**78.** (1) The option is determined at the time, and in the manner, stated in the last two sections, notwithstanding that the wife may be ignorant of her right <sup>1</sup> to avoid the marriage.

(2) Where the wife is ignorant of the fact of the marriage, the option is not determined until she has knowledge of that fact.<sup>2</sup>

It is said in the 'Hidaya' that "ignorance is no plea with respect to an institute of the law,"<sup>3</sup> which is probably taken from the maxim of Roman law 'regula est juris ignorantia non excuset neque.'<sup>4</sup> The 'Hidaya' adds, however, an exception to the rule: "it does not apply to a female slave, "who, being employed in the service of her master, has no opportunity to obtain any knowledge of the law." The following reason has been given for the rule: "Because the prophet of God . . . has said . . . 'seek knowledge even though it be in China: for the seeking of knowledge is obligatory on every Mussulman'"<sup>5</sup>

(2) *Option to Quasi-Guardians: 'Unequal' Marriage.*

**79.** In Sunni law, where a woman (though she is adult and sane) has contracted herself in marriage to a person not her equal in respect of the matters mentioned in s. 80, below, the marriage may be avoided by persons who, being agnates, would have been her guardians for marriage if she had been a minor or of unsound mind; and, on an application by such persons, the Court may dissolve the marriage;<sup>6</sup> provided that if any of the said persons<sup>6</sup> has consented to, or acquiesced in, the marriage, or the woman has given birth to a child, it cannot be so avoided or dissolved.<sup>7</sup>

If "one of her guardians has given his consent, it is no longer in the power of that guardian, or of any other equal to, or below, him, to

<sup>1</sup> Hed. 37.

<sup>2</sup> Bail. I. 50-51, Hed. 37.

<sup>3</sup> Digest, XXII, vi, 9.

<sup>4</sup> *Shark-i-Fiqh*, Book on *Nikah*, ch. II., on *Wali and Equality (ad wed)*.

<sup>5</sup> The rule of law, as stated above, may be supported on the maxim "boni iudices est ampliare jurisdictionem." It would be other-

wise if there were no discretion in the Court. In *Jamnat Ali Shah v. Mir Muhammad*, (1916)

51 Punj. Rec., 371 (No. 119) the discretionary nature of the jurisdiction seems to have been overlooked.

<sup>6</sup> *Mohammed v. Baicam* (1866) 1 Agr., 130.

<sup>7</sup> Bail. I. 67-69.

**SECTION 79.** cancel the marriage, but one superior to him may still do so."<sup>1</sup> So the bride's father was held <sup>2</sup> entitled to sue for dissolution of marriage though her mother and brother had consented to it. See comment to s. 76, above.

What constitutes inequality in regard to marriage

**80.** In considering whether a marriage should or should not be avoided on the ground of inequality under s. 79, above, the Court has regard to the following matters:—

the lineage of the husband:

whether the husband or his father, or grandfather, belonged to a religion other than Islam, or was a slave (which are exceptionable circumstances);

whether the husband has sufficient means to pay the 'mahr,' and to maintain the wife;

whether he is pious and virtuous; and,—

whether he exercises a trade or profession, much inferior to that exercised by the members of the woman's family.<sup>3</sup>

The Shiah law requires "equality" only in regard to Islam<sup>4</sup>, which point is really covered by s. 51 relating to prohibition by difference of religion.<sup>5</sup>

### § 9.—*Proof and Presumption of Marriage.*

Proof of bride's consent.

**81.** Where the question is whether or not a marriage was duly contracted in a valid form, the burden of proving that the alleged wife consented to it, is upon the person who affirms it:<sup>6</sup> provided that (1) where it is proved that the parties cohabited together continuously and for a long period, as husband and wife,<sup>7</sup> and were treated as such by their friends,<sup>8</sup> it is presumed that they were validly

Presumption from cohabitation and repute.

<sup>1</sup> Bail. I. 69.

<sup>2</sup> *Mohammed v. Bauran* (1866) 1 Agra 130.

<sup>3</sup> Bail. I. 62-66 Hed. 40. Adhur Rahim, "Muhammadan Jurisprudence," 333.

<sup>4</sup> *Jamast Ali Shah v. Mir Muhammad* (1910) 51 Punj. Rec. 371, 373 (No. 119).

<sup>5</sup> See Bail. II. 31, and ss. 50, 51, above.

<sup>6</sup> Bail. I. 58, 59.

<sup>7</sup> See (*Musunnat*) *Kureemoonissa v. Atallah* (1867), 2 Agra 211; (*Mirza Qaim Ali Beg v. Musst*) *Husain* (1827) S. D. A. 3 Cal. 152.

<sup>8</sup> See s. 20, *ill.* (3); Bail. I. 83-84: "This case is a precedent that marriage is established by mutual belief."

married:<sup>1</sup> and the burden of proving that their cohabitation was illegal, shifts to the person who affirms its illegality;<sup>2</sup> (2) where either party has acknowledged that he or she was married to the other, (and the other party has confirmed, or acquiesced in, the acknowledgment,) it is presumed that they are validly married,<sup>3</sup> unless prohibition to marry is established between them;<sup>4</sup> (3) where a man has validly acknowledged the paternity<sup>5</sup> of a child, it is presumed<sup>6</sup> that he was lawfully married<sup>7</sup> to the mother of the child, unless they were prohibited from intermarrying.<sup>8</sup>

See the Indian Evidence Act s. 50 illustration (2).

By the Muhammadan law of evidence testimony must be taken upon his own seeing and perception, not on that of another, except in some special cases, where he may take up his testimony on hearsay. It is not lawful for a witness to testify anything that he has not seen except 'nusah,' (i.e., 'descent from either parent') death, marriage confirmation, and the authority of a judge; and it is competent for him to testify to these matters when informed of them by a person in whom he has confidence."<sup>8</sup>

<sup>1</sup> On continual cohabitation and acknowledgment of parentage, as presumptive evidence of marriage and legitimacy, see the Indian Evidence Act, s. 50, and ill(a) to it and *Uday-ul-oolah v. Rai Jan Khanum* (1814) 3 Moo. I. A. 295; S. C., *Shams-un-nissa Khanum v. Rai Jan Khanum*, (P.C.) 6 W. R. 521. *Monowar Khan v. Abdulrah Khan* (1871) 3 N. W. 177. *Mahomed Baiker Hussein Khan v. Sharfoodissa Begum* (1860) 8 Moo. I. A. 136, followed in *Ashrafud Dowlah Ahmed Hussein Khan Bahadur v. Hyder Hussein Khan* (1866) 1 Moo. I. A. 94, and in *Ashrafuddinissa v. Azeezun* (1864) 1 W. R. 17; *Bibi Imabandi v. Mataswaid*, 15 Cal. L. J. 621, 13 Ind. Ch. 678; *Morji Lal v. Musannat Chandrabai Kumari* (1911) 38 Cal. 700, 38 I. A. 122.

<sup>2</sup> *Noor Bibee v. Narain Khan* (1866) 1 Ind. Jur. N. S., 221, Parock, C. J., & Morgan, J. (reversing Norman J.) See also *Parl. I. 421*.

<sup>3</sup> *Bail. I. 409; 11.5.*

<sup>4</sup> *Bail. I. 405, 409, 11.5.*

<sup>5</sup> See s. 222, below.

<sup>6</sup> *Roop Begum v. (Shahzadah) Walatgothur Shah* (1865) 3 W. R. 187: the presumption is not conclusive; and the fact that the parties are proved to have married on a subsequent date may exclude the presumption of a marriage at any earlier period. *Ashrafudowlah Ahmed*

*Hossein v. Hyder Hussein Khan* (1866) 11 Moo. I. A. 94, 7 W. R. (P. C.) 1; though it does not exclude the possibility of *mut'a* (under s. 25, above), prior to the permanent marriage. *Shoharat Singh v. Jafri Bidi* (1914) 1 L. W. 965 (P. C.). The presumption was held to be rebutted by the facts that the ladies, though parties to the suit, did not come to give evidence; and that one person who was called to prove the marriage threw doubt on it, and no explanation was given why the ladies were not called, and other witnesses not produced. *Butoobin v. Kudsom, and Butoobin v. Lloyd* (1876) 25 W. R. 441. *Khayah Hidayat Oolah v. Rai Jan Khanum* (1814) 3 Moo. I. Q. 205, 318, *Wier v. Sundul-oonissa* (1869) 11 Moo. I. A. 177, 193 (reversing the S. D. A. who had held the marriage not proved); *(Rana) Khajooroodam v. (Musannat) Rooshah Jehan* (1876) 2 Cal. 186, 3 I. A. 291; 26 W. R. 36; *Mahatula Bibee v. (Prince) Ahmad Hatermoozoon* (1881) 10 Cal. L. R. 293.

<sup>7</sup> *Khajooroodam v. Rooshah Jehan* (1876) 2 Cal. 186, 3 I. A. 291, 26 W. R., 36; *(Musannat) Jani Begum v. (Musannat) Minni* (1877) 12 Punj. Rec. 183 (No. 711).

<sup>8</sup> *Bail. I. 415, 424-425*, see the comment to s. 10, above, the paragraph headed "Custom and public policy, policy of Muhammadan law: principles of evidence."

## SECTION 81.

The Privy Council have held, in a case from Ceylon,<sup>1</sup> that mere cohabitation is evidence of marriage, and, although it is alleged that all the ceremonies are not performed, their due performance will be presumed. This case was followed by Kekewich, J., in England.<sup>2</sup>

Strict proof  
required in  
some cases.

In a suit, however, by a Hindu for restitution of conjugal rights, the rites and ceremonies were required by the Calcutta High Court to be specifically proved;<sup>3</sup> and, where a marriage is an ingredient of an offence, the Courts of India follow the English practice, which makes evidence of cohabitation and reputation admissible, but not sufficient, to prove marriage "where strict proof is required."<sup>4</sup>

Nature of  
cohabitation  
which raises  
the pre-  
sumption.

Cohabitation, in this connection, means something more than mere residence in the same house: so that residing as a menial servant in the house of a Mussulman, and bearing a child to him, does not raise the presumption of marriage, or, of lawful parentage;<sup>5</sup> and the Privy Council have held, that where it is admitted that the relation began as concubinage, lapse of time, and propriety of conduct and the enjoyment of confidence, with powers of management reposed in the woman, are not sufficient to raise the presumption of subsequent marriage.<sup>6</sup> Similarly, where the woman lived in a separate dwelling, apart from the one in which an undisputed wife was living, no presumption of marriage was drawn;<sup>7</sup> and where the parties had been divorced, a declaration by the defendant in a mortgage deed, that she was the wife of the plaintiff, was held not to be an acknowledgment, and no presumption<sup>8</sup> was drawn that a lawful remarriage had taken place, after the removal of the impediment to remarry a divorced wife. In a recent case there was cohabitation from 1870 to 1890, the first child being born in 1876,

It must be a  
wife.  
It must not  
have com-  
menced as con-  
cubinage.

<sup>1</sup> In *Sudry Pudasri Oronegara v. Sambucatty* (1881) 6 App. Cal. 361. See also *Monger Lal v. Chandrabhatta Kumara* (1911) 38 Cal. 700 38 I. A. 122.

<sup>2</sup> In *Re Shepherd, George v. Thye* (1901) 1 Ch. 456. See also *Dor, d. Fleming v. Fleming* (1827) 1 Hung. 266, *Collins v. Bishop* (1878) 48 L. J. (C.B.) 31, *Fox v. Bearblock* (1881) 17 Ch. D. 429 (unofficial entry as evidence of reputation), *Re Thompson, Lingham v. Thomson* (1901) 91 L. T. 680.

<sup>3</sup> *Saraswamony Dasi v. Kali Kaula Das* (1900) 28 Cal. 37; 5 Cal. W. N. 195.

<sup>4</sup> As to bigamy cases, see *Sobral v. Juagli* (1897) 2 C. W. N. 245; *The Empress v. Pitanbur Singh* (1879) 5 Cal. 566 (P. B.); *Queen-Empress v. Dal Singh* (1897) 20 All. 166, *Akbar Khan v. Empress* [1882] 17 P.R. Crim. Judgt., No. 50, p. 66, *Shahid Alimuddin v. Emperor* (1906) 10 Cal. W. N. 982, 984. Cf. the following English cases: *Morris v. Miller* (1767) 1 Burr. 2057,

239, *R. v. Simpson* (1883) 15 C. C. 424, *R. v. Athausen* (1893) 17 Cox. C. C. 630, *R. v. Atkinson* 1 Russ. on Crimes (6th Ed.) 159; *R. v. Woodward* (1838) 8 C. & P. 361. As to reputation in bigamy cases: *Catherwood v. Custon* (1811) 13 M. & W. 261, 265, *R. v. Wilson* (1862) 3 P. & F. 119.

<sup>5</sup> *Karimomissa v. Abdoollah* (1867) 2 Agri. 211.

<sup>6</sup> *Juristool-Batool v. Hussein Begum*, 11 Moo. I. A. 194, 10 W. R., P.C., 10.

<sup>7</sup> *Mant-un-nissa v. Pathani* (1901) 26 All. 265, following *Ashrafud Dowlat Ahmed Hussein v. Hyder Hussein Khan* (1866) 11 Moo. I. A. 91, 115; see also *Abdul Razak v. Aga Mohamed Jaffer Bandanum* (1893) 21 Cal. 666, 678; 2 I. A. 56.

<sup>8</sup> *Akhteromissa v. Sharifudoolah Chowdhry* (1867) 7 W.R. 268. See s. 11, above, and comment thereto.



but the Privy Council held that the presumption did not arise, as SECTION 81. the mother, before she was brought to the father's house, was admittedly a prostitute.<sup>1</sup>

Where marriage was once proved, subsequent divorce was not presumed from the facts that the wife left her husband's house on his taking another woman to live with him, and that he stated in his will that he had no wife.<sup>2</sup>

The presumption of marriage has been held to be less strong where there is no issue, and the invalidity of the marriage is alleged by the parties.<sup>3</sup> In another case<sup>4</sup> it was stated that even casual cohabitation without acknowledgment of marriage or parentage, raises a presumption of marriage and legitimacy, but that in such a case the presumption is rebuttable. Apart from estoppel, it is submitted that such presumptions from cohabitation are always rebuttable.

The acknowledgment of marriage must be unequivocal: but the Acknowledgment of marriage. celebration of the seventh month of pregnancy, and of the birth of the child, have been held sufficient to prove marriage and legal parentage.<sup>5</sup>

**82.** Where the husband and wife are together by themselves in a place where, if they so desire, they are secure from observation, and where there is nothing in decency, law, or health, to prevent their having sexual intercourse, they are said to have "validly retired."<sup>7</sup>

Hand and wife, H, are together in a closed room, by themselves. This Illustration. is valid retirement, ('*khilwat-i-sahih*' in Arabic) unless H or W has some illness preventing coition, or rendering it injurious, or the wife is an idolatress, or there is present any person (except a little child without understanding), or either is under the age of puberty, or is observing the ordained fast which makes coition unlawful.<sup>7</sup>

In Hanafi law, valid retirement has the same effect as consummation in the following matters:

1. the confirmation of dower.

Its effects compared to consummation of marriage.

<sup>1</sup> *Ghaznafar Ali Khan v. Khan Fatima* (1910) 32 All. 345.

<sup>2</sup> *Noor Bibee v. Nawas Khan* (1866) 1 Ind. Jur. (N. S.) 221.

<sup>3</sup> *Re M'Laughlin's Estate* (1878) 1 L. R. Ir., 241.

<sup>4</sup> *Nawabunissa v. Fazlunnessa, Nawabun v. Jumeerun Marsh* 128, 8, C. (same parties

*vice versa*) 2 Hay 470.

<sup>5</sup> *Mahabub Bibee v. (Prince) Ahmed Hakeemooddoun Currimunissa Begum v. the same* (1881) 10 Cal. L. R. 291.

<sup>6</sup> *Wise v. Sundulunissa Choudraner* (1869) 11 Moo. L. A. 177, 7 W. R. (P. C.) 11.

<sup>7</sup> *Bul. L.* 98-100; *Reed.* 45-46.

## SECTION 82.

Hanafi law.

2. the establishment of descent, or paternity ;
- 3 the necessity for the wife to observe 'iddat ';
4. the wife's right to maintenance and residence during 'iddat ';
- 5 the prohibition by conjunction against the husband marrying the wife's sister or other four women with her.

But valid retirement without actual consummation,—

1. does not prevent the husband marrying the wife's daughter,
2. nor, when a man has divorced his wife three times, is it lawful for him to remarry her, if there has been only valid retirement between her and her second husband, without actual consummation.<sup>1</sup>

Shiah law.

In Shiah law valid retirement without consummation, has not the same effect as sexual intercourse<sup>2</sup> except, —

- 1 in order to establish the revocation of a divorce,<sup>3</sup> and,—
2. to show that a thrice-divorced wife has had sexual intercourse with the second husband, provided that the wife so asserts<sup>4</sup>

The difference between Sunni and Shiah law on this point may be stated in the following terms : In Sunni law the mere fact that there are opportunities for consummation (by the parties being in valid retirement) affects the rights of the parties in the same way as actual consummation in regard to the five particulars above noted. In those five matters, though it were proved, or admitted, that there had been no actual consummation, the rights of the parties would in no wise, differ from what they would have been, had consummation taken place. Hence, the circumstances (whether or not, as a matter of fact consummation took place) being irrelevant in this connection, will not be allowed to be proved in British India. In Shiah law, on the other hand, mere valid retirement, as such, (*i.e.*, without consummation), does not affect the rights of the parties. But it does not follow that if the parties are shown to have retired, the court may not draw the inference of consummation: it would, in the majority of cases infer that consummation did take place. The difference in fact, therefore, can only be of importance where Shiah law is applicable, and it is shown that, though the parties retired, they did not, as a matter of fact, consummate.<sup>5</sup>

<sup>1</sup> Bail. I. 101 s. 11, above.

<sup>2</sup> Bail. II. 71.

<sup>3</sup> Bail. II. 121 (11th).

<sup>4</sup> Bail. II. 126 (par 2), and see s. 5B, above, and comment thereto.

<sup>5</sup> These remarks seem necessary owing to some observations in *Bismillah Begum v. Shahu Bano Begum* &c (1913, Sep.) 18 Ind. L. J. 179, Ind. Com. of Qudiy.

## § 10.—Irregular Marriages.

SECTION 83.

83. (1) According to Hanafi law, where a contract of marriage has been made, (a) without the presence of witnesses,<sup>1</sup> or (b) purporting to marry persons, with reference to whose intermarriage prohibition is established by unlawful conjunction,<sup>2</sup> or "iddat,"<sup>3</sup> or divorce, or religion, or super-venient illegality,<sup>4</sup>—the marriage is irregular and not void.<sup>5</sup>

(Hanafi law.)  
Absence of  
witness and  
some prohibi-  
tions make  
marriage  
irregular, and not  
void.

(2) Abu Hanifa holds that a marriage between persons who are prohibited from intermarrying for reasons other than those mentioned in sub-section (1), above, are also irregular,<sup>5</sup> and not void.<sup>6</sup> The two disciples of Abu Hanifa,<sup>7</sup> on the other hand, hold that marriages prohibited for causes other than those mentioned in sub-section (1) are void, and not merely irregular.<sup>8</sup>

(3) According to Shiah law, there is no such distinction between regular and irregular marriages: and marriages that under Sunni law might be merely irregular, are under Shiah law, void.

The Calcutta High Court has held<sup>9</sup> that the marriage of a Mussulman with the sister of his wife (the latter being alive and undivorced) is absolutely void, and not merely irregular, and that the issue of such a marriage cannot be legitimated by acknowledgment, nor be ever entitled

Azammusa v.  
Karimunnissa.

<sup>1</sup> See translation from *Zakhoor*, given in 23 Cal. at p. 173.

<sup>2</sup> *Kharshat Jan v. Abdul Hamid Khan*, (1908) 13 Pimp. Recs. 11 (No. 6) marriage with a fifth wife is only *fasiq* (or irregular) not *batal*, and the offspring of *fasiq* marriages are legitimate.

<sup>3</sup> See *Badama Rother v. Fatma Bi* (1911) 26 Mad. L. J. 260, 265; *Abdul Ghani v. Azim-ul-Haq* (1911) 39 Cal. 109; *Amir Beg v. Saouan* (1910) 7 All. L. J. 956, *Juma Bi v. Hasan Bibi* (1905) 11 Pimp. Rec. 309, (No. 85).

<sup>4</sup> See s. 52, above. Bail. I. 30 mentions fosterage and affinity as also merely rendering the marriage irregular ("invalid or vitiated"; see the next footnote). The passage translated purports to be an extract from the *Zakhoor*. It probably refers to supervening prohibition by fosterage and affinity. *Ala Mahamud Chaudhary v. Masummat Saqul Bete* (1910) 8 All. L. J. 950, 7 Ind. Cas. 820, contains an exhaustive judgment by Karamat Hussain, J., on the distinction between void and irregular marriages, and the

status of the issue in each case.

<sup>5</sup> *Fasiq* in Arabic, Bailie translates it "invalid," which is misleading. Bail. I. 150-151. See however, *Badama Rother v. Fatma Bi* (1911) 26 M. L. J. 260, [1911] M. W. N. 278, 15 M. L. T. 107, *Luqat Ali v. Karimunnissa* (1894) 15 All. 396. *Ram Kumar, in re*, (1891) 18 C. L. 264.

<sup>6</sup> It seems extremely probable that Abu Hanifa merely meant to assert that marriages, however strongly condemned by law, are effectual, *de facto*, so long as the parties are concerned without intending by this assertion to give any countenance to such marriages, perhaps he felt the injustice of visiting on the children the sins of the parents.

<sup>7</sup> See ss. 114 and 116, above, and comment thereto.

<sup>8</sup> Bail. I. 150-151.

<sup>9</sup> *Azammusa v. Karimunnissa* (1894) 23 Cal. 130, vigorously discussed from in *Tajbi v. Morie Khan* (1917) 11 Bom. 185.

**SECTION 83.** to inherit from the father. It will be observed that their lordships apparently disregard the views expressed in the Hanafi text-books on the distinction between different kinds of prohibitions to marry, and put their own interpretation on the Quran: they point out<sup>1</sup> that the Quran makes no distinction between a marriage with two sisters, and other prohibited marriages; and they hold, on that ground, that the effect of all prohibited marriages should be the same. Reference might in this connection be made to the dictum of the Privy Council that where commentators of great antiquity and high authority have ruled in a certain way, the British Courts ought not to put their own construction on the Quran.<sup>2</sup>

The decision, above referred to, has been dissented from in an exhaustive Judgment of the Bombay High Court.<sup>3</sup>

Distinction  
between  
prohibition by  
unlawful  
conjunction  
and other  
prohibitions.

The rule of Hanafi law distinguishing between perpetual and other prohibitions, it is submitted, is clear: the first cannot be removed by any act of the parties, but the second can be removed by the husband divorcing one of the wives; and it is for the same reason that all marriages that are vitiated by unlawful conjunctions of whatever kind, are considered by the Hanafi lawyers to be irregular and not void.<sup>4</sup>

Prohibition  
during 'iddat.

Similarly, the prohibition by 'iddat' is a mere temporary prohibition, (according to the view taken by the Hanafi school) for the marriage would be valid, if it were celebrated a few months later: it is, therefore, considered more favourably by the law than a marriage that can never be valid.

Divorce,  
religion,  
supervenient  
illegality,  
absence of  
witnesses.

As to the prohibition by divorce, religion, and supervenient illegality, different, but analogous, classes of reasoning apply which need not be detailed. Disregard of these prohibitions, therefore, makes the marriage irregular, not void. The absence of witnesses is also considered a mere irregularity in the form of marriage: a matter of which the Shi'ahs

<sup>1</sup> 23 Cal. p. 112 (par. 2), and p. 141 (second sentence), cf. the texts cited in the report, and see above, and also Abu Rahim, "Muhammadiyah Jurisprudence," 339, referring to *Kudrat-ul-Mukhtar* II., 380.

<sup>2</sup> *Aga Mohamed Jaffer Bandani v. Kudsom Bore* (1897) 25 Cal. 9, 18. See above s. 11, *infra*.

<sup>3</sup> *Tarbi v. Monte Kh'a* (1917, 11 Bom. 185).

<sup>4</sup> The Divorce Act IV. of 1869 makes a distinction between adultery and occasional adultery; s. 3, (b), cf. also the distinction between void, voidable and illegal contracts (ss. 5 & 6, Will, IV., c. 1). Similarly the Hanafi religious tenets prohibit an irregular marriage; but still, if it is contracted it has some legal results, one of them being the establishment of paternity

which imposes an obligation on the father rather than gives him any rights: see *ibid.* I. 52 (fourth sentence). Reference might also be made to a decision of the Calcutta High Court, where a Roman Catholic married the sister of a woman with whom he had illicit intercourse, and whom he had married when she was on her cohabited and *in extremis*, and still the second marriage was held valid, and it was presumed that the dispensation, necessary by the Roman Catholic religion, to remove the obstacle to the marriage with a deceased wife's sister had been obtained. *Lopez v. Lopez* (1885) 12 Cal. 706 (F. B.), *Abdul Ghani v. Aziz-ul-Haq* (1911) 39 Cal. 109, *Amir Beg v. Sumra* (1910) 7 All. L. J. 956; *Imam Din v. Hasan Bibi* (1905) 11 Punjab Rec. 309 (No. 85).

and Malikis permit the absolute dispensation in every case. With reference to these rules a word of caution is, perhaps, not unnecessary: Muhammadan law is enforced in British India for the same fundamental reasons for which customs and usages are enforced: and the practice of Mussulmans in India must not be entirely left out of consideration.

**84.** Where an irregular marriage has been contracted, but not consummated, either party may cancel it, even in the absence of the other, either expressly or by implication.<sup>1</sup> *Quære*, whether it is necessary that the other party should have knowledge of the cancellation.<sup>1</sup>

**85.** Where an irregular marriage has been consummated, it may be cancelled by the parties, by express words; but it cannot be cancelled by implication.<sup>1</sup>

H is the irregularly married husband of H and the marriage has been consummated: if H says "I have set your 'av free," or "I have relinquished you:" the marriage is cancelled. If, on the other hand, H merely denies the marriage, it does not cancel it unless he says to his wife at the same time, "Go and marry."

**86.** Where an irregular marriage has taken place, it is the duty of the Court to separate the parties.<sup>2</sup>

**87.** [It is stated in the 'Fatawa 'Alamgiri' that no separation can be made on account of prohibition established by fosterage, except by order of the Judge, but that when prohibition becomes established, it is not proper for the woman to live with her husband.]

There does not seem to be any statement corresponding to that on which this section is based, either in the 'Hidaya' or the 'Shara'ya-ul-Islam.' The section is enclosed in brackets, as it seems likely that the excerpt in question (it is from the 'Nahr-ul-Faiq') has come into the 'Fatawa 'Alamgiri' by inadvertence.<sup>3</sup> The 'Nahr-ul-Faiq' has

<sup>1</sup> Bail, l. 156.

<sup>2</sup> This is adapted from Bail, l. 156 substituting "irregular" for "invalid" and "Court" for "Judge." The parties themselves need not apply to the Court, but it is difficult to say at whose instance, and in what form, applications of this nature would be entertained in British India. See the Guardians and Wards Act, s. 8,

and compare the Indian Divorce Act IV, of 1869, ss. 10, 19, 22 and 24; Bail, l. 30 (ll. 3, sqq.) shows that intercourse is not a crime when the marriage is irregular "whether he had any doubt on the subject or not."

<sup>3</sup> Bail, l. 200.

<sup>4</sup> See comment on s. 167, below, for a similar inadvertence, and cf. comment to s. 348 below.

**SECTION 87.** apparently followed the view of Abu Hanifa (from which his two disciples have dissented, and which is not followed in British India) Abu Hanifa's view is, that, though according to the strict law, some marriages ought not 'o be contracted, yet, if contracted, all marriages have force and effect; therefore it is quite possible that he should consider an order of the Court necessary for cancelling any marriage whatever, including a marriage that transgresses the prohibition of fosterage. But the same reasoning does not apply in the case of the two disciples of Abu Hanifa, for, according to them, prohibition by fosterage is absolute, and it renders the marriage not merely irregular, but void; how then could it be urged that for cancelling such a marriage which is void in its inception, the intervention of the Court is necessary, whereas (according to them) no order of the Court is necessary (see ss. 84, 85, above) to cancel even a marriage that is merely irregular and not void?

### *§ 12.—Judicial Proceedings Arising out of Marriages.*

**88.** Where either the husband or wife<sup>1</sup> has, without lawful ground, withdrawn from the society of the other, or neglected to perform the obligations imposed on him or her by law, or by the contract of the marriage;<sup>2</sup> the Court may decree restitution of conjugal rights, and may put either of the parties on terms<sup>3</sup> securing to the other the enjoyment of his or her legal rights.<sup>4</sup>

Amongst lawful grounds for such withdrawal, may be noted "actual violence of such a character as to endanger personal health and safety, or reasonable apprehension of such violence,"<sup>5</sup> which would consequently be a defence to a suit for restitution of conjugal rights. In a case<sup>6</sup> where the parties were Hindus, English decision,<sup>7</sup> were followed which lay down that cruelty falling short of physical violence, but such as to

Suit for  
restitution of  
conjugal  
rights.

Defences to  
suit for  
restitution of  
conjugal  
rights;  
Cruelty.

<sup>1</sup> "The wife has a right corresponding to that of the husband to demand the fulfilment of his marital duties towards her."—Abdur Rahim, "Muhammadan Jurisprudence," 331, citing *Al-Wajiz*, II, 20.

<sup>2</sup> Cf. Civil Procedure Code O. XXI, O. 32, 33.

<sup>3</sup> *Abdur Rehman v. Shamsoossava* (1867) 11 Moo. L. A. 551, 615; *Hussain Begum v. Muhammad Rustum Ali* (1907) 29 All. 222, following *Markenze v. Markenze* [1895] A. C. 781. Cf. *Paragi v. Shewagani* (1886) 8 All. 78. *Parshoodas v. Bai Yashu* (1897) 21 Bom. 610.

<sup>4</sup> *Rail* I, 188-189, II, 88.

<sup>5</sup> *Abdur Rehman v. Shamsoossava* (1867) 11

Moo. L. A. 551, 611, following *Ernst v. Ernst* (1790) 1 Haggl. Cons. 1, with the remark that "the Muhammadan law of what is legal cruelty between man and wife would probably not differ materially from 'our' own." *Asha Bibi v. Kadir Ibrahim* (1909) 33 Mad. 22, 25. *Sa'ad Jafar Hussain v. (Maysammud) Hussain, Aro Begum*, 11 Ind. Cas., 608; *Hussain Begum v. Muhammad Rustum* (1906) 29 All. 222; *Dadar Koor v. Dazila Nath Meiser* (1905) 34 Cal. 971.

<sup>6</sup> *Rahma v. Peer Lal* (1889) 11 All. 180.

<sup>7</sup> *Kelly v. Kelly* (1870) L. R. 2 P. & D. 59. *Tomkins v. Tomkins* (1858). 1 Sw. & Tr. 168.

jeopardise health or sanity, is sufficient "cruelty" under s. 488 of the Criminal Procedure Code,<sup>1</sup> for refusal on the part of the wife to live with her husband, and yet to get maintenance from him.<sup>2</sup> Of course, wherever by Muhammadan law it would be improper for the husband and wife to cohabit (as after *zihar*,<sup>3</sup> *zihar*, etc.) a suit would not lie for restitution of conjugal rights, thus where it was proved that the husband had used blasphemous language against the Prophet, which amounted to a contumacious dissolving the marriage, the wife was held to have shown a valid defence to a suit for restitution of conjugal rights.<sup>4</sup> The husband may, however, by misconduct (though not amounting to such acts as might justify a decree for separation) disentitle himself to a decree for restitution of conjugal rights.<sup>5</sup>

It was held by the Madras High Court that a Hindu husband must offer to live with the wife as her husband, otherwise he is not entitled to ask her to come to his house.<sup>6</sup> The Bombay High Court, however, dissented from this decision, and held that where the husband denies the validity of the marriage, but offers to maintain the woman (though not as his wife) if she agrees to live in his house, she cannot get maintenance from him unless she accepts his offer so to live in his house.<sup>7</sup> These cases were between Hindu parties. A Mussulman husband may practically nullify an order for maintenance by divorcing his wife.<sup>8</sup>

The Indian Limitation Act, IX of 1908 repeats art. 34 and 35 of the previous Act, (XV of 1877) which barred suits for "recovery of wives," and for "restitution of conjugal rights," two years after possession or restitution was demanded and refused.<sup>9</sup> The question then arises whether art. 120 of the Act applies, which provides a six years' period of limitation "for suits for which no period is provided elsewhere." It has been assumed in one case that it applies.<sup>10</sup> On the other hand by s. 23 of the Act, "in the case of a continuing . . . breach of contract or . . . wrong . . . a fresh period of limitation begins to run at every moment of the time during which the breach or wrong . . . continues."

<sup>1</sup> The Criminal Procedure Code, s. 488 provides that magistrates may make an order of maintenance against a person who neglects to maintain his wife or legitimate or illegitimate child. The order may be enforced like a fine. The wife may on just grounds refuse to live with the husband, but the order for maintenance may still be made. See s. 286, below.

<sup>2</sup> *Pagdi v. Sheonartu* (1885) 8 All. 78.

<sup>3</sup> *Nowroz Ali v. (Mussamat) Aziz Bibi* (1876) 11 P. B. 235, No. 124.

<sup>4</sup> *Hussain Begam v. Muhammad Ruston Ali Khan* (1900) 29 All. 222, referring to *Mackenzie v. Mackenzie* [1895] A. C. 384.

<sup>5</sup> *Marattal v. Kandappa*, (1883), 6 Ma. 371, (Kernan and Moffitt-wami Avvar JJ.).

<sup>6</sup> *In re Gulabdas Baidas* (1891) 16 Bom. 269 (Jardine and Parsons, JJ.).

<sup>7</sup> *In re Abdul Ali Ismaili and his wife Husenu* (1883) 7 Bom. 180 ("Bohra" husband and Hanafi wife—the word "bohra" is wrongly used as though it denoted a class of people distinguished from others by their religious tenets and customs), *Shah Abu Husein v. Ulfat Bibi* (1896), 10 All. 50; cf. *Abdu Rohman v. Sakhana* (1879), 5 Cl. 558.

<sup>8</sup> *Arjunpuria Khatoon v. Buzloo Miah* (1906) 31 Cal. 79.

SECTION 81

s. 488.

Maintenance  
under Criminal  
Procedure  
Code, s. 488.Limitation on  
suits for  
restitution of  
conjugal rightsContinuing  
wrong.

**SECTION 88.** and actions for restitution of conjugal rights have been held<sup>1</sup> to arise out of a continuing wrong, and, therefore, practically incapable of being barred.<sup>2</sup>

Judicial protection to wife.

**89.** The Court may order the husband to be attentive to his wife; and, if he has more wives than one, to be just and equal between them, notwithstanding any consent having been given by any wife to unequal treatment.<sup>3</sup>

The husband (unless he has contracted otherwise) can always divorce his wife, and thus get rid of most of his matrimonial liabilities.<sup>4</sup> But he may not be willing to divorce, as that might render him liable to pay up the 'mahr,' a circumstance that may not be negligible. The wife, on the other hand, is more in need of protection, as she cannot so release herself. The 'Shariya'-ul-Islam,' indeed, suggests a kind of arbitration between the husband and wife when there is discord between them; but the arbitrators or "umpires" are to be appointed by the judge, and they have no power to pronounce a 'talaq' except with the consent of the husband, nor to pronounce a 'khu' unless the wife agrees to the amount of compensation payable by her to the husband.<sup>5</sup>

Declaratory suits, for justification of marriage.

**90.** (1) A person claiming or denying that he or she has been married to another, may bring a suit for a declaration that they are or are not married, as the case may be.<sup>6</sup>

Option to divorce

(2) A woman may bring a suit for a declaration that she has validly exercised an option to divorce herself, and that her marriage is dissolved.<sup>7</sup>

Acquiescence.

(3) *Semble*, in a suit for an injunction against justification of marriage it is a valid defence to prove that the plaintiff acquiesced in the defendant's assertion that they were married to each other.<sup>8</sup>

<sup>1</sup> (*Bai*) *Sari v. Sanku Harchand* (1870) 16 Bom. 711; *Guzli v. Mehram* (1870) 11 Puna. Rev. 157 (No. 60), followed in a Hindu case, *Binda v. Karamba* (1890) 13 All. 126.

<sup>2</sup> But see *Dhenjibhai Bomanji v. Harsha* (1901) 25 Bom. 644 (P. B.), followed in *Saravanas Perumal Pillai v. Ponnav* (1905) 21 Mad 135, and *Aswamintha Khatun v. Razlan Ma.* (1906) 34 Cal. 179, where such suits were held to be barred.

<sup>3</sup> *Bail. I.* 188-189, II. 88. *Quere*, whether in the converse case, *v. id.*, where the husband has consented that the wife should reside with her

parents, he will be prevented from suing for restitution of conjugal rights, see 4th head of comment to s. 24.

<sup>4</sup> See p. 165, p. 7, above.

<sup>5</sup> *Bail. II.* 88-89.

<sup>6</sup> *Bail. I.* 20. A suit praying for an injunction to restrain the defendant from falsely claiming to be the plaintiff's husband or wife, is referred to as a suit for "justification of marriage"; see the Specific Relief Act s. 12, *id.* (b).

<sup>7</sup> *Bail. I.* 213; cf. ss. 128-131, below.

<sup>8</sup> *Bail. II.* 16, 171, 5 (5th).



A suit was recently entertained in the Allahabad High Court for SECTION 90. jactitation of marriage, *i.e.*, to have it declared that a woman who claimed to be the plaintiff's wife was not so in reality.<sup>1</sup> The Court there stated that it must be strictly proved (1) that the defendant seriously claimed to be married to the plaintiff; (2) that the plaintiff did not acquiesce in the claim or allegation of the defendant; (3) that, in fact no marriage had taken place.

The effect of acquiescence in suit for jactitation has been stated above. It has been stated, however, that an acknowledgment, even in the presence of witnesses, would not be sufficient by itself to constitute marriage, unless judicially pronounced to be a marriage, or unless there is an expressed intention to 'make this (*i.e.* the acknowledgment) a marriage.'<sup>2</sup>

**91.** *Seemle*, in a suit by a Mussulman for breach of promise to marry, no damages will be allowed, in British India, beyond compensation for such pecuniary loss as has actually been suffered<sup>3</sup> by the plaintiff.<sup>4</sup>

An approach to the recognition of the binding effect of a promise to marry is furnished by passages in the 'Sharaya'-ul-Islam'<sup>5</sup> and 'Minhaj-ut-Talibin.'<sup>6</sup> In the former it is stated, that it is unlawful for a man to pay addresses to a woman who is engaged to another, but if she marries a man other than him to whom she was first engaged, the marriage is valid. The latter work is stricter, and it is therein laid down as follows: "The law forbids asking for the hand of a woman who has already received, and formally accepted, a similar proposition from another, except with the consent of one's rival; but until a woman has decided as to the first offer there is no objection to making a second. When a woman asks advice," the author continues, "from a third party as to a man who has made her an offer of marriage, this third party is bound to give her sincere and truthful information."<sup>6</sup>

Similarly, the great Hindu law-giver quaintly observes: "Neither ancients nor moderns who were good men have ever given a damsel in marriage after she had been promised to another man."<sup>7</sup>

The authorities do not seem to throw much light on the question of Quantum of damages.

<sup>1</sup> *Mir Asmat Ali v. Mahmud-ul-Nissa* (1897)

<sup>20</sup> All. 96; cf. *Thompson v. Bourke* [1893] P., 70.

<sup>3</sup> Bail. I. 16-17.

<sup>4</sup> Which would include a return of the ornaments, &c., given as presents, in anticipation of the proposed marriage. Cf. Indian Contract Act,

s. 65. *Abdul Razak v. Mahmud Hussain* (1916)

<sup>19</sup> Bom. L. R. 161

<sup>4</sup> Cf. the Indian Contract Act, s. 73

<sup>5</sup> Bail. II. 36 (1th).

<sup>6</sup> *Minhaj*, 282 (Book 3, s. 2).

<sup>7</sup> Manu, IX. 91.

**SECTION 91.** damages or a breach of a contract to marry. The rules giving a right to claim a part of the dower, or a present where the marriage is dissolved without consummation, may, perhaps, be of some assistance in assessing damages. These rules are the more deserving of consideration as they indicate (in cases where the lady is the defendant) one method of making allowance for the husband's power of divorcing

Under the circumstances, it is submitted, that a suit would lie for the actual loss suffered.<sup>1</sup>

The action, under the English law, for a breach of contract to marry is admittedly anomalous, being analogous in some respects to an action for seduction, in others, to one for libel.<sup>2</sup> In such an action the English Courts do not restrict damages to "compensation for loss or damage which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it,"<sup>3</sup> which is the compensation that it is submitted, could alone be claimed in British India by parties governed by Muhammadan law. The English Courts also allow exemplary and sentimental considerations to affect the assessment of damages. These considerations would be deemed irrelevant in a suit between parties governed by Muhammadan law.<sup>4</sup>

Compensation for actual pecuniary loss alone recoverable.

<sup>1</sup> In Roman law the *arrha sponsalitie* (earnest for a marriage), consisted of presents of a substantial kind, given on betrothal. They could be either forfeited, or claimed back with a penalty of the same, or of twice, or four times its value, on the marriage being broken off; Justin., V., 1, 1-5, 16. There was also an *actio ex sponsa*, "giving damages in proportion to the value of the marriage to the party disappointed". Hunter, "Roman Law," 696. In England Lord Herschell introduced a bill restricting the damages claimable in an action for breach of promise to marry, but it did not become law.

Such actions are "recognised by the Prussian Landrecht, but expressly denied by the Code of Italy." The French Code is silent, and the Courts in France have taken different views, but the better opinion agrees with the Austrian Code, which allows damages for actual loss, but no more. Prussian Code, Tit. II., §. 75-82; Italian, 2, 53; French Draft, 1482-1442; Austrian §§. 45, 46; Draft Civil Code of Germany, s. 1228 cited in Holland, "Jurisprudence," 258-259.

<sup>2</sup> See Mazure on Damages, Ch. XIV p. 8.

<sup>3</sup> Indian Contract Act s. 73.

## CHAPTER IV.

### 'MAHR' OR DOWER

#### § 1. Preliminary.

92. (1) 'Mahr' or dower is a sum that becomes payable by the husband to the wife on marriage being contracted. It becomes payable either by agreement between the parties, or by operation of law.<sup>1</sup>

(2) 'Mahr-nama' is the instrument containing the terms of the agreement to pay 'mahr.' Unless there is anything in the context to show a contrary intention, the expression 'mahr-nama' in this chapter includes the terms of an oral agreement for the payment of 'mahr.'

See s. 93, below. "Dower is not the exchange or consideration given by the man to the woman for entering into the contract, but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman." A transfer of property by the husband to the wife in lieu of dower, may operate as a sale, inasmuch as the wife gives up her legal rights to receive her 'mahr,' and in consideration thereof obtains the property.

<sup>1</sup> The agreement may be made after the marriage. *Kamarrunnissa v. Husain* (1884) 5 All. 266. The agreement for mahr, if it is in writing, is called *mahr-namah* or *kaban-namah*. But no writing is necessary: *Abdul Karim v. (Mussamat) Fazilat-un-Nissa*, 5 S. D. A. (BENG.) 75; *(Mussamat) Muleka v. Jumeela* (1872) 11 Beng. L. R. 375; *L. R., I. A., 81 PP.* Vol. 135; *Tajoo Beeber v. Noorun Beeber* [1864], W.R. 31. Of course, where the amount is large and there is no writing, the "very best description of evidence" is necessary to establish it. *Huseina v. Hasmatoonissa* (1867) 7 W. R. 195; *Abdul Jabbar Chowdhry v. Collector of Mymensingh* (1868) 11 W. R. 65; *Najeebudeen Ahmed v. Hossinec* (1865) 1 W. R. 110; *Mohamed Hossain Ali v. Moobaruckoonissa* (1851) 6 S. D. A., N. W. P., 356.

<sup>2</sup> *Bail. I. 91*; *II. 72*.

<sup>3</sup> *Bail. I. 91*. "In regard to marriage," says Grote speaking of prehistoric Greece, "we find the wife occupying a station of great dignity and influence, though it was the practice for the husband to purchase her, by valuable presents to her parents, a practice extensively prevalent among early communities, and treated by Aristotle as an evidence of barbarism." *Hist. of Greece*, Part I. Ch. XX. (Vol. II. p. 112.) Amongst the Teutonic races betrothal (*verlobung*) seems to have been a sale of the woman by her guardian for a *pretium pulchre* (*winde's halz* or *wedthum*), payable after marriage to the guardian, and later on, to the girl herself; Holland, "Jurisprudence," (7th Ed.) 257; citing Baring-Gould's "Germany Past and Present," 98.

\* *Khamrunnissa, alias Bibi Janbi v. Shah Hazarath Saib* (1911) 21 Mad. L. J. 958, see also illustration (1)(d), and comment to s. 525, below.

## SECTION 93

Agreement to marry without 'mahr', when valid—Sunni law.

Shiah law, by adult woman

by guardian

option to cancel 'mahr'

What may be the subject of 'mahr.'

Agreement to do something.

Promise to render services.

When subject of 'mahr' unlawful.

**93.** (1) Under Sunni law the wife is entitled to claim 'mahr' from her husband, even though she has expressly contracted not to do so.<sup>1</sup>

(2) Under Shiah Ithna 'Ashari law, (a) a woman who is adult "and not of a weak or facile disposition"<sup>2</sup> may validly agree not to receive any 'mahr';<sup>3</sup> (b) it is doubtful whether a guardian for marriage may validly contract his female ward in marriage without 'mahr';<sup>4</sup> the 'Sharaya'-ul-Islam' favours the view that he can;<sup>5</sup> (c) an option may be lawfully reserved to cancel the 'mahr.'<sup>6</sup>

The 'Da'ayam-ul-Islam,'<sup>6</sup> a Shiah Isma'ili text, seems to lay down the law in terms similar to those of sub-section (1).<sup>6</sup>

**94.** (1) The subject of 'mahr' may consist of (a) any specified thing that has value, and is in existence, except hogs and wine;<sup>7</sup> or (b) subject to sub-section (2), below, a promise on the part of the husband to do, or abstain from doing, something.

(2) In Sunni law an agreement by the husband that he will personally render some specified or unspecified service to the bride, cannot be the subject of 'mahr.'<sup>8</sup> In Shiah law, an agreement by the husband, that he will personally render services to the bride during a stated period of time, can validly be the subject of 'mahr'; provided, first, the services are specified in such a manner as to remove all doubt and uncertainty, and, secondly, that the husband is entitled, if he is unable to perform the services promised, to hire some one else to perform them.<sup>9</sup>

(3) Where the 'mahr' agreed upon consists of hogs or wine,<sup>7</sup> (a) the approved Shiah opinion is stated to be that the marriage is valid, but the agreement for 'mahr'

<sup>1</sup> Bail. I. 91.

<sup>2</sup> *Quære*, whether the special rules in favour of *pardaushah* women in British India would be a guide on this point cf. s. 359A, below.

<sup>3</sup> Such a contract is called *tafwiz* or voluntary surrender, Bail. II. 72.

<sup>4</sup> Bail. II. 72, 80 (second).

<sup>5</sup> Bail. II. 5 (fourth), 27 (twelfth).

<sup>6</sup> *Da'ayam* (note), see p. 33, above.

<sup>7</sup> Which are *extra commercium* in Muhammadan law. The case is not likely to arise in India; but is mentioned to show the scope and effect of the law.

<sup>8</sup> Bail. I. 91, II. 76, 69.

<sup>9</sup> Bail. II. 67, 69, 79.

is void, and the 'mahr-ul-mithl' is due;<sup>1</sup> (b) other Shiah authorities hold that the price of the hogs or wine has to be given in lieu of the 'mahr'; (c) according to a third view the marriage is absolutely null and void.<sup>1</sup>

(1) The rents and profits of property or the service of a person *illustration*, other than the husband may validly be the subject of 'mahr'.<sup>2</sup>

(1A) H marries W, on the 'mahr' of 'a cloth,' or 'a beast,' or a 'mansion', the 'mahr' is void for uncertainty and W is entitled to her 'proper dower',<sup>3</sup> but if the species of the cloth or beast is mentioned, then the 'mahr' is valid, and an article of medium quality belonging to that species becomes due.<sup>4</sup>

(2) H stipulates with his bride, W, that he will not take W out of her native place, or will divorce his existing wife or will not perform the 'haj' with her, or will not press the claim of a debt which he has against her; none of these promises can validly form the subject of 'mahr'.<sup>5</sup>

(3) H marries W on the condition that he is to give her father 1,000 'dirhams.' This is no 'mahr,' and W becomes entitled to the 'proper dower'.<sup>6</sup>

(4) F gives his daughter or sister, W, in marriage to H, 'on condition that H will give to F his daughter or sister, W's, in return, the right to the person of each woman being the dower of the other', the condition would not supply the place of 'mahr.' 'The contracts are effected, but the condition is void, and each woman is entitled to her own proper dower.'<sup>7</sup> According to Shiah law such marriages would be void;<sup>8</sup> and, *quære*, whether by the law of British India they would be held to be void as being against public policy.

(5) The guardian, G, of a woman, W, marries her to H, on the terms that 1,000 'dirhams' are to be paid by H to W and 50 'dinars' to G. W would be entitled in Sunni law to both the 'dirhams' and the

<sup>1</sup> Bail. II. 67-68. The *Du'ayam-ul-Islam* seems to support this view *Du'ayam* (Notes); see p. 15, above, see s. 97, below.

<sup>2</sup> Bail. I. 93.

<sup>3</sup> Bail. I. 106.

<sup>4</sup> Bail. I. 106, 109; and see Bail. II. 68 (par. 3).

<sup>5</sup> Bail. I. 91.

<sup>6</sup> Bail. I. 105. *Kalaraqunta Yenlata* v. *Lalshams* (1908), 32 Mad. 185 (F. R.). "If a decision in one way will involve results which our law considers prejudicial to the public interests or immoral, it is our duty to decide the other way" (per Farwell, J.). *Re Hoyle*; *How v. Jaqq* [1911] 1 Ch. 179, 187. See pp.

21, 25, above, and *Ghosli v. Umaro* (1893) 21 Cal. 119 (F. R.).

<sup>7</sup> Bail. I. 94 (par. 2). Such contracts were common before the advent of the Prophet, but the Prophet prohibited them. The Arabic name for such contracts is *shighat* which means "two persons combining to oppress a third." See also Bail. I. 94, note 1. The term is derived from the root-word *shahara*, which Ka-mir-ki explains as follows: "*lever un pied de derrière en l'air (un dit d'un chon qui le fait quand il urine)*" Bail. I. 94, n. 1, applies the meaning of *shahara* to *shighar*.

<sup>8</sup> Bail. II. 37, and see the last footnote to illustration (5) to s. 91.

SECTION 94. 'dinars.' In Shiah law the agreement to pay 50 'dinars' to G<sup>1</sup> would be void; and W would receive only 1,000 'dirhams'.<sup>2</sup>

(Hanafi law).  
'Mahr' may  
be to any  
amount not  
less than 10  
'dirhams'.

Reasonable  
dower in Oudh.

(Shiah and  
Shafi law)  
no minimum.

Illustrations.

95. (1) According to Hanafi law, subject to sub-sections (2) and (3) below, the wife is entitled to claim as her 'mahr,' not less than ten 'dirhams,'<sup>3</sup> notwithstanding any agreement on her part to accept a smaller 'mahr.'<sup>4</sup>

(2) Under the Oudh Laws Act<sup>5</sup> the Court will not, either in a decree, or by way of set-off, lien, or otherwise, award 'mahr' to an amount which is in excess of what shall be reasonable with reference to the means of the husband and the status of the wife.<sup>6</sup>

(3) According to Shiah and Shafi'i law, where there is an agreement on the part of the wife to accept less than ten 'dirhams' as her 'mahr,' she is not entitled to claim a larger sum; provided that the agreed 'mahr' is not totally destitute of value.<sup>7</sup>

W is divorced by H, her husband, then W offers to remarry W on condition that W should make a gift to him of the 'mahr' due on their first marriage. W's consenting to the offer does not affect her right to her first 'mahr,' whether they remarry or not; because W placed on herself her 'property' (the 'mahr') as an exchange for marriage; and no consideration is due from the wife to the husband in marriage."<sup>8</sup>

<sup>1</sup> Bail. I. 106.

<sup>2</sup> Bail. II. 98-99. According to Shiah law any promise by the husband to pay something to the wife's father has no binding effect, though the parties may agree amongst themselves to give part of the *mahr* to him; Bail. II. 98. This would imply that the wife should be a party to the agreement. Such a transaction would, of course, have to be strictly proved. Indian Contract Act s. 16, cf. *Londa & Wodegar Lunn & Dismant Co. Ltd. v. Rellon* (1911) 27 L. T. R. 181.

<sup>3</sup> Ten *dirhams* were valued at Rs. 107 in *Sagha Bibi v. Masuma Bibi* (1877) 2 All. 57. No grounds are assigned as the basis of this valuation; cf. Bail. I. 108 which shows 100 *dirhams* are of uncertain value. That case was not followed in *Asma Bibi v. Abdul Samad Khan* (1909) 32 All. 167, where Karanath Husani, J., in a learned judgment, after citing passages from the texts, laid down the value of a *dinman* to be between Rs. 3 and 4.

<sup>4</sup> Bail. I. 93, (part. 4). "According to the Shafi'as and Hanbalis it is desirable that

dower should not be less than ten *dirhams*." *Asma Bibi v. Abdul Samad Khan* (1909) 32 All. 167, 168, per Karanath Husani, J., citing *Qasatani*, VIII, 18-19 a commentary on the *Sahih*-*Bukhari*.

<sup>5</sup> The Act was held not to apply in *Zakari Begum v. Salim Begum* (1892) 19 Cal. 680 19 L. A. 127, in which a Muhammadan resident of Patna was for a time in Lucknow, and there married the plaintiff, who lived in that city.

<sup>6</sup> Oudh Laws Act, 1876, s. 5. See *Sulaiman Khatun v. Mirza Begum Sarwar Bibi* (1893) 21 Cal. 473; *Collector of Muzaffargarh v. Harbans Singh*, (1898) 21 All. 17.

<sup>7</sup> Bail. II. 48, Head 11. The author of the *Durum-ul-Islam* states that an agreement to pay less than 10 *dinars* is not void, but abominable.

<sup>8</sup> *Fakura Qazi Khan*, cited in *Alamgir v. Hiba Ch. VII, (nd Bar.)*, Bail. I. 540-541. Presumably in effect the passage means that the consideration for the remission of the dower is illusory, and the promise to do so cannot, therefore, be enforced. But see s. 100, below.

96. 'Mahr' is never invalid<sup>1</sup> by reason of its being excessive,<sup>2</sup> except as provided in s. 95 (2), above.

The 'Fatawa 'Alamgiri' contains a section (based on the 'Zakhrā') dealing with 'mahr' that has been nominally stated in public at a high figure, for the purpose of "reputation," but which is never intended to be demanded or paid.<sup>3</sup> Nominal dowers are frequently agreed to as a mere form in India, by persons who have no means of paying it.<sup>4</sup> The question whether or not an alleged dower was agreed upon, is, of course, a question of fact, but it seems necessary to point out that where the agreement is for an absurdly high figure, compared with the means and position of the parties then, in particular, the principle involved in s. 116 below, has an important bearing. The Court may also be well asked to consider whether, on such facts, it can come to the conclusion that there was a real agreement to pay the 'mahr,' which, ex concessis, the husband could not pay, or whether it was a mere sham just as parties to wagering agreements are anxious to give to their invalid agreements a form similar to that of real contracts.

97. (1) Where the parties have not agreed upon the amount of the 'mahr' at the time of the marriage, or where the Hanafi law being applicable, the parties have purported to agree that no 'mahr' shall be paid, the husband is bound to give, and the wife to accept the 'mahr-ul-mithl'<sup>5</sup> or proper dower, i.e., such an amount as was paid to other women in the same circumstances as the bride, viz., to her full or consanguine sisters, or to other female descendants of her male agnatic ancestors.<sup>6</sup>

<sup>1</sup> Though Shāfi' and the Shāfi authorities consider it abominable that it should exceed the *mahr-ul-unnah*, i.e., 500 dirhams, which is the *mahr* that the Prophet gave to his wives. *Bail*, II, 68 (par. 2), 70, (par. 4).

<sup>2</sup> *Bail*, I, 92, II, 68; *Umdatun Nisa Begum v. (Mirza) Asad Ali* (1899) 8, D. A., CAL. I, 277 (Shāfi case); *Umdatun Nisawati v. Zineb Beech* (1801), *ib.* p. 68, *mahr* of 300,000 gold mohurs; *Wajih On Nisa Khanum v. Mirza Husain Ali* (1808), *ib.* p. 266 (*mahr* of Rs. 1,14,000 and 355 gold mohurs held valid). The Bombay High Court (Jenkins, C.J., and Heaton, J.) upheld in appeal a decision of Russell, J., in which he passed a decree for eighteen lakhs of rupees for *mahr*. *Mir Asa Ali v. Banoo Begum* (Spe. 1907; O. O. C. J. Appeal No. 1472, from Suit 577 of 1906, unreported); cf. *Asha Bibi v. Kadir Ibrahim* (1909) 33 *Mud.* 22, 26; *Sugra Bibi v.*

*Musma Bibi* (1877) 2 *Al.* 573. The question is fully considered in (*Musammah Sahibzadi Begum v.*) (*Musammah*) *Sahibzade Begum* (1890) 15 *Punj. Rec.*, 297 (No. 123) (Brandreth and Bakley, J.J.) to which attention is drawn.

<sup>4</sup> The section is headed *unnah*, the word is spelt *unnah* by Bailie (I, 116). See footnote to the word *unnah* in s. 162, below.

<sup>5</sup> See also *Bail*, II, 70, II, 2-4.

<sup>6</sup> But the husband may agree to give more, or the wife to accept less. *Kanwaraswar v. Hootina* (1881) 3 *Al.* 266, *Bail*, I 130-131.

<sup>7</sup> Literally "dower of the like," i.e., of those similar to her, but technically, called in English books "proper dower." See *Bailie* I, p. xxx.

<sup>8</sup> *Bail*, I 95. The *mahr* given to the mother of the bride is not to be taken into

'Mahr' never invalid as excessive.  
Nominal dowers.

'Mahr-ul-mithl,' or proper dower

## SECTION 97.

(2) In Sunni Hanafi law where the 'mahr' is fixed, and it is less than ten 'dirhams' in value, the bride is entitled only to ten 'dirhams.'<sup>1</sup>

(Shiah law)  
Maximum of  
proper dower

(3) According to Shiah law, (a) the 'mahr-ul-mithl' can never exceed 500 'dirhams';<sup>2</sup> (b) where one of the parties dies without the marriage being consummated, and before the 'mahr' is agreed upon, neither 'mahr' nor a present ('mit'at') is due to the wife;<sup>3</sup> (c) where the amount of the 'mahr' is left to be fixed by the husband at his discretion, he may fix it at any amount, but where it is left to the discretion of the wife, she cannot fix it at more than 500 'dirhams.'<sup>4</sup>

According to Hanafi law, 'mahr' cannot be so fixed after the contract. And if it is left unfixed till then, the effect in the absence of a subsequent agreement is the same as if no 'mahr' had been fixed,<sup>5</sup> though the parties may, if they choose, agree on an amount after marriage.<sup>6</sup>

## § 2. — 'Mahr' When Due and in What Portions.

'Mu'ajjal' (or  
prompt) and  
'muwajjal' (or  
deferred)  
dower

98. 'Mahr' may either be prompt, or exigible, (in Arabic 'mu'ajjal')<sup>7</sup> i.e., payable immediately on marriage if demanded by the wife; or deferred (in Arabic 'muwajjal') i.e., payable on the dissolution of marriage, or the happening of some specified event.

Whether  
deferred dower  
becomes due  
on death of  
wife.

The Privy Council in a case more fully referred to hereafter, considered, but did not decide, whether the death of the wife is a sufficient dissolution of the marriage, in order to entitle her heirs to claim the

consideration marrying at the *mahr-ul-mithl*  
Ead I 95. Not the means of the husband  
*Sugra Bibi v. Masnada Bibi* (1877) 2 All.  
573. In *Najmuddin v. Ahmed Hassan*, (1865)  
1 W. R., 110, it was said, however, that the  
means and position of the bridegroom must  
not be altogether excluded from consideration.  
They should be considered, it is said, not  
only for determining whether the parties did  
arrive at an agreement intended to be binding  
upon them, or whether the ostensible  
agreement was a mere sham.

<sup>1</sup> Ead I 92-93, Ead 41

<sup>2</sup> Ead II 21

<sup>3</sup> Ead II 71. See - 102 (b) 1-100.

<sup>4</sup> Ead II 75

<sup>5</sup> Ead I 95.

<sup>6</sup> *Kamrunnessa v. Hasan* (1881) 3 All. 286.

<sup>7</sup> The period of limitation for a suit for dower is three years, and it begins to run for "exigible dower," when the dower is demanded and refused, or, where, during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death, or divorce (Indian Limitation Act, X 1908, Sch. I, art 103); and for deferred dower, "when the marriage is dissolved by death or divorce" (art. 101). In *Sarwa Khatun v. Alifgonna Khatun* (1863) 2 Hay, 210, the widow had been ejected by order of court from possession of



deferred dower.<sup>1</sup> It is submitted, however, that the statement in SECTION 98 the 'Fatawa 'Alamgiri' that death dissolves the marriage,<sup>2</sup> naturally means death of either party,<sup>3</sup> otherwise it would have been laid down expressly that the marriage is for this purpose considered to be dissolved only by the death of the husband.<sup>4</sup>

99. An addition may be made to the 'mahr' at any time during the continuance of the marriage, and the husband's promise to add to the 'mahr' if accepted by the wife, becomes incorporated with the marriage contract, and is binding on him;<sup>5</sup> provided that where the marriage is dissolved otherwise than by the death of either party, and without consummation or valid retirement, any addition that has been made to the 'mahr' after the marriage contract, becomes void; and, in such circumstances, where the wife becomes entitled to half of her 'mahr,'<sup>6</sup> she can claim half only of her original 'mahr,' and no part of the addition.<sup>7</sup>

100. The wife may validly agree to a reduction of her

her husband's property, which she held as security for her *mahr*. Limitation was held to run from the time of such agreement, and not from the death of the husband. When the ejection is not by court's order her then subsists, and the heir or purchaser takes the property subject to it. *Umud Ali v. Saifuddin* (1869) 3 Ben L. R. (N. C.) 175, *Bunday Ali Khan v. Chota Bibee* (1866), Azla 273. The question was left undecided whether in the case of a revocable divorce, limitation for deferred dower begins to run from the time of the pronouncement or at the expiration of the 'iddat. For cases before the Indian Limitation Act 1872, see *Umud Ali v. Begum v. (Muz)* *Umud Ali* (1809) 8 D. A. (C.A.) 1, 278. (*Muz*) *Amalotha v. (Musammam) Doodatoo Khattun* (1805) ib 103, *Noorunnissa Begum v. Nazeem Syed Mohsin Ali Khan Bahadur v. ib VII 10*, all over-ruled by *Ameerunnissa v. Maad-un-nissa* (1855) 6 Moo 1 A 211, in accordance with which the Indian Limitation Act of 1877, artt. 103 and 104, were framed, and retained in Act IX of 1908. See also *Kharunnissa Begum v. Ratanunissa Begum* (1873) 2 I A, 235.

<sup>1</sup> (*Muz*) *Badar Bakht Yahga Muhammad Ali Khan Bahadur v. (Muz) Khurram Bakht Yahga Ali Khan Bahadur* (1873) 19 W. R. 315 (P. C.).

<sup>2</sup> Bail I. 150 contains one of the few inaccuracies of which the translation may be accused. From line 3 it would appear that "marriage" is said to be "confirmed by consummation or death." In the original it is the 'iddat and not marriage that is said to be so confirmed.

<sup>3</sup> And so it was held in *Mohar Ali v. Amara* (1869) 2 Beng L. R. (N. C.) 306, S. C. *Khyatun v. Amara*, 11 W. R. 212, *Household v. Tordry v. Tordry* (1861), W. R. 199.

<sup>4</sup> Cf. the French Civil Code art. 227: "Marriages are dissolved 1. by the death of the husband or wife, 2. by a divorce lawfully decreed, 3. by a final sentence against the husband or wife to a punishment occasioning civil death." Civil death was abolished by the law of 31st May 1854.

<sup>5</sup> Bail I. 111, *Kamunnissa v. Huzay* (1884) 3 All 246, *Deakin Bazar v. Isa Rasul* (1916) 11 Bom. s. 10 (*per* Beaman J.). There may be difficulty in proving such an agreement, and, unless it can be shown to be governed by Muhammadan law, the question would arise whether a marriage already contracted, is a valid consideration. The consideration of *khauf* cannot be increased subsequently, 11 s. 165, below.

<sup>6</sup> See s. 102, below.

<sup>7</sup> Bail I. 111, ll. 78-79.

Addition to  
'mahr' subject  
to the 'iddat

Reduction  
of gift of  
dower by wife  
to husband

**SECTION 100.** 'mahr,'<sup>1</sup> or make a gift (or remission) of the whole of it to her husband, or after his death to his heirs.<sup>1</sup> Such a gift may be made conditionally;<sup>2</sup> and if purported to be made by a widow to a deceased husband or his heirs, it operates as a release<sup>3</sup> of the claim, which is operative without being accepted by the heirs of the husband.<sup>4</sup>

The whole of the 'mahr' due (1) on consummation, or (2) death of either party.

**101.** (1) Where there is an agreement fixing the amount of the 'mahr' and, the marriage has been consummated<sup>5</sup> or either party, has died,<sup>6</sup> the whole of the 'mahr' is payable to the wife.<sup>7</sup>

(2) Where the amount of the 'mahr' has not been agreed upon,—(a) under Hanafi law, if the marriage has been consummated, or either party has died, the wife (or her heir) is entitled to 'mahr-ul-mithl';<sup>8</sup> (b) under Shiah law, the 'mahr-ul-mithl' is payable if the marriage has been consummated, but where death takes place without consummation,<sup>9</sup> neither 'mahr' nor anything in lieu of it<sup>10</sup> is payable.<sup>10</sup>

For a summary of the rules contained in ss. 101-103 see the comment to s. 103, below.

When marriage dissolved before consummation by act of husband

**102.** Where the wife is divorced by the husband without consummation or valid retirement, or where, by any act on the part of the husband,<sup>11</sup> other than his exercising the

<sup>1</sup> Bail I 112-113, (discussed).

<sup>2</sup> Bail I 119 and 120. In *(Mufti) Badai Bulki Mukhannas Ali Khan, Babbar v. (Muzir) Khurram Bulki, Yakub Ali Khan, Bahadur* (187) 15 W R 315 (1911) it was alleged that the *mahr* was originally fixed at nine lakhs of rupees, and that Rs. 7,000 and two arabs (worth Rs. 3,000) were paid by the husband (th. King of Oudh), and were accepted, in satisfaction of the *mahr*, and that thereupon it was released. The evidence in the case appeared (both to the court of first instance and to the P. C.) "too weak to establish the plea of satisfaction" (p. 317, column 1).

<sup>3</sup> A gift has to be accepted for completion, but a release is effective without acceptance, and, accordingly, a gift cannot be made subject to a condition.

<sup>4</sup> *Iqbal Begum Fakirooideen v. Uroo Begum* (1908) 32 Bom 612, 10 Bom L R 754 (Scot. C. J.).

<sup>5</sup> Bail I, 96, II, 29-33, 65, (last 3).

<sup>6</sup> Bail I, 96 as to Shiah law see *Bismillah Begum v. Shaha Begum Begum* (1913), 18 Ind L J 179. (Cable Comm. of Oudh) (citing *Shah-e-Tamir, Keshab-ul-Laman, and Fakhr-ul-Akhan* to show that the *shah mahr* becomes due on death of either party).

<sup>7</sup> And her right to others is not affected by an "subsequent" event. Bail I 91, II, 29 (last par.) 62-63, 64-71.

<sup>8</sup> Which there has been consummation (see (1) or clause (b)).

<sup>9</sup> Bail II 71, c. q. *mutad*, see ss. 102-6.

<sup>10</sup> The exception to the rule in clause (b) is to be distinguished from s. 611, *ibid.* (3), below, by which a marriage contract purported to be made on *mahr-ul-mithl* and never consummated, is declared to be null and void. The latter rule is an illustration of the general rule contained in s. 606, below.

<sup>11</sup> The case where the husband dies, is provided for by s. 101, above.

option of puberty,<sup>1</sup> the marriage is dissolved before consummation<sup>2</sup> or valid retirement, the wife becomes entitled *either* (a) to receive half of the 'mahr' agreed upon; *or* (b) where there is no agreement in the contract of marriage fixing the 'mahr,' or an agreement invalidly<sup>3</sup> purported to be made that she is not to receive any 'mahr,' - she is entitled to a 'mit'at,'<sup>4</sup> or present, which, under Sunni law, must consist of three articles of dress, or of their value; and which, under Shiah law, is regulated by the condition and circumstances of the husband.

(1) H marries W, agreeing to pay Rs. 1,000 as 'mahr' and before consummation the marriage is consummated, or then, has been a 'valid retirement' between them, H divorces W, or makes a statement by which prohibition by forage is established between H and W (of which fact W had no knowledge) W is entitled to half of Rs. 1,000 as her dower.

(2) In the last illustration if there had been no agreement to pay any 'mahr,' or an express agreement that no dower should be paid to W, she would, if governed by Hanafi law, have been entitled to receive a present from H, and if governed by Shiah or Shafi'i law, she would be entitled to receive her proper dower.

(3) If the marriage had been consummated, or either H or W had died, then W or W's heirs would have been entitled, in the first illustration, to the whole of the Rs. 1,000, and, in the second illustration the 'mahr-ul-mithl.'

The fact that possession has been given to the wife of the 'mahr,' or of any part thereof, does not affect the amount or portion to which she becomes entitled, except in so far as it may show her consent to the amount of the 'mahr.'<sup>5</sup>

Where the 'mahr' consists of a stipulation on the part of the husband to render, or cause to be rendered, some service to the wife, which has already been rendered, and she becomes entitled to only half the 'mahr.'

<sup>1</sup> Bail I 51.

<sup>2</sup> *Abdul Latif Khan v. Noor Ahniet Khan* (1909) 6 All. L. J. 121.

<sup>3</sup> In Shiah law an agreement to receive no 'mahr' is valid under the circumstances mentioned in s. 97, above. In Sunni law they are always invalid.

<sup>4</sup> Cf. s. 97, (1) (b) above. The word is also pronounced *mitat* and, accordingly, in Bail I 97 it is spelt *mitat*. See the note to the word *phat* in s. 102, (2) below.

<sup>5</sup> Bail I 97, II 71.

<sup>6</sup> Bail I 112, 113, II 71. The *Fatawa 'Alamgiri* contains many rules as to the effect of accession or damage to the subject of *mahr* in case the wife has to return it wholly, or in part (Bail I 112-116) but these have been omitted, as it is unlikely that the question should arise in the Indian Courts, and if it did, probably the general law of contract would apply.

(1) If dower is agreed upon,—half of it, i.e., i.e.,  
(2) if (a) no dower agreed upon, or (b) equal the value of the dower is to be paid,—a. i. e., i.e., due

Possession does not affect portion of 'mahr' due.

Services already rendered as 'mahr'

SECTION 102. she must pay him half of the hire for such service.<sup>1</sup> Where the wife has released<sup>2</sup> the 'mahr' or any portion of it, or has taken anything in lieu of it, and then the husband has divorced her, without consummation of the marriage, he is entitled to claim from her half of the 'mahr' originally agreed upon.<sup>3</sup>

Release of  
'mahr'

For a summary of the rules contained in ss 101-103 see next page.

(Shiah law.)  
When marriage void or  
cancelled

103. According to Shiah law, (1) Where the marriage is void, but it has been consummated, the proper dower, and not the dower agreed upon, is due; (2) Where a valid marriage is cancelled after consummation the dower that has been agreed upon, is due.<sup>4</sup>

Breach of terms  
of marriage.

103A. Where the husband commits the breach of a condition incorporated in the marriage contract, the wife may become entitled to claim not merely the 'mahr' contracted for, but her 'mahr-ul-mithl' or "proper dower."

#### PROPORTIONS OF 'MAHR' WHICH BECOME PAYABLE<sup>5</sup>

When marriage consummated or either party dies.

I. Where there has been consummation of the marriage or valid retirement, or either party has died,

- (1) if the marriage is regular, and,
  - (a) the dower is specifically agreed upon, *the whole dower is due*;<sup>6</sup>
  - (b) if the dower is not specified, or it is invalidly agreed that no dower is payable, *the proper dower is due*.<sup>6</sup>

Provided that, under Shiah law, if one of the parties dies before the marriage is consummated, and before the dower is settled, *nothing is due*;<sup>7</sup> unless it had been agreed that the amount should be fixed subsequently, in which case *half of the amount so fixed is due*.<sup>8</sup>

- (2) if the marriage is irregular, and,
  - (a) if the dower is specially agreed upon,
 

<i>the proper dower or the specified dower</i>	}	<i>whichever is less, -is due</i> ; <sup>9</sup>
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  - (b) if the dower is not specified, or it is invalidly agreed that no dower is payable, *the proper dower is due*.<sup>10</sup>

<sup>1</sup> Bail. II. 75.

<sup>2</sup> See s. 100, above.

<sup>3</sup> Bail. II. 75 (4th & 5th).

<sup>4</sup> Bail. II. 65-66.

<sup>5</sup> See ss. 101, 103, above.

<sup>6</sup> Bail. I. 96.

<sup>7</sup> Not even a present (*mahrat*). Bail. II. 71. (*first*).

<sup>8</sup> Bail. II. 73, II. 16-27. In this connection it must be pointed out that these rules postulate the existence of a valid marriage: when there is no marriage they cannot apply. The validity of the marriage itself depends, in one case, upon consummation: see 641, *id.* (3).

<sup>9</sup> Bail. I. 156, (par. 1), 32, *id.* (1-3).

<sup>10</sup> Bail. I. 156.

(c) According to Shiah law in all cases where the marriage is void, SECTION 103A *the proper dower, and not the specified dower, is payable.*

11. Where there has been neither consummation, valid retirement, nor the death of either party,—

(1) if the marriage is regular, and,

(a) it is dissolved by any act of the husband,<sup>1</sup> other than the exercise by him of the option of puberty,<sup>2</sup> and,

(i) if the dower is specifically agreed upon, then *half the specified dower is due*;<sup>3</sup>

(ii) if the dower is not specified, or it is invalidly agreed that no dower is payable, *a present is due*;

(b) if it is dissolved by the act of the wife,<sup>4</sup> or by either the husband or wife exercising the option of puberty, *nothing is due.*

(2) if the marriage is irregular, *nothing is due.*<sup>5</sup>

When marriage not consummated nor dissolved by death

### § 3.—*Liability to Pay and Right to Give Valid Discharge for ‘Mahr.’*

104. (1) Where the marriage has been contracted on behalf of a minor of the male sex by his guardian for marriage, the property of the minor is liable for the ‘mahr,’ and, if he has no property, the guardian is liable to pay it to the wife.

Liability for ‘mahr’ on marriage of minor husband.

(2) Where the guardian has paid the ‘mahr,’ and the minor, on attaining puberty, divorces his wife without consummating the marriage. *semble*, the wife is bound to refund half of the ‘mahr’ to the husband,<sup>6</sup> and not to his guardian.<sup>7</sup> The husband is entitled to a refund of half of the ‘mahr,’ even though he was an adult at the time the marriage was contracted, and the ‘mahr’ has been paid by another person who has purported to act as his guardian for marriage.

105. Payment of ‘mahr’ to the legal guardian of a woman who is a minor, or of unsound mind, or to the father, or grandfather, of any woman who is a virgin, is a sufficient

Who can give valid discharge for ‘mahr.’

<sup>1</sup> Bail. I. 96.

<sup>2</sup> Bail. I. 53.

<sup>3</sup> Bail. I. 96, 53; 11.

<sup>4</sup> Bail. I. 96, 11, 71

<sup>5</sup> Bail. I. 31, 156.

<sup>6</sup> There is room for doubt. Bail. II. 81.

<sup>7</sup> Bail. II. 80.

SECTION 105. discharge to the husband ; and effectually exonerates him from his liability to pay it to his wife.<sup>1</sup>

§ 4.—*Means for Enforcing Payment of 'Mahr.'*

(1) *Denial of Conjugal Rights until 'Mahr' Paid.*

Refusal of  
conjugal  
rights until  
dower paid.  
Option in  
wife.

106. (1) The wife has, subject to sub-section (3), below, the option of refusing to the husband his conjugal rights, and of disregarding his attempts to restrain her movements, until the exigible ('mu'ajjal'<sup>2</sup>) part of her 'mahr' has been paid to her.

Her guardian's  
option

(2) Where the wife is a minor,<sup>3</sup> or of unsound mind,<sup>4</sup> her guardians have the option of refusing to give her into the custody of her husband, and, if she is in his custody, they have the option of taking her back, and keeping her in their own custody, until the exigible portion of her 'mahr' is paid up.<sup>5</sup>

Option lost  
when mar-  
riage once  
consummated.

(3) Where the husband has once had sexual intercourse with his wife with her consent, (she being then neither a minor, nor of unsound mind) the two disciples of Abu Hanifa,<sup>6</sup> the majority of Shiah authorities,<sup>7</sup> and the latest rulings of the Courts in British India<sup>8</sup> hold that her option is determined, and that the husband is entitled to restitution of conjugal rights;<sup>9</sup> though *semble*, the Court may in its discretion refuse to grant restitution except on the

<sup>1</sup> Bail. I. 129-130. (1) *Nasib Khasra Muhammad v. Nasib Hussain Begum* (1910) 32 All. 410, 37 I. A. 152, 12 Bom. L. R. 638 (2 C.). In *Uftaarunnisa Begum v. Anwar Ali Khan* (1871) 7 Beng. L. R. (P.C.), 643, the dower being five lakhs, the husband set aside four and a half lakhs' worth of Company's paper, held, this was in satisfaction of *mahr*, and not a gift.  
<sup>2</sup> Or prompt.

<sup>3</sup> *Re Khatoon Bibi* (1866) 5 Beng. L. R. 557 and *Mahmud Bibi* (1871) 13 Beng. L. R. 105.

<sup>4</sup> See s. 234, below.

<sup>5</sup> Bail. I. 124; II 70.

<sup>6</sup> Bail. I. 125; Hed. 54.

<sup>7</sup> Bail. II. 70.

<sup>8</sup> *Abdul Kadir v. Salima* (1886) 8 All. 149, containing an elaborate judgment of Mahmood, J.; *Kuski v. Mordha* (1886) 11 Mad. 327; *Hannunissa Bibi v. Zakaruddin Sheikh*, (1890) 17

Cal. 670; *Bai Hissa v. Abdulla* (1905) 30 Bom. 122; 7 Bom. L. R. 684.

<sup>9</sup> The opinion of Abu Hanifa and a minority of Shiah authorities is that the wife's option is not determined by her husband having sexual intercourse with her. Some of the earlier decisions of the Allahabad High Court were in accordance with this view; Macnaghten, "Muhammadan Law," 291-292 (case 31); (*Sheikh*) *Abdul Shukoor v. Fakreemonaissa* (1873) 6 N. W., 91, *Bidia v. Mazhar Hussain* (1879), 1 All. 153, and *Widayat Hussain v. Allah Rakhi*, (1880) 2 All. 931. The two last cases were expressly over-ruled in *Abdul Kadir v. Salima* (1886), 8 All. 149 (P.C.). In *Abdul Karim Khan v. Chhote* (1906) 3 All. L. J. 432 the decision in *Widayat Hussain's* case was followed, apparently in inadvertence of the fact that that case had been over-ruled 20 years before.

terms that the prompt portion of the 'mahr' is paid up.<sup>1</sup> SECTION 106.

*Explanation.*—The rights and liabilities of the wife under the marriage contract, other than those of sexual intercourse, are not affected by her exercising the option referred to in sub-section (1).<sup>2</sup>

The following are translations of extracts from the 'Sharh Lum'a.'<sup>3</sup> mahr text on option to refuse conjugal rights  
 a Shiah book of authority: "It is competent for a wife to refuse his conjugal rights (to the husband) before the consummation of marriage, until she receives the 'mahr'; provided that it has become payable [whether the husband is able to pay or not, and whether the subject of 'mahr' consists of substance or usufruct; and whether it has been fixed or not]."<sup>4</sup> Option lost on consummation.  
 "After consummation of marriage, it is not competent for her to refuse herself, according to the more correct opinion, [for 'mahr' is confirmed by sexual intercourse, and she has willingly surrendered herself; the result is that her right is thereafter restricted to making a demand for payment; but she cannot refuse herself. — 'nikah' being a contract for return, and when one of the parties to such a contract gives the return due from him voluntarily, it is not competent for him (the other) to withhold it (his part of the consideration)]."<sup>5</sup>

107. According to Abu Yusuf's exposition of Hanafi law, where the 'mahr' is payable at a future date, or only on the happening of a specified future event, then, in the absence of an express agreement to the contrary, the wife or her guardian has the option of denying to the husband his conjugal rights, until the 'mahr' becomes due and is paid.<sup>6</sup> According to Imam Muhammad's exposition of Hanafi law and according to Shiah law there is no such option.<sup>7</sup> When dower deferred whether wife has option to refuse conjugal rights until dower becomes due and is paid.

<sup>1</sup> So held by the Punjab Chief Court: *Jau Muhammad v. Chawja* (1890) 20 Punj. Rec. 91 (No. 14); *Musammat Saikh Bibi v. Rafi-ud-din* (1889) 24 Punj. Rec. 573 (No. 164) (P. R.) a decree to the same effect was passed by the Lower Court and affirmed by the Chief Court in *Euben v. Mazhar Hussain* (1877), 1 All. 483. See also the remarks of Mahmood, J., in *Abdul Kadir v. Salima* (1886) 8 All. 149, 170, 171; in the latter case the husband brought the money into court after suit, and it was held that he could then obtain a decree for restitution of conjugal rights. But see *Nazir Khan v. Umarao* [1882] All. W. N. 96.

<sup>2</sup> Hed. 54.

<sup>3</sup> *Sharh Lum'a*, Vol. I. p. 96 (86), the *Sharh* (commentary) is enclosed in [ ].

<sup>4</sup> *Id.* p. 97; similarly the *Jum'at-us-Shittat*, p. 113, which adds the following by way of explanation: "In contracts which involve exchange, refusal of possession is allowed on both sides till the payment of the return." Compare the rules as to *hubb bil'azwaj*, contained in ss. 106, and 407, below.

<sup>5</sup> Ball I. 94-95, 108, 110; II. 78. The reasoning of Mahmood, J., and the other judges in the cases referred to in the footnotes to s. 106 (3), above, tends to show that Abu Yusuf's opinion would not be followed in India.

## SECTION 108.

(2) *Widow's Lien for Unpaid 'Mahr.'*

Widow's lien  
for unpaid  
'mahr' over  
property in  
her lawful  
possession

**108.** (1) Where the husband dies without paying the 'mahr,' his widow becomes a creditor of his estate for her 'mahr,' and until it is paid, she has (subject to the provisions of this section, and of s. 112, below) the right, as such creditor, to retain possession of the property of her deceased husband, of which she has lawfully and without force or fraud obtained possession.<sup>1</sup>

Lawful possession,  
how obtained

(2) *Seemle*, such possession must initially be obtained by the widow on the ground of her claim for 'mahr.'<sup>2</sup>

Presumptions

(a) it is lawful,  
and in lieu of  
dower

(3) The widow's possession of her husband's property is lawful, and is considered to be held in lieu of her 'mahr,' where the 'mahr-nama'<sup>3</sup> provides for it, or where she has been put into such possession by her husband in his lifetime, or by his heirs after his death.

(b) that possession  
has been lawfully  
obtained.

(4) Where the widow has been in possession of her husband's property during his lifetime, and has continued so for some time after his death, it will be presumed that her possession has been lawfully obtained and is in lieu of her 'mahr.'

*Illustrations.*

(1) A Mussulman died leaving a widow (the appellant) and other heirs. On his death the widow applied to the Collector to have her name put in the register, claiming that she was in possession of the property "by right of inheritance, and also on account of her dower."<sup>3</sup> Her application was opposed by the other heirs, but was granted by the Collector, and she continued in possession. The other heirs took no steps to disturb her possession for nearly ten years, after which two cross suits were brought: by the widow to establish her right to 'mahr' and to hold the estate for securing the payment of her deferred dower; and by the other heirs to eject the widow and obtain possession of their shares in the estate. *Held*: (a) the claim of the widow to hold the property to satisfy her dower, cannot be founded upon an original hypothecation

<sup>1</sup> (*Mussammat Bebee Breekun v. (Sheikh) Hamud Hussen* (1871) 14 Moo. L. A. 377, 381; 10 Beng. L. R. 41. 17 W. R. 113; *Hibi Tajim v. (Syed) Wahed Ali* (1873) 22 W. R. 113; *Sahabjoo Beem v. Aswaruddin* (1911) 28 Cal. 475

<sup>2</sup> See the illustrations, and comment to this section. In *Majumdar v. Bibi Sahib Jan* (1912)

17 Bom. L. R. 770, it was found that the widows had obtained possession (1) with the consent of the heirs, (2) in lieu of dower; and so the question involved in subs. (2) had not to be considered.

<sup>3</sup> This expression includes, in this Chapter, an oral agreement to pay *mahr*, see s. 92, above.



of the estate for her dower; for such a right does not arise by the SECTION 108. Muhammadan law,—(i) as a consequence of the gift of dower, nor (ii) was Illustration. there any agreement on the part of the husband to pledge his estate for the dower; but (b) the widow, having obtained actual and lawful possession of the estates, under a claim to hold them as heir and for her dower, she was entitled to retain possession until her dower was satisfied.<sup>1</sup>

(2) A Mussulman died, leaving two widows, and other heirs. The widows, who were living in the house of the deceased with him continued, after his death, in undisturbed possession of the house, for more than a year. A suit brought by the other heirs for possession by partition of the property, was resisted by the widows on the ground that they were in possession for 'mahr, which was proved to be due. *Held*, that in this case, the presumption was that the widows were let into possession by their husband in lieu of dower, or that they obtained such possession, after the death of the husband, with the consent, or by the acquiescence, of the heirs.<sup>2</sup>

(3) The mother and sister of a deceased Mussulman, as his heirs, sued his widows for a declaration of their title as such heirs, and for possession of their shares in the estate. The plaintiffs offered to pay a proportionate part of the dower debt found to exist in favour of the widow. The High Court held, on the evidence, that neither of the widows was in possession of the property at the death of the deceased, but one of them seized it in order to have a lien on it, there being no evidence that the widow in possession had obtained it either by contract with her husband, or the consent of the other heirs. The widow relied on proceedings in a revenue court, in which, adversely to the other heirs, she had been placed in possession of the properties in lieu of her dower. *Held*, that the widow could not give herself a lien, by taking possession of the estate, without the consent or authority of the persons entitled, and that, in the circumstances, it was not shown that her possession was lawfully obtained, so as to give her a lien.<sup>3</sup>

"The dower ranks as a debt," said Lord Parker, delivering the advice of the Judicial Committee, "and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other

Widow's lien for 'mahr' defined

<sup>1</sup> (Mussulman) *Belee Bichan v. (Sheikh) Hamid Hassan* (1871) 14 Moo. I. A. 377, 782-388. Their Lordships added, "It is not necessary to say whether the right of the widow in possession is a lien in the strict sense of the term though so stated in *Ahmed Hassan v. Khodje*, 10, W. R. 309." See s. 112, below.

<sup>2</sup> *Muhammad Karim-ullah Khan v. Amam*

*Begum* (1895) 17 All. 91, Edge, C. J., and Banerjee, J., upholding *Burkitt, J.*, (1894) 16 All. 252, though not agreeing with his statement that the widow does not require the permission of the heirs for lawfully entering into possession (p. 227). See comment to s. 108.

<sup>3</sup> *Ammat-un-nissa v. Bashir-un-nissa* (1891) 17 All. 77 (Edge, C. J., and Banerjee, J.)

SECTION 108. unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board."<sup>1</sup>

The second of the three sentences cited above, is, it is submitted, a confirmation of the view which had been expressed in the first edition of this work, with reference to the conflict between the two cases that are considered below.

'Amr-  
un-nisa' v.  
Bashir-un-  
nisa'—  
considered.

Facts  
of the case.

The cases given as illustrations (2) and (3), above, were decided by the same judges, but it has been questioned whether they are consistent with each other, and the judgment in the latter has been dissented from,<sup>2</sup> and subjected to severe criticism.<sup>3</sup> On the ground that the decisions on which it purports to be based do not contain the propositions in support of which they are cited,<sup>4</sup> or that they have been over-ruled, or discredited.<sup>5</sup> Some expressions<sup>6</sup> in the judgment referred to may be admitted to be open to criticism, but the actual decision could hardly have been otherwise. For the plaintiffs sued the widow for their shares in the estate, and offered to pay her a proportionate part of her 'mahr.' Under such circumstances, it is obvious, that the widow cannot resist the claim of the heirs: if it were decided otherwise, her rights would be not analogous to those of other creditors, but of a far more extended kind.<sup>7</sup>

<sup>1</sup> *Hamira Bibi v. Zubaid's Bibi* (1916) 38 All 581, 588 (p. c). See s. 112, below.

<sup>2</sup> *Ramzan Ali Khan v. Asghara Begam* (1910) 32 All 563, 565.

<sup>3</sup> *Sir R. Wilson's* "Anglo-Muhammadan Law," 225, under s. 102.

<sup>4</sup> *I* s., (i) (*Musunnat*) *Wahab-un-nisa' v. Shubratun* (1870), 6 Beng. L. R., 54, to which Edge, C. J., referred as leading him and his colleague to the conclusion at which they arrived, merely decides that the widow cannot follow the property in the hands of a bona fide alienee. (ii) In (*Biber*) *Mehran v. Musunnat Kuberun* (1870) 13 W. R. 49, 6 Beng. L. R. 60 note, the plaintiff was silent as to whether she had ever had possession since her husband's death. (iii) In *Ali Muhammad Khan v. Azizullah Khan* (1883) 6 All 50, the question really decided by the judges was that the right to dower is personal to the widow, and does not pass to a purchaser of the estate, and yet the last two cases are cited by Edge, C. J., as "supporting the view" that his Lordship and his learned colleague took.

<sup>5</sup> (*Musunnat Meerun v. Musunnat Najeehun* (1867) 2 Agra 375, which is not followed by the

very judges who decided it—see (*Syud*) *Imdad Hosein v. Musunnat Hussain Buksh* (1870) 2 N. W. P. 327.

<sup>6</sup> See the next two footnotes. The expressions referred to, consist solely of a reference en bloc to a number of cases, the relevance of some of which is not at once apparent. It may be that the cases had been discussed in argument, and, in delivering judgment, the judges did not cover the same ground over again by a detailed reference to the facts and decisions of each case that was cited and commented upon.

<sup>7</sup> See the Chapter on Administration, ss. 559, et seq. below, and the footnote to the word "debt" in s. 569, below, and the comment thereto. In the cases where a creditor is the plaintiff, and the heirs resist his claim on the ground that they do not represent the estate, it is admitted that the heirs are entitled to their shares subject to payment by them of proportionate parts of the debts: see ss. 566, 567, below, and *Jafri Begam v. Amir Muhammad Khan* (1885) 7 All. 822; *Ambahankar Harprasad v. (Syud) Ali Rasul* (1894) 19 Bom. 273.

Then as to the opinion expressed by Edge, C. J., that unless the widow comes in under a contract with her husband, or by the consent or acquiescence of the heirs, her possession is unlawful,<sup>1</sup>—before it can be pronounced unsound, it is necessary to examine the other means by which it can be suggested that the widow may claim to have obtained lawful possession. If she takes possession against the consent of the heirs, in the sense of doing so by force, it need hardly be stated that her act cannot be sustained.<sup>2</sup> Barring the two alternatives referred to by Edge, C. J., viz., (1) by consent of either the deceased owner, or (2) his representatives after his death, there is one other obvious mode in which the widow can claim to get into possession, viz: (3) by claiming to have a right to be put into possession “in due course of law.” In regard to such a claim, as her rights are similar to those of other unsecured creditors of the deceased, she can lay no such claim. Assuming that she has such a right she would have to apply to the Civil Court for being put into possession. It is clear that the decision on such a point by the revenue courts, on which ‘Amanat-un-nissa’ relied,<sup>3</sup> could not have any force in a civil court: ordinarily, the Revenue courts would refer the parties claiming such rights to the Civil courts. (4) Is there any fourth mode in which the widow may get into possession, quietly and peaceably, without force or fraud? Richards, J., says in ‘Ramzan Ali’s’ case<sup>4</sup> “It seems to me that if the widow obtains possession peacefully and quietly and without fraud, she is entitled to remain in possession until her dower debt is discharged, subject to her liability to account for the profits that she has received whilst so in possession.” The question in

Modes in which widow may obtain possession in lieu of dower:  
1. Contract.  
2. Consent.

1. and  
alt. native

On principle, Possession cannot be obtained otherwise

<sup>1</sup> This proposition is not so singular and devoid of authority, as Sir R. Wilson seems to imply. Thus, even before the Privy Council decision in *Hamira Bibi's* case (1916) 38 All. 580 above referred to,—(1) Macpherson and Jackson, J.J., in (*Meer Mehr Ali v. (Museum) Ammae* (1860) 11 W. R. 212, say that “the contract itself does not give the woman a lien on her husband’s property” (p. 213) then, after carefully pointing out that the widow is in exactly the same position as other creditors, they say “It is not intended in any decree to lay down that a woman has a lien on her husband’s property in the ordinary and legal sense of the term lien” (2) This case is followed by Phear and Jackson, J.J., in (*Biber Mehar v. (Museum) Kuberan* (1860) 13 W. R. 49, who again point out that (a) there is no lien by the law itself, (b) that no contract was set up, (c) that “the heirs never did allow her to take possession.” (3) Again Straight, O. C. J., and Tyrrel, J., say “except when there is a distinct agreement to that effect there is no presumption of hypothec-

ation of his estate for her dower” *Ali Muhammad Khan v. Azizullah Khan* (1883) 6 All. 50, 51 (4) Finally Mahmood, J., in *Ayub Begum v. Nazir Ahmad* (1890) All. W. N. (Vol. X) 115, held that though the widow purported to convey the whole moiety of the house belonging to her husband, she passed only the share she inherited, inasmuch as she was never placed in possession in lieu of dower, by the other heirs, (see p. 116, first column last sentence; and penultimate sentence of the judgment, p. 117) See reference to this case in the comment s. 115, below

<sup>2</sup> The heirs could summarily recover possession under the Specific Relief Act, s. 9. Cf. *Mariam v. Muzhar Ali Khan* (1904) 1 All. I. J. 394

<sup>3</sup> (*Biber Selamat v. (Shaukh) Moulvi Bulah* (1866) 5 W. R. 191. (Trotter and Glover, J.J.) The headnote exactly covers this point, but the judgment is meagre, and, as reported, it does not seem to carry much weight. See also s. 112, below.

<sup>4</sup> Cf. s. 34, (3) to s. 108, above.

<sup>5</sup> (1910) 32 All. 563.

**SECTION 108.** *this connection may be, whether, if the widow takes possession of property of which only a fractional part has devolved upon her as one of the heirs of her deceased husband, she can be said to have got into possession of the whole of the property peacefully and quietly and without fraud, in a case in which it is shown that the other heirs did not consent to her getting into possession of that portion of the property which did not devolve upon her.*

Where the other heirs do not consent to her taking possession, and she takes possession by force, or without the knowledge of the other heirs, can her action be permitted, or rather favoured, by the law? Much as the law may desire to favour the widow, it cannot be intended to recognise or encourage a scramble by the widow for seizing hold of the property, against the wish or knowledge of the other heirs of her husband who are co-owners with her.

Presumption  
is to lawfulness  
of her  
possession  
and as to its  
nature

The presumptions as stated in s. 108 seem to present a view of the law as favourable to the widow as can be taken consistently with principle. In applying them to the facts of any particular case the Court may, and generally does, lean in favour of the widow, unless 'bonâ fide' creditors are concerned. Indeed, when it is borne in mind how easily, by collusion between the widow and other heirs, the claim of a lien for dower may be raised against the ordinary creditors of a deceased person, it seems a great concession to lay down that possession, however obtained in the lifetime of the husband, will be presumed, unless the contrary is shown, to be possession obtained in lieu of dower.

Lien not  
favoured  
by the Law

To the considerations based on general principles of law mentioned in the first paragraph of the comment to the present section, it may be added that, in England, general liens are discouraged. *Le Blanc, J.*, said: <sup>1</sup> "General liens are a great inconvenience to the generality of traders, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body at large of the creditors instead of coming in with them for an equal share of the insolvent's estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionately amongst all the creditors, and they ought not to be encouraged. But I do not mean to say that a usage in trade may not be so general and well established as to induce a jury to believe that the parties acted upon it, in their particular agreement." <sup>1</sup> And Lord Ellenborough said: "Growing liens are always to be looked at with

<sup>1</sup> *Rushforth v. Hatfield* (1805) 6 East 319, 328.

jealousy and require stronger proof.<sup>1</sup> These observations are directly SECTION 108. applicable, when the interests of other creditors are in question.

Whether the presumptions referred to in s. 108 are strong or other- The pre-sump-  
wise, must, it is obvious, depend a great deal on the circumstances tion is artificial  
of the case. Apart from the subtleties of the law, the presence on  
of a great portion of the husband's property by the wife, would  
ordinarily be attributed to her being in management of his  
household, and be considered as held, in reality on his behalf. At  
any rate, the last idea that would occur to most persons would be that  
the house, in which the husband and wife are staying, and that the  
articles, which are in the immediate possession of the wife, but which  
are in the use of both, are in the possession of the wife in lieu of her  
dower. For that would imply that, in the case of a dissolution of the  
marriage (either by the death of wife, or by divorce), the husband would  
have to vacate the premises, and that the wife or her heirs could keep  
him out of possession, until the 'mahr' were paid up. Considered in  
this light, no one would question the necessity of producing strong evi-  
dence to establish the position, that in the lifetime of the husband, he  
had placed his property in the possession of his wife in lieu of dower. If  
the dower is small compared to his means, the husband would pay it off,  
if it is large, he would not voluntarily place this additional burden and  
risk on himself.<sup>2</sup>

If this reasoning is correct, the presumption that the change in the  
nature of possession takes place<sup>3</sup> 'ipso facto' on the husband's death  
can arise only by interpreting the law very favorably to the widow,—a  
course with which no Mussulman (except the immediate parties in an  
action, opposed to the widow) will find fault, for though she is not, like  
the minor, expressly and formally under the special protection  
of the courts of law, her rights, like those of orphans, are specially  
safeguarded in the Quran, with strong injunctions not to be unjust or  
hard with her.<sup>4</sup>

Having dealt with the principles on which the widow's lien is based—  
principles that apply just as much to the widow as to the other

Injunctions  
in Quran  
relating to  
widows.

Widow must  
get into  
possession  
with consent  
of heirs.

<sup>1</sup> *Rushforth v. Hadfield* (1806) 7 East 221, 223.

<sup>2</sup> The question, in whose possession goods are to be considered to be when they are in the house in which the husband and wife are living together, has been considered by Lord Esher, M. R., and Davey, J. J., for the purposes of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31): *Ramsay v. Margrett* [1891] 2 Q. B., 18, 25, 27, 28. In another case, Lindley L. J. "wished

to guard against its being taken that goods which were the separate property of the wife were in the apparent possession of the husband when the husband and wife were living together." *Shepherd & another v. Putbrook* (1887) 4 T. L. R. 642, 643.

<sup>3</sup> Some such change must take place, otherwise the wife has no lien: cf. the Indian Contract Act, ss. 170, 171.

<sup>4</sup> Quran, Sura IV, vv. 1, 2, 23; II. v. 240.

SECTION 108. creditors<sup>1</sup> of the deceased, but which come into prominence because the widow's rights are more directly governed by the Muhammadan law, than by the general law of India, and because she has many facilities for getting into possession that are not available to the other creditors; it must now be considered whether there is any authority for the proposition of Burkitt, J., that the widow does not require the permission of the heirs for lawfully getting into possession.<sup>2</sup> He cites the Privy Council decision<sup>3</sup> which is given as the first illustration to this section, and says that though, when the widows obtained mutation of their names, they did not, in the case before him, " expressly claim that any dower was due to them," yet, in his opinion, this fact " did not affect the question," nor distinguish it from the Privy Council decision referred to.<sup>3</sup> With all deference, it may be pointed out that the Privy Council were at pains to bring out the fact that the widow entered into possession under her dower claim, and that they referred to it on every occasion that they alluded to her possession<sup>4</sup> (Can it then be supposed that the fact so referred to did not, in their opinion, affect the question? The next point that the learned judge takes is, that consent of the heirs could not be necessary for lawful possession, inasmuch as in the case before the Privy Council, the other heirs had also opposed the application for mutation of names; but he forgets that in the said case<sup>5</sup> the widow in her application to the Collector had claimed that she was in possession, and that after the Collector had decided in favour of the widow, ten years had elapsed before the decision of the Collector was questioned, from which circumstance, and from the other contentions in the case, the Privy Council may well have drawn the conclusion that the opposition of the other heirs to the widow remaining in possession had been withdrawn, and that the heirs, having failed in their contention that the dower she claimed was not due, had acquiesced in a state of affairs which perhaps they did not feel themselves in a position lawfully to contest.

Possession must commence with a claim for dower.

<sup>1</sup> *Ameer-oon-Nissa v. Moorad-oon-Nissa*

Finally, the case of 'Ameer-oon-Nissa v. Moorad-oon-Nissa'<sup>3</sup> has

<sup>1</sup> It will be observed in the Chapter below dealing with Administration, that the rights of the creditors in the estate of a deceased Mussulman have mostly been considered by the Courts, in cases where the widow's right to her unpaid *mahr* has been concerned. And it has been assumed, it is submitted rightly, that her rights are the same as those of the other creditors.

<sup>2</sup> *Amanji Begum v. Muhammad Karimullah* (1894) 16 All. 225, 227.

<sup>3</sup> (1871) 11 Moo. L. A. 377.

<sup>4</sup> 11 Moo. L. A., at p. 382, (par. 5). "She alleged

in her petition that she was in possession by right of inheritance, and also on account of her dower"; p. 383 (par. 1: "She claimed to hold not merely her one-fourth share to which she was entitled as co-sharer with the heirs, but the entire estate on account of her dower"; p. 384 (par. 1: "But the appellant having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower.")

<sup>5</sup> (1855) 6 Moo. J. A., 211.

been referred to on the ground that "there the widow did not profess to SECTION 108, have been put into possession in her husband's lifetime, and certainly had not the consent of her co-heir, who did not even admit that she had been the wife of the deceased." But the only questions that the Privy Council decided in this case, were that the marriage and deed of dower were proved, that the claim for dower was not barred, and that the Sadr Diwani Court was not wrong in dismissing the suit as framed, but that the dismissal should be without prejudice to the heirs' rights to bring a suit for an account and administration of the deceased's estate, consistent with the establishment of the marriage and the deed of dower.<sup>1</sup>

The point involved in s. 108 (2) has been already alluded to with reference to the remarks of the Privy Council in *Mussummat Behee Bachun's* case.<sup>2</sup> It is referred to (but not decided) in *Majidman v. Bibi Saheb Jan*.<sup>3</sup>

**109.** Where a Mussulman widow is in possession of the property of her deceased husband in lieu of her 'mahr,' (a) she is under the liability to account to the heirs of the deceased for the profits received by her;<sup>4</sup> and (b) she is herself entitled to charge interest on the 'mahr' due to her, and to set it off against the said profits.<sup>5</sup>

In *'Nabiban Bibi v. Shaikh Medu'*<sup>6</sup> it was unsuccessfully contended that where the widow is in possession in lieu of dower, she cannot rank as a co-sharer for the purposes of pre-emption. The assertion of the claim for 'mahr' does not, of course, deprive her of her right of inheritance.

**110.** The widow's lien over her husband's property for her unpaid dower is not affected by the fact that the amount of her 'mahr' is not ascertained.<sup>7</sup>

<sup>1</sup> *Ib.*, pp. 225-226, 230-231. See *ib.*, p. 224, where it is said: "The lady who lived with the deceased appears to have entered, at his death, into possession of his property in the neighbourhood of the place where he died, and she was treated by the local authorities as administratrix." Her claim was that the deed of dower charged the whole estate of the husband with the payment of the dower, but it did not impuginate his estate, to secure the sum.

<sup>2</sup> (1871) 14 Moo. I. A., 377.

<sup>3</sup> (1915) 10 Bom. 34; 17 Bom. L. R. 770.

<sup>4</sup> (*Behee*) *Bachun v. (Shaikh) Hamid* (1871) 14 Moo. I. A. 377, *Ramzan Ali Khan v. Asghari*

*Bequm* (1910) 32 All. 563, dissenting from *Amnat-nas-rissa v. Beshir-nas-rissa* (1894) 17 All. 77.

<sup>5</sup> *Haidara v. Zubaida* (1910) 33 All. 142 (P. F.), affirmed (1916) 38 All. 581 (P. C.) *Wamnat-ul-Fatima Bequm v. Meeranun-nissa Khanum* [1868] 9 W. R. 318.

<sup>6</sup> (1905) 2 All. L. J. 775.

<sup>7</sup> *Ahmed Hossain v. (Mussummat) Khodera* (1869) 10 W. R. 369, 3 Beng. L. R. (A. C.), 28, note (Peacock, C. J., and Mitter, J.); *Baland Khan v. (Mussummat) Janer* (1870) 2 N. W. P., 319. Cf. *Azzullah Khan v. Ahmed Ali Khan* (1885) 7 All. 353.

Widow bound to account for profits, and entitled to interest.

Widow's possession and pre-emption.

Lien not affected by doubt as to amount of 'mahr'.

**SECTION 110.** *The heirs ought, in a case where the 'mahr' is not ascertained, to bring a suit for an account of what is due to the widow for 'mahr' and pray that upon satisfaction of that amount they be put into possession of their shares of the inheritance,<sup>1</sup> but they are not entitled to recover possession and mesne profits so long as any portion of the dower is due.<sup>2</sup>*

Then for dower does not take away right to sue for it

**111.** The widow, by being in possession of the property of her deceased husband in lieu of her dower, does not lose her right to sue for her 'mahr,' provided that she offers to surrender possession of the said property.<sup>3</sup>

Widow's claim for dower ranks pari passu with claims of other creditors

**112.** 'The widow's claim for 'mahr' is a debt due from the estate of the deceased,<sup>4</sup> and ranks equally and rateably' with the claims of other creditors.<sup>5</sup>

'Mahr' is a debt within the terms of the Succession Certificate Act.<sup>7</sup> and if property is transferred to a wife in consideration of the 'mahr' due to her, it is not a gift, but a sale or barter.<sup>8</sup>

Alienation of property held in lieu of dower

**112A.** Where the widow is not in possession of the property of the deceased, the other heirs may alienate it, and the widow has then no right to follow it in the hands of alienees in good faith for consideration.<sup>9</sup>

Widow holding property in lieu of dower not adverse to other heirs.

<sup>1</sup> (*Sardar United Ali v. Mussamat Saifi Begm* (1860) 1 Beng L R, (N) 175)

<sup>2</sup> See p. 189 n. 8.

<sup>3</sup> See next footnote; *Ghulam Ali v. Sahar-at-Nissa Bibi*, (1901) 23 All. 432, the proviso appears in the last three lines of the judgment at p. 432.

<sup>4</sup> *Hameed Bibi v. Zubaida Bibi* (1916) 38 All. 581, 588 (P.C.)

<sup>5</sup> See the Probate and Administration Act, 1901

<sup>6</sup> See the passage from Lord Parker's judgment in *Hameed Bibi v. Zubaida Bibi* (1916), 38 All. 581, 588 (P.C.) cited at the beginning of the comment to s. 108, above. "The widow's claim has no special charge or preference over the other creditors" (*Meer Mehr Ali v. Mussamat Amara* (1860) 11 W. R. 212, 213; (*Sardar Imad Hossein v. Mussamat Hossein Bitch* (1870) 2 N. W. P. 327, 382, *Ameeer*

*Ameeer v. Soudagar Narayana Chetty* (1901) 25 Mad. 67 where it was held that the lien with possession "can give her no right to demand a purchase in execution of a decree for sale passed on a mortgage." In also (*Bibee Sahmat v. Shakh Mulla Bitch* (1860) 5 W. R. 191.

<sup>7</sup> (*Sardar Ahmad v. Mussamat Banwadi* (1891) 26 Panj. Rec., 129 (No. 88) Ct. 5, 364, below.

<sup>8</sup> *Bibi Joolia v. Hameed Sahib* (1910) 21 Mad. 1, 3 958, *Mustafa v. Hussain* (1880) 2 All. 851 *Abbas Ali v. Karim Bitch* (1908) 13 Cal. W. N. 160, *Khanji Chaudhry v. Abdunnasser* (1914) 42 Cal. 361.

<sup>9</sup> *Wahidunnissa v. Shabratun* (1870) 6 Beng. L. R. 54, 68, approved by P. C. : *Bazayet Hossein v. Dooli Chaud* (1879) 4 Cal. 402, 408.

<sup>10</sup> (*Becher*) *Azemman v. Asgur Ali* (1867) Agra, 307; *Mahomed Usaid-Dolah Khan v. (Mussamat) Ghansheen Beebee* (1866) 1 A. 150.



limitation run against her or her heir's claim for deferred dower under the Indian Limitation Act, article 104, during the period when the widow is in lawful possession of her husband's property in lieu of dower.<sup>1</sup>

X put his wife, W, in possession of his property in lieu of dower, and she then died, in 1895. W continued in possession till her death after which X's other heirs, H and HA, took possession, in 1906, of three-fourths of X's property, and obtained a decree entitling them to pre-empt the other one-fourth share. W's heirs, WH and WHH, brought a suit against H and HA in 1907 for W's unpaid dower out of X's estate. *Held*, that the suit was not barred, as the cause of action arose only in 1906, when the wrongful dispossession took place.

**114.** A widow, who holds the property of her deceased husband in lieu of her unpaid dower, is not entitled to alienate or charge it in derogation of the rights of the other heirs of her husband; and the said heirs may avoid any transfers of such property purported to be made by her.<sup>2</sup>

Widow's lien gives no power to alienate or charge property

X died possessed of, and entitled to, a moiety of a house. His widow, W, claimed to be in possession of the moiety in lieu of "mahar." W, jointly with the owner of the other moiety of the house, purported to sell the whole of it to P. It was found on the facts that W had not entered into possession in lieu of dower with the consent of the other heirs of X. *Held*, that W could only have transferred to P her own rights by inheritance in X's property, and could not have passed the entire rights of her deceased husband, even if she had been validly possessed of the moiety of the house in lieu of dower.<sup>3</sup>

Widow's lien

**115.** (1) Where the widow, having been in possession of her deceased husband's property in lieu of her

Queen's Does the lien for unpaid dower devolve on widow's heirs?

<sup>1</sup> *Hamidullah Khan v. Nazjo* (1911) 33 All. 705.

<sup>2</sup> *Mahomed Usseid-oolah Khan v. Musannid Ghassan Berber* (1866) 1 A. 150, (suit of property avoided to the extent of plaintiff's share therein); *Mahomed Noor Khan v. Nur Dyal* (1866) 1 Agra, 67 (affd); (*Rebec*) *Lecamus v. Leque Ale* (1897) 2 A. 397, (alienation set aside); *Chahid Bibi v. Shams-ul-Nissa Bibi* (1891) 17 All. 19 (mortgage set aside). Of course, the heirs can only set aside the acts of the widow, in so far as such acts refer to their own rights in the estate. In all the cases noted above, the plaintiffs sued for possession

which was not decreed. *At* *Muhammad Khan v. Azizullah Khan* (1883) 6 All. 70 (purchaser from the widow not allowed to plead non-payment of dower to widow, as against the heirs of the husband). In *Mahammad Hussain v. Bashirah* (1914) 12 All. F. J. 1114, it was held (by Piggott, J., sitting alone) that the right of a widow to be in possession in lieu of "mahar" can only be transferred along with the dower debt itself.

<sup>3</sup> *Ajuba Begum v. Nazir Ahmed* [1890] All. W. N. (Vol. X) 115, Mahmood, J. See comment to s. 115, below.

SECTION 115. unpaid 'mahr,' dies without having the 'mahr' paid to her, there are conflicting decisions of the Allahabad High Court on the question whether her heirs are entitled to succeed to her right of possession in the said property.<sup>1</sup> The Bombay High Court has held that the heirs succeed to the right.<sup>2</sup>

(2) Where the widow has died without having obtained possession of the estate of her deceased husband in lieu of her unpaid 'mahr,' her heirs are not entitled to take possession of it.<sup>3</sup>

Conflicting  
decisions.

It is difficult to imagine that the judgment of Edge, C. J., in 'Hadi Ali's case'<sup>4</sup> to the effect that the right does not devolve upon the heirs, is correctly reported. There are two misprints on p. 263; one in the footnote, in which 16 All. is printed for 6 All.; and the other, making the last sentence on that page difficult to understand. As reported, the judgment can hardly carry any weight. In the first place the decision of Mahmood, J., in 'Ajuba Begum's case' cited by the Chief Justice,<sup>5</sup> is not to the effect that the widow had acquired a lien, as the Chief Justice is reported to have said, but quite the contrary: Mahmood, J., says that the widow was "never placed in possession of the house, which she sold in its entirety, in lieu of dower, by the other heirs of her husband, and that, therefore, whatever the amount of her dower may be, all that she could convey and pass . . . were her rights and interests only by inheritance from her husband."<sup>6</sup> Again, Mahmood, J., expressly states that he adhered to his previous decision in 'Azizullah Khan's case'<sup>7</sup> to the effect that the heirs upon "the death of a Muhammadan widow, who was in possession in lieu of dower, succeed to her estate, including her claim to dower," and says "that the position of such heirs was vastly distinguishable

Mahmood, J.,  
distinguishes  
rights of  
widow's heirs  
from those of  
purchasers  
from her

<sup>1</sup> That the right devolves on the heirs, was held in *Azizullah Khan v. Ahmad Ali Khan* (1885) 7 All. 453, (O'Hallid and Mahmood, JJ.), and *Ali Baksh v. Allahabad Khan* (1910) 32 All. 521 (Richards and Tudball, JJ.), where all prior authorities are considered. The contrary was held in *Hadi Ali v. Akbar Ali* (1896) 20 All. 262, (Edge, C. J., and Buratt, J., upholding *Burjee, J.*), *Munaffar Ali Khan v. Parbati* (1907) 29 All. 610, 646 (Knox, Ag. C. J., and Dillon, J.) the widow purported to transfer her rights by sale, and it was said, "Furthermore we have held in this Court that such rights are neither inheritable nor transferable, see the decision in *Hadi Ali v. Akbar Ali*."

<sup>2</sup> *Magnum v. Biba, Sahel Jan* (1915) 40 Bom. 24, 17 Bom. L. R. 770, 781, 782.

<sup>3</sup> *Tahirunissa Biba v. Naeab Hassan* (1914) 12 All. L. J. 906, distinguishing *Ali Baksh v. Allahabad Khan* (1910) 32 All. 521.

<sup>4</sup> *Hadi Ali v. Akbar Ali* (1896) 20 All. 262.  
<sup>5</sup> *Ajuba Begum v. Aziz Ahmad* [1890] All. W. N. (Vol. X) 115.

<sup>6</sup> [1890] All. W. N. 116, last sentence in the first column. It may be stated that the husband was entitled to only a moiety of the house, and the owner of the other moiety joined the widow in selling the whole of it, so that when Mahmood, J., speaks of the widow selling the house in its entirety, he must be taken to refer to the entire interest of the husband in the house.

<sup>7</sup> *Azizullah Khan v. Ahmad Ali Khan* (1885) 7 All. 453.

from the position of a purchaser from her of an isolated piece of SECTION 115. immovable property."<sup>1</sup> And yet Edgo, C. J., is reported to have said that Mahmood, J.'s decision was in favour of the view which the Chief Justice himself took, viz., that the widow's lien is a purely personal one, and does not devolve upon the heirs.

The other case which the Chief Justice cites<sup>2</sup> as supporting the above is a decision on the point involved in the last section, and is noted there. It does not deal with the rights of the widow's heirs, but of a purchaser from her.

The question, therefore, resolves itself not so much into a choice of distinction between the decision of Edgo, C. J. and Mahmood, J., but whether the two decisions of Mahmood, J., are consistent with each other. In other words, whether he is correct in holding that the position, on the one hand of purchasers from the widow, and, on the other hand of the heirs of the widow, are so distinguishable that quite different rules of law should prevail regarding the rights acquired by each.

### § 5.—*Presumptions as to Amount and Prompt Portion of Dower.*

**116.** Where a dispute arises between the parties to a marriage, at any time during the existence of the marriage, regarding the amount of the 'mahr,' or its subject matter, the 'mahr-ul-mithl' or proper dower is to be assumed as the standard of probability.<sup>3</sup>

**117.** (1) In the absence of any agreement and custom to the contrary, the whole of the 'mahr' will be presumed to be prompt.

(2) In places, and amongst classes of people, where there is a custom that part only of the 'mahr' is promptly payable, and the rest is deferred, such a portion only thereof will be considered to be promptly payable, as in the case of women in similar circumstances, and with similar dowers, is customarily made promptly payable.<sup>4</sup>

(3) It is presumed in British India (except in Madras) that by general custom, part only of the dower is promptly

<sup>1</sup> [1890] All. W. N. 118 (col. 11, par. 2).

<sup>2</sup> *Ali Muhammad Khan v. Azizulla Khan* (1887) 6 All. 50.

<sup>3</sup> Bail. I. 130, cf. 5B. above.

<sup>4</sup> Bail. I. 129-127.

**SECTION 117.** payable. It has been held that (in the absence of any Custom in India, evidence of custom relating to women in similar circumstances and with similar dowers) it is in the discretion of the Court to fix what amount should be held to be prompt, and that a third of the dower may reasonably be so fixed.<sup>1</sup>

#### 1 THE TEXTS AND AN OLD PRIVY COUNCIL DECISION

' Fatawa Qazi Khan ' on promptness of dower.

The ' Fatawa ' Alamgiri ' <sup>2</sup> cites the ' Fatawa Qazi Khan ' on the point covered by sub-section (2), above. The passage intended to be referred to is probably that which is to be found at Vol. I, p. 175, of the latter work : it may be translated as follows : " Where a woman marries, and a certain amount of dower is fixed, then she has the option of refusing herself, in order to have the whole of her dower paid, but if he be in a place where the custom is that he should pay a portion promptly, while the balance is left deferred in his charge, (till the time of divorce or death (as is the case in our country), then she is allowed to refuse herself, in order to get the prompt portion, which is called ' dast-pauman ' <sup>3</sup> in Persian, and she is not entitled to demand the whole of the dower. If the parties have specified the amount of the prompt portion, that portion should be paid promptly, but if nothing has been specified [in this regard], then consideration should be given to the woman and the dower mentioned in the contract, in determining what portion ought to be considered prompt in the case of such a woman [as the wife], from such a dower [as was agreed upon], and that portion should be paid promptly."

It seems to be laid down, however, in the ' Da'ayam-ul-Islam ' that where it is not specified whether the ' mahr ' is prompt or deferred the whole must be presumed to be prompt. <sup>4</sup>

Is the whole or only part of dower to be presumed to be prompt. Marnaghten's view. The whole prompt.

The question whether the whole or only a part, of the dower must be presumed to be promptly payable in India, has been the cause of some difference of opinion in the Courts. The Privy Council have approved of a statement of Marnaghten's to the effect that " in all contracts . . . if it be not expressly stipulated that the payment of the consideration shall be deferred, it must be paid immediately as a matter of course, and that dower is the consideration of marriage." <sup>5</sup> This statement of

<sup>1</sup> See comment.

<sup>2</sup> Ball. I. 126-127.

<sup>3</sup> On *dast-pauman*, see Ball. I. 111-115.

<sup>4</sup> *Da'ayam-ul-Islam* (Notes), (see p. 33, above).

<sup>5</sup> (*Mirza*) *Bedar Bukht Mohammod Ali Khan Behloul* v. (*Mirza*) *Khatrun Bukht Yahya Ali Khan Behloul* (1873) 19 W. R. 315 (P.C.). The points taken before the Privy Council were three. (1) whether the *da'ayam* produced in

the case was genuine, (2) whether, if it was genuine, the *mahr* had not been satisfied, (3) whether, in any event, (the whole of) the *mahr* was not to be considered as deferred, till after the death of the husband, and not payable in his lifetime, even though the wife had already died.

<sup>6</sup> " Mohammedan Law," 279 n. See also *Id.*, 59, Chapter VII, par. 22.

Macnaghten's is dissented from by Baillie in a learned note,<sup>1</sup> which does **SECTION 117**, not seem to have been brought to the notice of the Privy Council at any rate it has not been referred to. When, however, the views of the two <sup>of Baillie's view</sup> learned authors are carefully compared, they do not seem to be irreconcilable. <sup>"properly prompt"</sup> Baillie says that the amount that has to be promptly paid must be <sup>portion</sup> determined by a reference to the portion that is customarily made prompt in the case of "like women."<sup>2</sup> The reference to custom in this connection must not be taken to have the same effect as Muhammadan law as it has ordinarily in English law. For where a custom is mentioned in English law, it is something different from the general law and it must be proved by evidence, (unless it has been so often proved as to be capable of being judicially noticed) whereas when a custom is referred to in the original texts of authority,<sup>3</sup> on Muhammadan law, and recognised as being validly in existence as a custom,<sup>4</sup> by this very reference becomes a part of the general Muhammadan law as much as any other proposition contained in the texts, and by being so recognised, it becomes a part of the law and as such capable of being judicially noticed. It has been pointed out before<sup>5</sup> that a great portion of the Muhammadan law is based on customs prevalent in Arabia or Persia at the time when the authoritative books on the law were first written. They are not spoken of as customs any more, but as general Muhammadan law. Hence, the statement in Baillie<sup>6</sup> must be interpreted to mean that "mahr," in the absence of a contract to the contrary, must be presumed in law to be prompt as to only part thereof, and that the practice of other ladies of the bride's family is to be the guide for determining what portion is to be considered prompt. To this extent there is, no doubt, a conflict between Baillie and Macnaghten, and as their lordships' judgment contains no reference to Baillie, it is difficult to consider it as a decision to the effect that the law as laid down in the books of authority is more correctly represented by Macnaghten than by Baillie. It should be pointed out, however, that their lordships refer to the fact<sup>7</sup> that there was evidence in the case of very large dowers to other women, and apparently the whole of such dowers were proved to be promptly payable. At the same time it must be noted that their lordships were bound by "the law and practice of Oudh"<sup>8</sup> to cut down even the "mahr-ul-mithl" (or proper dower) to a "reasonable" dower;

<sup>1</sup> Bail I 126-127 n., referring to *Durr-ul-Mahkar*, *Shah-i-Iqbal*, and other texts.

<sup>2</sup> *Mahr-ul-mithl* in Arabic, which may be rendered "properly prompt" on the analogy of "proper dower," "proper" being taken to signify that which is done in the case

of women of the same family and status.

<sup>3</sup> See the Introductory Chapter.

<sup>4</sup> Bail I 92 126-127 and Bail I 127, n.

<sup>5</sup> 19 W R at p. 317.

<sup>6</sup> Cf s. 75 (2), above, the Oudh Laws Act is dated 1875, the decision being of 1873.

effect of the law as stated by Baillie.

**SECTION 117.** and by their decision they ordered this to be done; while again, it was not contended that only a part of the dower was payable promptly, and the rest deferred—the contention was on the one hand that the whole was deferred, and on the other that the whole was prompt.<sup>1</sup> In *'Umda Begam v. Muhammadi Begam'*<sup>2</sup> it is stated that '*Bedar Bakht's*' case must be regarded as an authority in the case only of persons subject to the Shiah School. It is difficult to do so, considering that the authorities referred to were not Shiah texts. Nor is there anything to show that their lordships intended to differentiate between the two schools.

#### 2 PROOF OF CUSTOM AS TO EXIGIBILITY OF DOWER IN BRITISH INDIA

Evidence as to  
dowers of  
other  
Indies

Whichever view of the law is taken to be correct, in British India there is no such difficulty in the way of proving a custom even opposed to strict Muhammadan law, as there might be in countries governed by Muhammadan rulers. As has been already explained, the effect of the law as represented by Baillie is, that no evidence need be adduced to prove a custom to the effect that part only of the '*mahr*' is promptly payable, but that the Court will itself order (unless an agreement to the contrary is proved) that only a part of the '*mahr*' should be promptly payable: what part should be made prompt has to be determined by a reference to the practice prevailing amongst other ladies of the same social position. Hence, even according to Baillie it is assumed that evidence is produced by those who assert that part only of the dower is promptly payable, in order to show what part is so payable, and what part is deferred. This evidence would consist of the proof of the dower contracts relating to marriage of other ladies of the family to which the wife belonged; and is not, in effect, distinguishable from proof of custom.

Practice to  
consider a  
third as  
prompt

Even where no such evidence has been adduced, those Courts in India that have accepted Baillie's view have been inclined to order that a third of the '*mahr*' should be promptly paid and the rest be deferred.<sup>3</sup> In doing so, it is clear that they depart from the law as laid down in *Macnaghten*

#### 3 DECISIONS IN BRITISH INDIA CONSIDERED IN DETAIL

Conflict of  
decisions.

The decisions in India are conflicting, but the law as stated in s. 117, above, attempts to evolve a general rule, consistent with most, if not all, the decided cases.

<sup>1</sup> There is a passing reference by Mahmood, J., to this decision, in *Abdul Kader v. Salima* (1886), 6 All. 119, 158 but it does not carry us any further

<sup>2</sup> (1910) 33 All. 291, 293; 294, 9 All. L. J. 27.

<sup>3</sup> The cases are considered in the comment below

In '*Tadiya v. Hasanbiyari*,'<sup>1</sup> the Court held that the whole of the SECTION 117.. dower was to be presumed to be prompt, but as it was not contended that the decisions which hold that the whole of the 'mahr' is presumed to be prompt, the question did not arise what part was prompt. This case was followed by a Full Bench of the Madras High Court,<sup>2</sup> who expressly preferred the ruling contained in it and the statement of Maenaghten to that of Baillie. The view of the referring Judges (Hite C. J., and Moore, J.) was evidently opposed to that adopted by Davis, Benson, and Boddam, JJ., who formed the Full Bench. See also '*Husain Khan v. Ghulam Khatun*'<sup>3</sup> which is more fully referred to below.

In an old decision<sup>4</sup> the wife claimed her dower alleging that the whole of it was prompt, which the husband admitted, and the Court held, showed collusion: "Since it is never customary for the whole of so large a dower to be 'prompt' or 'payable on demand', nor do the witnesses brought forward . . . appear to be acting so. Moreover, by the 'futwa' now obtained from the law officer, it appears that while her husband was alive, Imdadee Begum could not claim the whole of her dower as exigible, for by the Muhammadan law where (as in this case) no specific amount is proved to have been expressly declared as exigible, one-third of the whole must be considered as exigible or payable on demand, 'mowajjul,'<sup>5</sup> and two-thirds 'deferible' or payable at a future time, 'mowajjul.'" The last-mentioned case was referred to with approval in Bombay,<sup>6</sup> after the Court had cited a passage from Baillie;<sup>7</sup> and the lower Court's order that one-third only of the dower could be considered prompt, was not disturbed.

In four cases in Allahabad,<sup>8</sup> however, the judges have followed more closely the rule as laid down in Baillie, *viz.*, they presumed that only part of the dower was prompt, and said that it was a question for the Court in its discretion to decide how much should be deemed prompt.

In the latest reported case on the point the husband set up, but could not prove, a custom that the dower could not be claimed except in the case of a divorce, or the death of the husband, and the Court

<sup>1</sup> (1870) 6 Mad. H. C. Rep. 9.

<sup>2</sup> *Moslem Sahib v. Asma Begum* (1900) 17 Mad. 371 (C. B.). The order of reference carefully collates all the authorities, pp. 372-373.

<sup>3</sup> *Husain Khan v. Ghulam Khatun* (1911) 15 Pina 386; 13 Bom. L. R. 511.

<sup>4</sup> *Muram-mun-Nissa Begum v. Imdadee Begum* (1848) 3 S. D. A. (S. W. P.) 185; Morl., Dig. (S. W. P.) 182, (per G. Thompson, Judge, sitting singly).

<sup>5</sup> *Sie, for mowajjul*.

<sup>6</sup> *Fatma Bibi v. Sadrudin Valat Nizamuddin* (1865) 2 Bom. H. C. R. 291 (Conch. Tucker and Warden, JJ.).

<sup>7</sup> Bail I 126.

<sup>8</sup> *Fedat v. Mozkar Husain* (1877) 1 All. 483; *Tanhl-Um-Nissa v. Ghulam Kambar*, *ib.* p. 506; *Habibun-Nissa v. Nizamuddin* decided 31st July 1877 (unreported) referred to 1 All. 507; *Umida Begum v. Muhaimmed Begum*, (1910) 33 All. 291. In the first of these cases, as the wife was a prostitute, and came of a family of prostitutes, the High Court held that the lower court had exercised its discretion wisely in directing only one-fifth prompt. In the second one-third was declared prompt.

<sup>1</sup> followed in Bombay.

Cases where only part is presumed to be prompt.

Custom set up that whole deferred.

SECTION 117, consequently held that the whole of the dower was prompt.<sup>1</sup>

Analogy of  
'khul'.

It may be noted that in the absence of express agreement, the whole of the consideration for a 'khul' (separation by agreement) is promptly payable.<sup>2</sup> The consideration for a 'khul' is the counterpart of, and closely connected with, 'mahr'; the latter being frequently spoken of (though not with strict accuracy) as the consideration for marriage.<sup>3</sup>

<sup>1</sup> *Hussain Khan v. Gulam Khatoon* (1911)  
13 Bom. 286, 13 Bom. L. R. 211.

<sup>2</sup> See p. 181, below.

<sup>3</sup> See pp. 176, et seq., below.



## CHAPTER V.

### DIVORCE<sup>1</sup> AND DISSOLUTIONS OF MARRIAGE.

#### § 1.—*Preliminary.*

**118.** Marriage<sup>2</sup> may be dissolved,<sup>3</sup> in the lifetime of the parties thereto, either by act of the husband or wife, or by mutual agreement, or by operation of law, or by a judicial order of separation;<sup>4</sup> or it may be annulled.<sup>5</sup> In this Chapter, unless there is anything repugnant in the subject or context, by the word "divorce" is meant 'talaq' as defined in s. 119, below.

Marriage may be dissolved in the lifetime of the husband and wife in any of the following ways: (1) by a 'talaq,'<sup>6</sup> i.e., a pronouncement of divorce made by the husband or by some person duly authorised by him in that behalf, (2) by 'ila,' i.e., the husband abstaining from conjugal intercourse in accordance with an oath to that effect, (3) by 'zihar,' i.e., the husband comparing the wife to a person within the prohibited degrees, on which the marriage may be dissolved by the Court on the application of the wife, (4) by 'irān,' i.e., by the husband solemnly accusing the wife of adultery, and, on the wife denying the accusation, and each respectively imprecating the curse of God, on the husband for falsely accusing, and on the wife for falsely denying the accusation, on which the marriage may be dissolved by the Court, (5) by 'khul' or 'mubarrat,'<sup>7</sup> 'khul'.

<sup>1</sup> For the sake of conforming with a familiar title this chapter is headed 'divorce' in the sense of all dissolutions of marriage, but in the body of the chapter the word 'divorce' is used (unless the subject or context indicates otherwise) to refer to one particular method of dissolving marriage: see s. 119, below. On the ambiguity of this word see the comment to s. 40, above.

<sup>2</sup> A marriage in accordance with Muhammadan law is meant, not, e.g., a marriage in England between a Muslim and a Christian woman: see *Rect v. Hammersmith*, *Supra* indicated.

*Registry of Marriages, ex-parte Mir-Ammir-ud-Din*, [1917] L K R 631.

<sup>3</sup> Called *paqā*, in Arabic.

<sup>4</sup> In Arabic *faskh*, i.e., annulment or cancellation: see s. 191, *et seq.*, below.

<sup>5</sup> Baillie calls a separation caused by the husband pronouncing certain appropriate words a 'repudiation,' and all other separations for causes originating from the husband "divorces." Bail. l. 204. The term "divorce" or *talaq* is used by the present author to refer to what Baillie calls "repudiation."

<sup>6</sup> See s. 131 *et seq.*

**SECTION 118.** *i.e.*, a mutual agreement between the husband and wife to dissolve the marriage (for some consideration proceeding from the wife to the husband); (6) by the cancellation of marriage on account of physical defects in the husband or wife; (7) by the Court separating parties whose marriage is irregular, or is avoided by a minor on attaining puberty, or by a person of unsound mind on recovering reason.

Cancellation

Judicial  
separation

The first, second, third, and sixth forms are by the act of the husband, the third and fourth, partly by act of husband (and wife) and partly by operation of law, the fifth by agreement, the seventh by the Court. They are treated in the following pages in such order that the forms in which the husband has greatest voice are mentioned first. The first and the last are probably the most important.

## § 2.—*Dissolution of Marriage by 'Talaq' or Divorce.*

### (1) *Form of 'Talaq.'*

'Talaq' or  
divorce,  
pronounce-  
ment by  
husband.

**119.** A 'talaq' is a dissolution of marriage effected by the husband<sup>1</sup> making a pronouncement to the effect that the marriage<sup>2</sup> is dissolved, or that the relationship of husband and wife shall not any more subsist between them.

Form in  
which divorce  
must be  
pronounced.  
Shia law.

**120.** According to the Sunni Hanafi law no special form<sup>3</sup> of pronouncement is necessary for effecting a 'talaq.'

"No special form or formula is prescribed for divorce under the Hanafi law," say the learned judges in a case to which Rafiq, J., was a party. "All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage."<sup>5</sup> Contrast with this the comment to s. 120A, below, which deals with the Shia law.

Shia law.  
form of  
pronouncement.

**120A.** (1) According to Shia law a pronouncement

<sup>1</sup> See the comment to s. 11, above.

<sup>2</sup> There is no *talaq* in the case of a contract of *mut'a*, but the relation arising from *mut'a* may be otherwise terminated: see s. 25 (2), & 295, and ill (4); Bail. II 110.

<sup>3</sup> *Ibrahim v. Syed Ebi* (1888) 12 Mad. 61, *Wahid Khan v. Zannab Bibi* (1914) 36 All 158, *In Hamid Ali v. Indrazan* (1878) 2 All. 71, the husband said, "Thou art my cousin, the daughter of my uncle, if thou goest." The Urdu words are given in a footnote to the report. Evidence showed that the words were used in the sense that no other relation would subsist (if the wife went) and they were

held to constitute a valid pronouncement of divorce, and, consequently, the husband was not entitled to recover either his wife or his infant daughter.

<sup>4</sup> *Talaq* pronounced in the absence of the wife may be effectual *Sarabat v. Rahmatbi* (1905) 39 Bom 537, *Ahli Bibi v. Kadir Ibrahim Baulker* (1907) 33 Mad 22, 23 (dissenting from *Fazant Hossain v. Juma Bader* (1878) 4 Cal. 588), *Wahid Khan v. Zannab Bibi* (1914) 12 All. L. J. 707.

<sup>5</sup> *Wahid Khan v. Zannab Bibi* (1914) 36 All 458, 460, 151 (Rafiq and Piggott, JJ.).

of 'talaq' must be made in the presence, and hearing, of SECTION 120A. two male witnesses, who are Muslims, and of approved probity.

(2) The Shiah authorities are agreed that a pronounce-<sup>(Shiah law)</sup>ment made in one of the following forms gives effect to <sup>Unscripturable</sup> forms. a 'talaq,' viz., —

(a) the husband uttering words,<sup>1</sup> in the Arabic language meaning : <sup>2</sup> "Thou art," or "this person,"

or "such and such a person" "is divorced ;" or

(b) the husband replying to a question. in one of the following forms :

(i) *Question* : "Is thy wife divorced ?" — *Answer* : "Yes."

(ii) *Question* : "Hast thou divorced thy wife, or such a person ?" — *Answer* : "Yes."<sup>3</sup>

Provided that where a person is unable to pronounce the specially appointed Arabic words (but not otherwise) he may use another language for expressing what is above stated.<sup>4</sup>

(3) The Shiah authorities are divided in opinion as to whether 'talaq' takes place unless the pronouncement is made in one of the forms mentioned above. *Semble*, in British India if the form of words used does not strictly conform with the above, but nevertheless consists of an unequivocal declaration that the wife is divorced, and is made in the presence of two male witnesses who are Muslims and of approved probity, a 'talaq' will be considered to have taken place in accordance with Shiah law ;<sup>5</sup> provided that the pronouncement conforms with the requirements

<sup>1</sup> *Talaq* pronounced in the absence of the wife may be effectual : *Sarabat v. Rahmat* (1905) 30 Bom. 537; *Agha Bibi v. Kader Ibrahim Roshkar* (1909) 33 Mad. 22, 23 (dissenting from *Purzad Hossein v. Jami Bibee* (1878) 1 Cal 588), *Wahid Khan v. Zainab* (1911) 12 All. L.J. 707.

<sup>2</sup> Compare the necessity of using Arabic words in the case of marriage, s. 18 (3), above. The *Du'atun-ul-Islam* however does not refer to

the Arabic language being necessary — *Du'atun-ul-Islam* (Notes). It may be remarked that the Hanah law requires witnesses for marriage but not for divorce, and the Shiah *Ithna 'Ashari* law is exactly the reverse.

<sup>3</sup> *Id.* II, 113-115.

<sup>4</sup> *Id.* II, 113-114.

<sup>5</sup> See the illustrations and comment.

SECTION 120A. of s. 136, or 138, below, and is not otherwise opposed to any provision of Shiah law.

*Illustrations*  
(Shiah law.)

(1) If a man should say "thou art the repudiation, or (divorce)" or "repudiated," or (divorced); or "among the repudiated or (divorced),"—the words would in Shiah law be without effect, even though he intended to repudiate thereby.<sup>1</sup>

(2) So also would they be ineffectual if he were to say "a repudiated (divorced) person." The Sheikh<sup>2</sup> however has said that in this case repudiation (divorce) would take effect if intended; but the opinion is not supported by the grammatical construction of the phrase.<sup>3</sup>

(3) On the other hand he (the Sheikh<sup>2</sup>) has said that it (divorce) would not take effect if a man were to say that "I have repudiated such an one," but this also is attended (in Shiah law) with some difficulty arising from the fact that if the question were asked: "Is thy wife repudiated?" and the person addressed should answer: "Yes" there would be an effectual repudiation.<sup>1</sup>

(4) If one should say to his wife, "Thou art vacated" or "free," or "The reins are on thy back," or "Betake thyself to thy people," or "Thou art absolutely separated," or "unlawful," or "cut off," or "released,"<sup>4</sup> the expressions would, in accordance with Shiah law, be quite negatory, and no repudiation take place, whether it were intended or not.<sup>5</sup>

(5) If he (the husband) should say "count"<sup>6</sup> intending 'talaq' thereby, it is maintained that there would be a valid repudiation and there is a tradition to that effect recorded by Halbi and Muhammad from Abu Abdullah on whom be peace; but this has been disputed by many of our doctors whose opinion is more in accordance with the general principles of the law.<sup>1</sup>

The author of the 'Sharaya'-ul-Islam' explains in the following words the strict requirements about the exact formula of 'talaq' which is essential in Shiah law: "As a rule marriage being a chaste or protected condition, favoured by the law, and in its own nature, not admitting of being dissolved, it is necessary, in taking off or removing the tie, to adhere strictly to the terms of the legal permission."<sup>7</sup>

With the quotation given above, the Prophet's saying may be

Reason for  
strictness  
of form  
in Shiah law.

The Prophet's  
disapproval of  
divorce.

<sup>1</sup> Bal. II. 113.

<sup>2</sup> I. e., Muhammad al Hasan ibn 'Ali ibn Ja'far al Tusi, author of the *Ma'abud*.

<sup>3</sup> Bal II. 113; see ss. 5c and 5d, above.

<sup>4</sup> Bal II. 111 (par. 1).

<sup>5</sup> Bal. II. 114 (par. 2).

<sup>6</sup> I. e., the root word of '*addat*' implying 'commence to observe' '*addat*.'

<sup>7</sup> Bal. II. 113.

compared, that "of all things that have been permitted by the law the SECTION 120A, worst is divorce."<sup>1</sup>

The illustrations to this section are given, not for the purpose of making the section clearer, but as the most convenient form in which the differences of opinion amongst the Shiah authorities, may be represented: the Shiah authorities are not inclined to let a 'talaq' be effectuated whenever it is intended to be given.

On the modes of pronouncing 'talaq' see ss. 136, et seq., below.

**121.** Pronouncements<sup>2</sup> of 'talaq' are either revocable<sup>3</sup> or irrevocable.<sup>4</sup> A revocable pronouncement of 'talaq' does not dissolve the marriage until the period of 'iddat' has expired<sup>5</sup> and may, at any time during the said period, be revoked.<sup>6</sup> An irrevocable pronouncement of 'talaq' dissolves the marriage immediately on its utterance.

Revocable and  
irrevocable  
divorces

The usual terminology has been adhered to in speaking of "revoking 'talaks.'" It would have no doubt concluded to greater clearness if the expression "withdrawing" the pronouncement had been adopted. But the prevalent phraseology is too firmly rooted to be disturbed, and has its conveniences.

Marriage can be dissolved by the mere pronouncement of 'talaq,' but, during the period of 'iddat' the husband has the power of revoking or withdrawing the pronouncement,<sup>6</sup> either by express words or by resuming the conjugal relationship. (See ss. 150, 151, below.) This power of preventing the pronouncement from becoming effectual, is distinct from the option to the divorced parties to re-marry after the pronouncement has had its effect.

Revocation of  
divorce  
distinguished  
from  
re-marriage.

The law gives to the husband the power to revoke the first two

First two  
pronounce-  
ments) revo-  
cable third  
irrevocable.

<sup>1</sup> See the *Mishcat-ul-Masabih*, XIII., xli., 2, (Mathews, II, 118); Abdur Rahim's "Muhammadian Jurisprudence," 335-336, citing *Fath-ul-Qadir*, III, 328; *Asha Bibi v. Kadir Ibrahim Banothi* (1906) 33 Mad. 22, 25.

<sup>2</sup> The epithet "revocable" or "irrevocable" is annexed to the "pronouncement," and not to the divorce (or *talaq*), revoking the pronouncement is different from annulling the result of an unrevoked pronouncement: the result of an unrevoked pronouncement being dissolution of the marriage, this result may in a certain sense be annulled by a re-marriage. The revocation of a divorce is, however, frequently spoken of, when what is meant is the revocation of a pronouncement. This often causes confusion. In the present work, therefore, the expression revocation of the

pronouncement has consistently been used where there is any danger of ambiguity.

<sup>3</sup> In Arabic *raj'i*: *Abdul Ghani v. A. G. Hing* (1911) 39 Cal 409; *Amir Beg v. Suman*, (1910), 7 All I. J. 656; *Imam Dui v. Hassan Bibi* (1905) 41 Punj. Rec 309, (No 85).

<sup>4</sup> In Arabic, *lain*.

<sup>5</sup> In Shiah law, the marriage may sometimes be said to subsist even beyond the period of 'iddat. See s. 155, below.

<sup>6</sup> After the 'iddat has expired, the pronouncement has effectuated into a divorce which cannot be revoked, whether the pronouncement was in its inception revocable or not. *Macaulay Ali v. Kameerunnisa Bibi* (1861) W. R. 32. But the parties may immediately re-marry, unless there have been three pronouncements or a triple pronouncement.

SECTION 121. pronouncements of 'talaq,' but the third is irrevocable.<sup>1</sup> The Hanafi law, moreover, permits a man (1) to pronounce three 'talaqs' in one breath; and, (2) as an extension of this principle, it permits a pronouncement of 'talaq' to be irrevocable, though three 'talaqs' are not pronounced, *seriatim*, and though the pronouncement is not in the triple form, but is expressed to be irrevocable;<sup>2</sup> (3) finally, the Hanafi law even permits a pronouncement of 'talaq' to be interpreted as an irrevocable one, where there is something implying that it is such,—though, in its terms, it is neither triple nor irrevocable. The Shiah law does not permit any of these three courses.<sup>3</sup> What has just been said refers to 'talaqs' and not to other modes of dissolving a marriage, some of which are revocable, others not, as will appear hereafter.

Revocation of  
pronouncement:  
re-marriage.

With reference to the revocation (or withdrawal) of pronouncements of 'talaq,' three notions must be kept distinct:—

- (1) the power to revoke a pronouncement after it has been uttered, so as to prevent a dissolution of the marriage;
- (2) the power to pronounce a 'talaq,' in such form that there cannot be any revocation of it;<sup>4</sup> and
- (3) the right of the divorced parties to re-marry after their marriage has been once or twice dissolved.

Effect of revoking  
pronouncement

The only effect of revoking or withdrawing a pronouncement of 'talaq' is, that the marriage continues undissolved. The revocation has not the effect of wiping out (so to say) the fact that the pronouncement was once made. This is material for the purpose of s. 41, above, which refers to an important result of making a pronouncement of divorce quite irrespective of the dissolution of marriage following (or not following) the pronouncement: for though the primary result of the pronouncement (dissolution of marriage) may be stopped by revoking the utterance, a husband cannot indulge in more than two such pronouncements without coming under s. 41, above.

On the other hand, under Hanafi law, the husband who desires to make three pronouncements in one breath, can do so. He can also pronounce a single 'talaq' which is irrevocable. A single irrevocable pronouncement completely severs the marriage tie, and, in this respect, its result agrees with that of three pronouncements, but when there is a single pronouncement, although the pronouncement is irrevocable

<sup>1</sup> Unless, of course, the pronouncement is in an irrevocable form.

<sup>2</sup> *Ibid.* I, 285, II, 120.

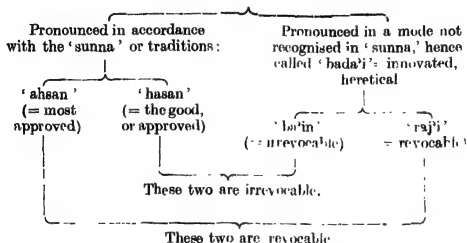
<sup>3</sup> See comment to s. 142, below.

<sup>4</sup> The explanation why depriving one-self of

the power of revoking is referred to as "the power to pronounce an irrevocable divorce,"—is that husbands in anger occasionally wish to threaten their wives with a divorce which cannot be withdrawn.

the parties have the right to re-marry; whereas when there are three pronouncements or a single pronouncement effecting three 'talaks,' they cannot re-marry unless s. 41 is satisfied.

## CLASSIFICATION OF DIVORCES IN HANAFI LAW.



**122.** Where the pronouncement of 'talak' purports to be subject to an option in the husband to cancel it, or to be restricted as to its effect within certain places only, the option or restriction is void, and the 'talak' is absolute.<sup>1</sup>

The 'cancellation' is to be distinguished from a revocation or withdrawal.

**123.** According to Hanafi (but not according to Shafi'i or Shiah) law a pronouncement of 'talak' is effectual, though it has been made under coercion,<sup>2</sup> or without the intention of dissolving the marriage; provided that, according to all schools, it is of no effect if pronounced by a person who is involuntarily, or for a necessary purpose, in a state of intoxication.<sup>3</sup> *Quære*, whether the rule of

Divorce pronounced under compulsion, or in a state of intoxication.

<sup>1</sup> Ball, I. 217.

<sup>2</sup> Three criteria are mentioned by the *Sharaya-ul-Islam* for its being established that the divorce was by compulsion: There must be (1) a threat of a serious injury to the husband himself, or "to some one dear to him as his own soul, such as a father or a child;" (2) power in the coerer to carry out his threat; (3) strong apprehension of the threat being carried out in case of refusal to comply. Ball, II. 108. In *Fazl-e-Hussain v. Janu Bibi* (1878) 4 Cal. 588, the father of the wife

induced the husband to believe that the marriage was invalid, and the husband pronounced the word *talak* three times. The High Court in its judgment stated that "If the formula for divorce prescribed by the law-books had been really pronounced," there would "probably" have been a divorce, notwithstanding that false representations had been made to the husband. Cf. *Buzl-ul-Ruhani v. Lutefutunnissa* (1861) 8 Moo. I. A. 378.

<sup>3</sup> Ball, I. 208-209; II. 107, 108; Hed, 75.

SECTION 123. Hanafi law mentioned in this section would be enforced in British India, or be held to be against public policy.<sup>1</sup>

Divorce under compulsion.

Under Hanafi law a 'talaq' pronounced under compulsion is valid, just as consent to a contract of marriage and a revocation of divorce given under compulsion are valid.<sup>2</sup>

Has Court authority to dissolve marriage without the husband's consent ?

A question may arise whether this provision of law (if it prevails in British India) gives the Court power to compel a person to divorce a wife—a question, depending not only on Muhammadan law, but upon the adjective law of British India. The 'Fatawa 'Alamgiri' refers<sup>3</sup> to a divorce given under compulsion by the Sultan.<sup>4</sup>

In a reported case, the husband had "reluctantly consented" to a divorce (in the form of a 'khuḥ'), on the District Judge's suggestion that it would be best for him to divorce a wife who had, by suing for dissolution of the marriage on the ground of his impotence, and by alleging cruelty on his part, shown her determined aversion to him. The High Court uphold the divorce, holding that the husband had freely consented to the District Judge's suggestion, though they add in the next sentence: "Under the Muhammadan law a *khoḥa* divorce is valid even though it may be given under compulsion."<sup>5</sup>

## (2) Persons who may Pronounce 'Talaq.'

Husband 'sui juris.'

124. Any husband, who is of sound mind and has attained puberty, may make a pronouncement of 'talaq'.<sup>6</sup>

Illustration

The marriage of H and W has become unlawful by supervenient prohibition: H then purports to divorce W. Separation is incumbent on them, but the divorce does not take effect, as in the eye of the law H was not W's husband at the time.<sup>6</sup>

Divorce through agent

125. A husband may lawfully authorise his wife,<sup>7</sup> or any other person, as his agent, to make or to revoke a

<sup>1</sup> In *Pachon Molla v. Enayet ur Ruchman* (1869) 12 W. R. 460, 4 Beng. L. R. (A.C.) 13, it was enforced; and see *Vadaka Fida Ismail v. Odabai Begokutti Umah* (1881) 3 Mad. 311. See also s. 22, above, and comment.

<sup>2</sup> There are inconsistent traditions of the Prophet, which are quoted in the comment on s. 22, *q. v.*

<sup>3</sup> *Bail*, I. 210.

<sup>4</sup> *Vadaka Fida Ismail v. Odabai Begokutti Umah* (1881) 3 Mad. 347. Both volumes of *Bailie* are cited in the judgment, and there is no indication as to whether the parties were Sunnis or Shi'ahs.

<sup>5</sup> *Bail* I. 208-209, II. 107, 108; *Head*, 75

*Asha v. Kahir* (1909) 33 Mad. 29, 23; *Ala Muhammad Chaudhary v. (Muzumil) Sayyate Bibi* 8 All. L. J. 95, 7 Ind. Cas. 820. There is one Shiah tradition (which, the author of the *Sharaya* considers unauthenticated) that a boy of ten years may lawfully and effectually pronounce a divorce in the form approved by the Prophet's traditions (under s. 126, or s. 138 below); *Bail* II, 107.

<sup>6</sup> *Bail*, I. 205, 210 (par. 3, 4).

<sup>7</sup> The Shiah authorities are not unanimous on this point, Imam Shiakh Ja'far-us-Sadiq being of opinion that a wife may not be appointed agent. *Bail* II, 109.



pronouncement of ‘talaq’ on his behalf.<sup>1</sup>

SECTION 125.

*Explanation.*—A general agent for all the affairs of the husband has no authority to make a pronouncement of ‘talaq,’ unless the terms of his agency expressly or impliedly include such authority.

H, a Hanafi Muslim, says to his wife, W, “Every woman I marry, I have sold her repudiation to thee for a ‘dirham.’” After this, H marries X. As soon as W becomes aware of H’s marriage to X, she says “I have accepted,” or “I have repudiated her,” or “I have bought her repudiation.” Then X is divorced from H.

In the illustration above, the husband ‘sells’ to the wife for one ‘dirham’ the right to divorce any wife whom he may marry—and the sale is held to be valid.

As to the various modes in which the marriage may be made dissoluble at the instance of the wife, see ss. 134-141, s. 308, *ibid.* (2), below; see also the comment to s. 18, above. The distinction between power to divorce and agency for divorce is important.<sup>2</sup> The authority of the agent may be restricted to a particular mode of pronouncement in which case it must be exercised in that mode.

**126.** The guardian of a person who is permanently of unsound mind, and who has attained puberty, may pronounce a divorce on behalf of that person when it is to the benefit of that person.<sup>3</sup>

Minor may be divorced by his guardian.

**127.** Where a party to a marriage has not attained puberty,<sup>4</sup> his or her guardian cannot pronounce an effectual divorce on his or her behalf.<sup>5</sup>

Minor cannot be divorced by his guardians

One Mussamat Rakima, while a minor, was contracted in marriage with another minor, Shafi. After a week she was purported to be married to one Zakaria also a minor. Later, ‘talaqs’ were purported to be pronounced either by the minors Shafi and Zakaria, or their fathers, and Rakima was purported to be married (for the 3rd time) to Hashmatullah. *Held*, that the guardian of a minor has no power to pronounce a

<sup>1</sup> Bail. I. 236, 241, 252-3, 287; II. 109.

<sup>2</sup> Bail. I. 263.

<sup>3</sup> Cf. *Hamudalla v. Faruqunissa* (1882), 8 Cal. 372; *Agittannaveva v. Karamali* (1908) 46 Cal. 23, where the distinction is given effect to though not clearly enunciated.

<sup>4</sup> Bail. II. 198.

<sup>5</sup> Whether or not the infant is of sound mind; Bail. II. 107-108. After attaining puberty he is competent to act.

<sup>6</sup> Bail. II. 107. See illustration to s. 127 above.

SECTION 128. divorce on his behalf, and consequently that the marriage of Rakima to Hashmatullah was invalid.<sup>1</sup>

'Khul' The guardian of a female may agree to a 'khul' with the husband under certain circumstances.<sup>2</sup>

### (3) *Delegation of Authority to Divorce.*

#### (a) *Power to Divorce.*

Husband may authorise another to divorce.

128. The husband may lawfully give an option<sup>3</sup> to his wife, or power to any other person, to pronounce a divorce between his wife and himself.<sup>4</sup>

See ss. 125, 134, and 144, below, and the comment on the two latter, for a comparison between power to divorce and agency for divorce : cf. s. 308, illustration (2).

Duration of power.

129. A power<sup>4</sup> to divorce must, in the absence of an express provision to the contrary, be exercised "at the same meeting"<sup>5</sup> at which the person to whom it is given becomes aware of it ; and the power is determined by his or her rising from the meeting :<sup>6</sup> provided that where the power is given to the wife, she will be presumed to have exercised it at the same meeting, if she so affirms.<sup>7</sup>

#### (b) *Termination of Powers to Divorce.*

How option to wife may be determined

130. (1) Subject to sub-section (2), below, where an option to divorce is given to the wife, and no period is fixed for its duration, the husband may bring about the termination of the option by causing the wife "to rise from the meeting," or having intercourse with her, even

<sup>1</sup> *Ata Mohammad Choudhry v. Begum Bibi* (1910) 8 All. L. J. 953 (per Karamat Hussain, J.)

<sup>2</sup> See ss. 185, 196, below.

<sup>3</sup> Bailie calls the a "option;" in all cases, that expression has been reserved in this Chapter to cases where the power is given to the wife.

<sup>4</sup> A stipulation may be made in the marriage contract, authorising the wife under certain conditions to divorce herself. In that case she is rather an agent authorised to divorce, than one having an option limited by ss. 129-135. See comment to s. 134, below, *Badarunnissa Bibee v. Maftallah* (1871) 7 Beng. L. R. 442; *Humifoolie v. Fazlunnissa* (1883)

8 Cal. 327; *Nuruddin v. Mussummat Chennur* 3 Cal. L. J. 49; *Ponno Bibee v. Fyz Buksh* (1878) 15 Beng. L. R. (supp.) 5; (*Meer Ashraf Ali v. Meer Ashraf* 445 (1871) 15 W. R. 260, followed in *Ayatunnissa Berbee v. Karam Ali* (1908) 36 Cal. 22; *Nuruddin v. Mussummat Chennur* (1905) 3 Cal. L. J. 49; *Mi Nazimunnissa alias Ma Endu v. Boli Fakhrman*, 20 Ind. Cas. 642; 7 L. B. R. 43; 6 Bur. L. T.; 125.

<sup>5</sup> Cf. Bail. I. 10, for details as to when the "meeting" comes to an end; *Hod. 38, 87.*

<sup>6</sup> Bail. I. 236-237.

<sup>7</sup> Bail. I. 242-243; but see s. 106 of the Indian Evidence Act, and ss. 5b, 5c, 5d, above.

though it be caused or brought about against the wish and consent of the wife.<sup>1</sup> SECTION 130.

(2) It has been held that the rule contained in sub-section (2), above, applies only to options by way of permission granted by the husband to the wife after the marriage has already been contracted; and that, where the parties, either before marriage, or in the marriage contract itself, enter into an agreement that the woman should, under certain contingencies, have the option to divorce herself after marriage, the wife need not, immediately on the happening of the said contingencies, exercise the option: in particular, that where the option to divorce is subject to the condition that the husband marries a second wife, such second marriage is a continuing wrong, and delay in exercising the option does not terminate it.<sup>2</sup> Options to divorce before marriage or in marriage contract

In Ayatunnissa's<sup>3</sup> case the court restricted the operation of the hard rule contained in s. 130 (1) by drawing a distinction, which will, no doubt, be availed of whenever the question arises.

**131.** Save in the manner referred to in s. 130, above, the husband cannot revoke, nor bring about the termination of a power or option to divorce; notwithstanding that it purports expressly to provide that it shall arise at a future period of time, and such period has not arrived.<sup>4</sup> How it may not be determined.

(c) *Interpretation of Powers to Divorce.*

**132.** Where the terms of a power to divorce purport to fix a period of time within which it must be exercised, but are silent as to the time from which the said period should be deemed to commence, it will be deemed to commence from the time when the power is given, notwithstanding that the person to whom it is given does not become aware of it at that time; and even though he becomes aware of it only after the said period has expired; provided When power cannot be exercised.

<sup>1</sup> Bail. I. 237. See s. 131, below.

<sup>2</sup> So held in *Апатисова v. Karamuli* (1908) 36 Cal. 23; see also *Nurani v. Musummat Chenuri* (1908) 3 Cal. L. J. 19.

<sup>3</sup> Bail. I. 240, 257 (par. 1).

<sup>4</sup> Bail. I. 210, 243, 248, 249 (l. 11). But see s. 5c, above.

**SECTION 132.** that where such a power comes to the knowledge of the said person after the expiration of the said time, it may still be validly exercised "during the meeting" when the said person so becomes aware of it.<sup>1</sup>

Rejection of  
option or  
power.

**133.** A power to divorce is exhausted if it is once rejected,<sup>2</sup> unless its terms provide that it shall be continuing or recurring.<sup>3</sup>

*Illustration*

H says to W his wife: "Exercise the option of divorce to-day, and exercise it to-morrow." W may reject her option of the first day without affecting her option of the next day. But if H had said, "I give you an option till to-morrow," W's exercising it on the day it was given would have finally determined the option.<sup>3</sup>

Exercise of  
option on  
power

**134.** On the power to divorce being exercised, the divorce takes effect; and the exercise of the power cannot be revoked or cancelled.<sup>1</sup>

Modes in which  
wife may  
acquire power  
to divorce.

The wife may derive the right to effectuate a divorce in several ways

- (1) by a stipulation in the marriage contract that she shall have such a right,
- (2) by an option to divorce, derived from the husband;
- (3) by being appointed the husband's agent in that behalf,
- (4) by the husband pronouncing a divorce contingently on something happening, the contingency being such that the wife has some kind of control over it. *see ss. 125, 128, 134-144*

Stipulation in  
marriage contract

The first seems to be the most prevalent in India. The last three are not necessarily contemporaneous with the marriage contract; they must, in strictness, follow the marriage contract, because it is only then that there is a husband and only then that he himself has the authority to divorce.

Agency or option.

The effects of appointing the wife an agent to divorce, and of giving her an option to divorce, differ from each other in this, that in the case of agency (under strict Muhammadan law), though the authority continues until revoked, the husband has the power of revoking it; whereas

<sup>1</sup> *Rail I* 249 (par 1), and see table following s. 116, below.

<sup>2</sup> Not by mere omission to exercise the power. *Ishtaf Ali v. Arshad Ali* (1871) 16 W. R. 350.

<sup>3</sup> *Rail I* 240.

<sup>4</sup> *Rail I* 210. This, of course, does not mean that the divorce cannot be revoked: whether the divorce can be revoked or not would depend

upon the nature of the divorce pronounced, and that again upon the terms of the option, or the power.

<sup>5</sup> See comment on s. 141, below, 4. To divorces pronounced by the husband contingently on his marrying another wife—or a clause in the marriage contract to the effect that a second marriage will *ipso facto* render the first marriage void.

in the case of options, the power is restricted to the "same meeting," SECTION 134. but cannot be determined by the husband except by bringing about the termination of the "meeting." Where, however, there is a stipulation in the marriage contract entitling the wife to pronounce a divorce, she is, according to the decisions of the Courts, practically (though it is not expressly so stated) an agent to divorce, whose authority the husband has no power to revoke—a result which is in accordance with the combined effect of the rule stated in the section and the principle of justice, equity, and good conscience underlying the Indian Contract Act, s. 202.<sup>1</sup>

The fourth case is that of a contingent divorce and this in its forms contingent divorce, are not carefully considered, may be like a floating mine, capable of destroying the marital bond, and may be beyond the direct control of the husband or wife, though it cannot seriously harm them in practice if both wish to ward it off. But this method of empowering the wife to free herself from the husband may, with care, be moulded in a most beneficial manner. The author of the 'Sharaya-ul-Islam' in giving an exposition of the general law, apart from special contract, suggests that in cases where there is "discord" between the parties, the judge should himself select umpires, one from the family of the husband and the other from that of the wife.<sup>2</sup> If this suggestion is utilized for introducing special stipulations in the marriage contract, the power to divorce may be made to depend upon the decision of the umpires, with reference to the existence of certain circumstances for fixing upon which the analogy of the English or other systems of law may be followed. Or, without following any such analogy, it may be provided in the contract (as is occasionally done) that the husband shall perform his duties as laid down in the Quran and the traditions, viz., shall give to the wife her conjugal rights, maintain her, and be kind to her if he wishes to keep her as his wife, or shall divorce her with kindness,—that if he fails to perform these duties then the wife may claim to be divorced, and that the claim shall be considered either by a person named in the contract, or by a person or persons to be nominated as umpires respectively by the husband and wife. Or it may be provided that if the wife asserts that the husband has deserted her, or has been guilty of cruelty and adultery, then her claim shall be placed before the umpires nominated respectively by herself and her husband, and, on their holding that her assertions are well founded, she, or they, or either of them, (as the case may be) shall have the power to pronounce a divorce.

Suggestions for clauses in marriage agreement in form of contingent divorces

<sup>1</sup> *Hamidulla v. Fuzaimaissa* (1842), 8 Cal. 327.      <sup>2</sup> *Bail II* 88, 89.

SECTION 134. The author of the 'Sharaya'-ul-Islam' in the passage referred to lays down that the umpires cannot (under the general law) pronounce a divorce without the consent of the husband.<sup>1</sup> It is necessary, therefore, that the marriage contract should expressly provide for this power. It may also be provided that if the umpires think it just and right, they should have the power to require the wife to return her 'mahr' or a portion thereof, or even to make a payment in excess of the 'mahr.'

Exercise by  
the wife of  
option to  
divorce.

Various examples of options and their exercise are given in the texts, from which Sir R. Wilson draws the general principle, that the wife cannot give herself a more complete divorce than the husband had intended.<sup>2</sup> The illustrations have reference very often to the interpretation of Arabic words and expressions, and they do not seem to be of much use in the circumstances likely to arise in India.<sup>3</sup> The general rules of agency would, no doubt, be applicable.

Option to wife  
to divorce if  
husband  
marries a  
second wife.

In the cases that have come before the Courts in British India, and have reported, the stipulations entitling the wife to divorce herself have been conditional on the husband taking a second wife. Such a conditional option is obviously different from an agreement prohibiting the husband to marry another wife, which latter would be void,—in accordance with any rule with the 'Sharaya'-ul-Islam, in which text such a prohibition is expressly stated to be "contrary to the (Shiah) law."<sup>4</sup>

Agreement not  
to marry a  
second wife.  
Contract of  
Act, s. 26, on  
void.

The Indian Contract Act, s. 26, also declares that agreements in restraint of marriage are void. That section would probably apply where such a stipulation is made as an independent contract, or subsequently to the marriage, and does not form part of the marriage contract; for then the law governing the agreement would apparently be the law that is laid down in the Indian Contract Act, and not the Muhammadan law of marriage. Where, however, such an agreement is made as part of the terms of a contract of marriage between a Muslim man, two circumstances throw considerable doubt on the question whether the said section would operate so as to make the term void: (1) The law governing the transaction would presumably be the Muhammadan law, and not the Indian Contract Act. The fact that the law relating to marriage is in Muhammadan law is considered to be a part of, and is on many points identical with, the general Muhammadan law of contracts, would not apparently affect the question, the governing consideration being the scope of the Indian Contract Act as intended by the Legislature; and it is difficult to think that in enacting the Act

<sup>1</sup> Part II, ss. 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

<sup>2</sup> "Ando-Muhammadian Law," (3rd Ed.)

<sup>3</sup> Part II, § 76. The *Da'ayim-ul-Islam* seems to be for the same effect: *Da'ayim-ul-Islam*, Part

the Legislature intended to regulate the marriage laws.<sup>1</sup> (2) Assuming SECTION 134, that the Indian Contract Act is applicable, it is doubtful whether s. 26 can be considered to have for its scope restraint of polygamy, or merely the absolute restraint of marriage.

#### (4) *Modes of Pronouncing Divorce.*

135. The modes<sup>2</sup> of pronouncing divorce mentioned in ss. 136 and 138, below, are approved by the traditions<sup>3</sup> of the Prophet, and are valid according to all schools of Muhammadan law.<sup>4</sup> The modes mentioned in ss. 140 and 142, below, are not so approved, and are not valid according to Shiah law.

136. (1) The 'ahsan' or most approved<sup>4</sup> mode of pronouncing divorce is subject to the following conditions, viz., that, where the marriage has been consummated<sup>5</sup> and the wife is subject to menstruation,<sup>6</sup>—

(a) the divorce must be pronounced while the wife is free from her menstrual courses; <sup>6</sup>

(b) the husband must not have had sexual intercourse with the wife since her last menstrual courses;

(c) the husband must not have divorced her during the said courses; <sup>7</sup> and

(d) according to Shiah law (but not according to Sunni Hanafi law) the wife must not be in her puerperal courses. <sup>8</sup>

(2) Where the marriage has not been consummated,<sup>9</sup> the pronouncement may be made in the 'ahsan' mode at any time, even though the wife be in her menstruation. <sup>9</sup>

<sup>1</sup> See s. 64, above.

<sup>2</sup> Usually referred to as "forms" of divorce. The expression "mode" has been preferred in this work, to draw attention to the fact that these modes refer not merely to the "form" of words used, but also to the occasion of pronouncing them, and other circumstances.

<sup>3</sup> *Sunnah* is the Arabic for "tradition," hence divorces in accordance with the requirements of the traditions, are occasionally referred to as the *sunnat* or "traditional" modes of divorce—an expression that has been avoided in the present work, as it may convey an implication that

the *ahsan* modes are not recognised by the Shiahs, whereas the fact is that only these two traditional modes are recognised by the Shiahs.

<sup>4</sup> It would be more correct to call it the least disapproved mode, see the comment to s. 120, above.

<sup>5</sup> In Hanafi law valid retirement is, in this case, equivalent to consummation.

<sup>6</sup> See comment.

<sup>7</sup> Bail. II 110.

<sup>8</sup> Bail. I. 205.

<sup>9</sup> Bail. I 205, II. 111.

Modes of pronouncing divorce in accordance with 'sunnah.'

The first and most approved mode of divorcing. (1) When marriage consummated.

(2) Where marriage not consummated.

## SECTION 136.

(8) Where  
\* wife not  
subject to  
menstrues.

When husband  
absent.

(3) In cases where the wife is not subject to menstruation, the pronouncement may be made in the 'ahsan' mode at any time, even immediately after sexual intercourse.<sup>1</sup>

It is stated in the 'Sharaya'-ul-Islam,' a book of authority on Shiah law, that where the husband is absent from the wife, the pronouncement may be made at any time (irrespective of her being in a 'tuhr,'<sup>2</sup>) after she has either actually menstruated since the last occasion on which they had sexual intercourse, or after the expiration of sufficient time for the husband to be certain that she has menstruated since the said occasion:<sup>3</sup> for this purpose the husband is not considered to be absent from his wife, if he lives in the same city as herself, and meets her so as to know when her courses are on her.<sup>4</sup> These rules would no doubt be followed in India should the question ever arise. See the comment to s. 142, below.

'Ahsan' mode  
of divorce  
revocable  
Exceptions

137. A divorce pronounced in the 'ahsan' mode (*i.e.*, under s. 136, above) is revocable;<sup>5</sup> provided that in Shiah law where it is pronounced against a wife (1) with whom marriage has not been consummated; or (2) who is past child-bearing; or (3) who has not attained puberty, the pronouncement is irrevocable.<sup>6</sup>

The SECOND  
MODE of  
divorcing  
permitted by  
the 'sunnah,'  
viz., the  
'hasan' or  
good mode.

138. The 'hasan' or good<sup>7</sup> mode of divorce consists of three successive pronouncements made during consecutive 'tuhrs' during which there has been no sexual intercourse; or, in cases where the wife is not subject to menstruation, after intervals of a month or thirty days between each preceding and succeeding pronouncement.<sup>8</sup>

Three  
pronounce-  
ments.

In accordance with this mode, the first two pronouncements are revoked before the second and third pronouncements are respectively made. Where the said revocations are followed by resumption of cohabitation, the divorce that is effected is called the 'talaq-ul-'iddat,' by the Shiah authors. See the comment following s. 142, below.

<sup>1</sup> Bail. I. 207; II. 111.

<sup>2</sup> The time when a woman is not in her menstruation (or the period between two successive menstrual courses) is called *tuhr*.

<sup>3</sup> Bail. II. 110.

<sup>4</sup> Bail. II. 111. The *Da'amm-ul-Islam* (a Shiah Isma'ili text) seems to be to the same effect, and gives the following details: the absence must last not less than 3 months, and the distance must be not less than two *barsahs*

(if *s.* 56 English miles): *Da'amm (Notes)*.

<sup>5</sup> *I. e.*, during the period of 'iddat: s. 121.

<sup>6</sup> Bail. II. 119, 127-128.

<sup>7</sup> Or "approved,"—as distinguished from "most approved." See the comment to s. 120, above. This is one of the two modes allowed by the traditions of the Prophet. See s. 125, above.

<sup>8</sup> Bail. I. 206. See also Bail. I. 205.



**139.** A divorce pronounced in the 'hasan' mode (i.e., SECTION 139. under s. 138, above) dissolves the marriage when the third pronouncement has been made: it may be revoked at any time until the third pronouncement is made, after which it is irrevocable.<sup>1</sup>

The second mode irrevocable after third pronouncement.

**140.** According to Hanafi law, where the marriage has been consummated, the pronouncement of a single divorce is valid, though made at a time when the wife is in her menstruation, or after the husband has had intercourse with her since her last menstruation. This mode of divorcing is disapproved, but held lawful, under Hanafi law. It is III The THIRD mode - (Hanafi law) 'Tahr' not regarded not valid, under Shiah law.<sup>3</sup>

In this mode the Prophet's directions are disregarded both as to the times when, and occasions on which divorce may be pronounced.<sup>4</sup>

**141.** A divorce in the mode referred to in s. 140, IV The FOURTH mode - (Hanafi law) above, is revocable.<sup>5</sup>

See the comment following s. 142, below

**142.** (1) Three pronouncements of divorce may be validly made, according to Hanafi law, during a single 'tahr' of the wife, either in a single sentence, or in separate sentences. IV The FIFTH mode - (Hanafi law)

(2) This is the fourth mode of divorcing: the 'talaq' given in this mode is called 'talaq-i-bâin',<sup>6</sup> because the divorce is complete and final, and the marriage dissolved immediately and irrevocably. It is highly disapproved: but held lawful under the Sunni law.<sup>7</sup>

(3) This mode is not known to Shiah law.<sup>8</sup>

'Talaq-i-bâin,'  
Not known to  
Shiah law.

(4) A pronouncement of divorce in this mode need not

<sup>1</sup> Bail I 206. See also Bail I 205.

<sup>2</sup> Bail I 207. This mode and that which is mentioned in s. 142, below, are characterized as *bad'ari*, which means "new" or "innovated" or "unorthodox."

<sup>3</sup> Bail II, 118.

<sup>4</sup> Bail I, 207.

<sup>5</sup> As explained in the comment to s. 121, above, primarily the first two pronouncements

of divorce are revocable, (or capable of being withdrawn) and here, there being only a single pronouncement, it is necessarily revocable.

<sup>6</sup> *Bâin* means manifest, notorious, complete, final.

<sup>7</sup> *In re Abdul Ali Ishmael* (1883) 7 Bom. 180; *Sarabai v. Rahabai* (1905) 30 Bom 537.

<sup>8</sup> Bail II 118.

SECTION 142. be in the triple form ; but it is effective if it is expressly stated, or it is implied, that it is either triple or irrevocable.

#### 1. THE FOUR MODES OF DIVORCE COMPARED.

Origin of four  
modes of divorce.

The four modes of divorce mentioned in ss. 136, 138, 140, and 142, respectively, appear to have all originated from the first one, which alone seems to have been primarily sanctioned or contemplated by the Prophet. The main features of the first and most approved mode, consist of restrictions as regards the occasions on which it can be pronounced, and of its being left revocable during the whole of the period of 'iddat.' The other modes are mentioned, above, in the order in which they approximate to the first mode.

Characteristics  
of first mode.

The following are some of the main characteristics of a divorce in the first and most approved mode: (1) It is not pronounced at a time, when the husband is prevented from having intercourse with his wife owing only to her courses. (2) The husband is required to abstain from having intercourse with the wife, even though it becomes permissible after the enforced abstinence during her menses. (3) The divorce is in suspense during the 'iddat,' and the husband has time to reconsider his decision; so that if the pronouncement is not revoked, there is indication that it was not capriciously or hastily made. (4) After the divorce is complete and the marriage is dissolved, there being only one pronouncement, there is no prohibition against the re-marriage of the parties.<sup>1</sup> (5) In the first mode the period of suspense for the wife is not so prolonged as it is in the second mode: in the third and fourth modes the period is not longer, but it is unrelieved by the chance of a revocation, as revocation is impossible. (6) If the husband or wife dies during the period of 'iddat' the other can inherit. see s. 154 (1), below. (7) The wife's menstruating after the last occasion when there has been sexual intercourse ensures the husband that she is not going to bear a child to him: her being pregnant may remove the cause of the divorce.

#### 2. THE SECOND MODE OF DIVORCE.

Second mode  
an evasion of  
first.

The second mode (s. 138, above) follows, on most points, the letter, though it does not follow the spirit, of the Prophet's injunctions as indicated by the rules relating to the first mode (s. 136, above); for, divorce in the second mode is a divorce during 'iddat,' or practically, "a divorce

<sup>1</sup> See s. 11, above. Even where divorces are not so easy as they are for a Muslim husband,

the divorced parties sometimes re-marry, e.g. see *F. Indall v. Goblemd* (1877) 2 P. D. 263.

upon a divorce," though in order to satisfy the forms of the law, the first pronouncement is nominally revoked. It will be observed, that what is done in the second mode is, that a divorce is pronounced in the approved first mode, and then revoked; again, a second pronouncement is made, and again revoked; on the third pronouncement the divorce becomes irrevocable: the marriage is then completely and irrevocably dissolved, and the parties are prohibited from intermarrying with each other. Thus, in the main, it consists of the pronouncement and revocation of two divorces followed in rapid succession by a third pronouncement which (by reason of being the third) is irrevocable: the power to revoke divorces is made to bring about an irrevocable dissolution of marriage.

The revocation is not genuine.

This mode is called by the Shiah lawyers the ‘*talq*’ of ‘*iddat*.’<sup>1</sup> (Shiah law) where after each revocation, the husband resumes cohabitation. That fact furnishes some indication, that he does not intend to dissolve the marriage; and though the pronouncement, soon after, or in the next ‘*tuhr*,’ of another divorce, may cast suspicion on the motive with which the first pronouncement was revoked, and though that suspicion may almost amount to certainty when the process is repeated a second time, still it was felt by the Shiah authorities that such an evasion could not be prevented, without radically adding to the requirements or restrictions of the first and most approved mode<sup>2</sup>: such additional restrictions<sup>3</sup> would, almost of necessity, have to be of a nature that might affect even a husband who has no intention of evading the law at the time that he revokes the earlier divorce, so that the restrictions would indirectly have the tendency of preventing well-intentioned revocations.

Though the husband revokes the first pronouncement verbally, merely for the purpose of following up the revocation with a second and a third pronouncement in succession, it is none the less a valid revocation.

For these reasons, in spite of the anxiety of the Shiah lawyers to “adhere strictly to the terms of legal permission”<sup>4</sup> as to divorce, they could not hold that it was unlawful for a man to revoke a divorce which he had pronounced in the preceding ‘*tuhr*’ of his wife, and at the

<sup>1</sup> *Talaq-ul-iddat* in Arabic, Bail II 110. The name betrays that the revocation of the first and second pronouncements is not genuine, for, after a sincere and effectual revocation, there would be no ‘*iddat*’. The practical difference is that the husband, by repeating the pronouncements, places it out of his power to revoke the divorce, or to remarry the wife unless she is immediately married to another husband.

<sup>2</sup> See *Footnote* 136 above.

<sup>3</sup> It could, e.g., have been provided that a certain period must elapse between revocation and another divorce, or that a divorce cannot be pronounced in a *tuhr* in which a previous pronouncement has been revoked. The Arabs were (and are at the present day) inveterate in their divorcing propensities.

<sup>4</sup> See *Footnote* on s. 120, above.

SECTION 142. same time to pronounce if he chose to do so, another divorce, in the same breath with which he revoked the previous pronouncement. In other words, the 'talaq-ul-'iddat' could not be prohibited.<sup>1</sup>

The next point that comes up to be considered in connection with the second mode of divorce is, whether, when the revocations of the first and second pronouncements are made verbally, without resumption of conjugal relations,<sup>1</sup> there is such a departure from the injunctions of the Prophet,<sup>2</sup> as to justify the proceeding being declared invalid. The Shiah authorities are not agreed on the point; the balance of authority, however, is stated in the 'Shara'ya-ul-Islam' to be in favour of holding the pronouncements valid, though they have the effect of establishing a triple divorce, unrelieved by a genuine revocation intervening between the first and second pronouncement.<sup>3</sup>

Shiahs permit no departure from the first mode beyond those of the second mode.

As already stated, the Shiah authorities permitted with difficulty, and with dissentient voices, a second and third, divorce, where the first two were not revoked by resumption of conjugal relations. They had less difficulty in rejecting a further evasion that was suggested,<sup>4</sup> viz. that the three divorces should be permitted to be pronounced in the same 'tahr,' two of them being revoked intermediately; for, in this case it amounted to a direct breach of the rule contained in s. 136 (1) (c), above. If this evasion had been permitted, then the Shiahs would have come to the other two modes of divorce which are recognised by the Sunni law in spite of their being stigmatized in that law as sinful.<sup>4</sup> These forms have next to be considered. The main points of difference and the gradations by which they got a footing in the law have already been indicated with some fulness in considering the various stages of the Shiah law of divorce. It will, therefore, be possible to deal with them very concisely.

Third and fourth modes.

### 3. THE THIRD MODE OF DIVORCE

Third mode of divorce disregards 'tahr'

In the third mode<sup>5</sup> there is a disregard of the injunctions that the divorce has not to be pronounced while the wife is in her courses, nor unless he has passed through one period of menstruation after the last coaction when there has been intercourse between them.

### 4. THE FOURTH MODE OF DIVORCE

Fourth mode : (a) disregards 'tahr' and (b) is irrevocable.

The fourth mode<sup>6</sup> disregards the injunctions of the Prophet both as to the wife being in a 'tahr',<sup>7</sup> and by being triple and therefore irrevocable.<sup>8</sup> Nor does the departure of this mode from the approved form stop

<sup>1</sup> Bail II, 121.

<sup>2</sup> *I.e.* as it is laid down in s. 136 above.

<sup>3</sup> Bail II 120-121.

<sup>4</sup> See s. 112, above.

<sup>5</sup> See s. 110, above.

<sup>6</sup> See s. 112, above.

<sup>7</sup> See s. 136 (1), (a) and (b), above.

<sup>8</sup> See s. 136 (1) (c), above.

here; for, if the three pronouncements were allowed to be made in one SECTION 142  
'*tahr*,' it followed that they could, so far as the rules contained in s. 136, Steps of  
above, were concerned, be made in immediate succession, and, if so, then departure from  
they could be made in one sentence; and if in one sentence, then there first mode  
would be little meaning in insisting upon the formula being pronounced  
three times: the husband might (it was thought) be allowed to say:  
"I divorce three times," instead, of having to reiterate: "I divorce,  
I divorce, I divorce." Next, the husband could say "I divorce irrevoc-  
ably," instead of saying "I divorce three times." Finally, he could  
indicate his intention of the divorce being irrevocable, without using the  
word "irrevocable," or "triple."

By a deplorable, though, perhaps, natural development of the sunni Prevalence of  
law, it is the fourth and most disapproved or sinful mode of *talaq*, fourth mode,  
that seems to be most prevalent, and in a sense even favoured by the law.  
For, the requirements of the other mode being seldom attended to, it is  
generally assumed (on the principle that the intention of the parties  
must, as far as possible, be given effect to) that the fourth mode was  
intended to be employed,<sup>1</sup> with the result not only that the formalities  
for the divorce are done away with, but even its effects are aggravated;  
for, inasmuch as the pronouncement is presumed to be in this mode, it possible  
is presumed to be irrevocable. It is indeed possible, that the sunni explanation  
jurists wished to inflict on a husband, who disregard the requirements of  
s. 136, the penalty of rendering the divorce irrevocable, and there are  
indications that they considered it always a favour to the wife to relieve  
her of the husband (cf. s. 147, *ill.* 8, below).<sup>2</sup> At the same time, as  
has been remarked, "Men have always moulded the law of marriage so  
as to be most agreeable to themselves."<sup>3</sup>

### (5) Divorce in Writing.

143. According to the Hanafi law, where the husband Divorce in  
executes a document<sup>4</sup> containing a statement that he writing  
divorces his wife, and the document is properly superscribed  
and addressed in the usual form, showing the name of the  
writer and the person addressed, it constitutes a valid  
pronouncement of divorce, irrespective of the intention  
with which it is written; where the document is not written Intention to  
divorce when  
required

<sup>1</sup> See s. 147, *et seq.*, below.

<sup>2</sup> *Amiruddin v. Khatun Bibi* (1917) 39 All.  
371, 475.

<sup>3</sup> Mayne, *Hindu Law*, s. 153 *ad fin.*

<sup>4</sup> And it has been observed that between per-

sons of rank and property, a document is  
to be expected for satisfactory evidence of a  
divorce. (*Khorrah Goudar Ali Khan v. Khorrah*)  
*Ali Khan* (1873) 20 W. R. 214.

SECTION 143. and superscribed in the usual form, it does not constitute a pronouncement of divorce unless it can be comprehended and read, and unless it has been written with the intention of its operating as a pronouncement of divorce.<sup>1</sup>

When  
permitted by  
Shiah law.

(2) In Shiah law the pronouncement of a divorce in writing, or by signs, is not valid, unless the husband is unable to pronounce the formula of divorce;<sup>2</sup> and unless the document is written, or the signs made, with the intention of pronouncing a divorce.<sup>3</sup>

(6) *When Divorce Comes into Effect: Conditional Divorce.*

Hanafi law.  
Divorce  
referred to a  
future time  
or condition.

144. (1) In Hanafi law, a divorce may be so pronounced as to come into effect not immediately, but at some future time,<sup>4</sup> or contingently on the happening of some specified future event:<sup>5</sup> a divorce may be pronounced by a man between himself and a woman who is not his wife,<sup>6</sup> contingently on his marrying that woman, with or without other conditions.<sup>7</sup>

Shiah law.

(2) In Shiah law, a divorce cannot be pronounced subject to any condition<sup>8</sup> or qualification, or so as to come into effect at a future time.<sup>9</sup>

*Illustrations.*  
1) *Euseb's Law.*

(1) H, a Hanafi, says to his wife W: "Thou art repudiated after a month." The divorce would take effect a month later.<sup>10</sup>

(2) H, a Hanafi, says to his wife, W: "Thou art repudiated, and I have an option to cancel the repudiation for three days." The divorce is absolute, and the option void.<sup>11</sup>

(3) H, a Hanafi, says to his wife W: "Thou art divorced in Mecca." The divorce is absolute, and it holds in all places.<sup>12</sup>

(4) H, a Hanafi, says to X, a woman who is not his wife: "If you enter this house you are divorced." H then marries X, and X enters

<sup>1</sup> Bail. I. 282.

<sup>2</sup> Bail. II. 113-114; *Du'nyam* (Notes); see § 120 (2), above.

<sup>3</sup> Witnesses are also necessary; s. 120, above.

<sup>4</sup> Bail. I. 212.

<sup>5</sup> Bail. I. 212. So in *Hanafi Ali v. Imtiaz* (1878) 2 All. 71, noted in footnote to s. 146.

<sup>6</sup> Cf. *Kur'oud Hossein v. Jaua Bibee* (1878) 1 Cal. 588.

<sup>7</sup> Bail. I. 261, II. 109, 111-115; see *id.* (1).

<sup>8</sup> The only apparent exception mentioned is when "there is a condition in appearance, but none in reality,"—the husband knowing it to be fulfilled at the time of pronouncing divorce. Bail. II. 115.

<sup>9</sup> Bail. II. 115.

<sup>10</sup> Bail. I. 217, 218-219.

<sup>11</sup> Bail. I. 217, 225.

<sup>12</sup> Bail. I. 217.

the house. There is no divorce; but if H had said "If I marry you (and SECTION 144 you enter this house) then you are divorced," the divorce would be effectuated on H's marrying (and X her entering the house after the marriage).<sup>1</sup>

(5) According to Shiah law, the pronouncements in all the illustrations given above, would, it appears, be invalid, except that, perhaps, in the second illustration it may be held that the option is separate from the pronouncement, and that the latter is valid, while the option is void. The question would depend on the words actually used. It need hardly be stated that the validity of the terms of the pronouncement is not enough to give effect to a divorce in Shiah law unless all the requirements of s. 136, or s. 138 are satisfied.

See s. 125, above. Syed Sahib Ameer Ali states that 'lancee are usual in marriage contracts to the effect that should the husband marry another wife, the first marriage will 'ipso facto' be void.<sup>2</sup> Such a clause, provided that it is so worded as to be capable of being interpreted as a contingent divorce, would be valid in Sunni law and would have the effect of dissolving the first marriage<sup>3</sup> on the husband taking a second wife. If the first marriage has been consummated, the whole of the 'mahr' would then be due. Whether an agreement would be valid to the effect that on a second marriage the first would be dissolved 'ipso facto,' and that the first wife be entitled to her 'mahr' though the marriage with her has not been consummated, would depend upon the question whether the laws relating to 'mahr' and laying down what portions thereof become due on dissolution of marriage, can be altered by agreement between the parties; or, perhaps, on the question whether the 'mahr' can be claimed as damages or otherwise, under the Indian Contract Act, irrespective of the Muhammadan law of marriage. But it is a question that is very unlikely to arise in British India.

145. (1) A divorce in writing may validly be so expressed as to take effect either from the time when it is written or from the time when it reaches the wife.<sup>4</sup>

(2) A divorce in writing is considered to have reached the wife (a) if it reaches the father<sup>5</sup> of the wife;

<sup>1</sup> Ball, I, 264.

<sup>2</sup> "Mahomedan Law," II 171.

<sup>3</sup> Cf. *Furquand Hussein v. Jassu Bibee* (1878)

4 Cal. 588, 589.

<sup>5</sup> As in *Sherif Saib v. Usanbibi* Annual (1871) 6 Mad. H. C. R. 152; the husband

was in Trichinopoly, and divorced his wife who was at Tinnevely; (there was no evidence of the wife having received any intimation of the divorce), *Saibai v. Rababai* (1905) 30 Bom. 537.

<sup>6</sup> *Waj Bibee v. A. mut Ali* (1807) 8 W. R. 23.

Effect of stipulation in marriage contract, that it shall be dissolved on marriage with another wife.

Time when divorce in writing takes effect.

SECTION 145. provided that he is in the town in which she is at the time, and that he has the disposal of her affairs generally ;<sup>1</sup> or (b) if endeavours are made to communicate the divorce to the wife, and she frustrates them by keeping out of the way.<sup>2</sup>

" Writings of this kind may either be so expressed that the repudiation takes effect on the mere writing . . . whereupon a repudiation takes effect and an 'iddat' becomes obligatory from the time of writing ; or the writing may be so expressed as to make the repudiation dependent on the receipt of the writing " <sup>3</sup>

### (7) Interpretation of the Pronouncement.

#### (a) When it Amounts to a Divorce.

(Hanafi law )  
(a) Ambiguity  
as to whether  
divorce given  
intention  
determines  
it.

**146.** According to Hanafi law, where the husband utters ambiguous words,<sup>4</sup> susceptible of being interpreted as a pronouncement of divorce they effectuate a divorce, if they are uttered with that intention.<sup>5</sup>

#### PRE-SUMPTIONS AND RULES OF INTERPRETATION OF OPTIONS OR PRONOUNCEMENTS

I Where the husband is in an agreeable frame of mind and utters ---

- (1) " words of consent and nothing else," *i.e.*, which imply an absolute option to the wife, *or*
- (2) " words which are good for consent or refusal," *i.e.*, by which the wife is asked to do something which is in her power to refuse to do,<sup>6</sup> *or* .
- (3) " words of consent and reproach," *i.e.*, reproachful expressions which apparently imply an option to the wife, .

in none of the cases above referred to does a divorce take place unless the husband had the intention of divorcing [the husband's statement as to his intention being conclusive] <sup>7</sup>

II. Where the husband utters the above mentioned classes of expressions on being asked by the wife or someone on her behalf for a divorce, the first and third classes of words effect a divorce, the second does not

<sup>1</sup> Bad I 233

<sup>2</sup> *Sarabhai v. Rohatki* (1905) 30 Bom 537

<sup>3</sup> Bad I 233.

<sup>4</sup> The Indian Evidence Act, ss. 61, *et seqq.* would apply to documents. A man said to his wife " Thou art my cousin, the daughter of my uncle if thou wilt " It was proved that he meant to imply by the words that she would be no other relation to him, and the statement

was given effect to as a divorce *Hamid Ali v. Indira* (1878) 2 All 71

<sup>5</sup> This is taken from Bad. I 238-239.

<sup>6</sup> This is referred to at Bad. I 236 "as ambiguous expressions from which repudiation may be inferred," including *ikhla'ar* or choice, *on aur bu and* or " business in hand "

<sup>7</sup> As to the value and effect of such presumptions, etc., see ss. 5a and 5c above.



III. Where the husband utters the above mentioned classes of expressions in anger,<sup>1</sup> the first class of words effects a divorce, the second and third classes of words do not effect a divorce, unless the husband intended it.<sup>2</sup> [His statement as to his intention being conclusive.]<sup>3</sup>

Where the question arises whether or not, in any particular case a dissolution of marriage has taken place, and when this depends upon whether, from the facts before the Court, the inference ought or ought not to be drawn that a ‘talaq’ was validly pronounced, the various points of view referred to in ss. 119-157, have all to be considered.

Thus, in *Hamid Ali's Case*<sup>4</sup> the words uttered were: “Thou art my cousin, the daughter of my uncle, if thou gress— Marriage with the daughter of an uncle is not prohibited, so that the expression could not be taken to correspond even remotely to a ‘Zihar’ (s. 187, below) and yet it was construed as implying that in the contingency referred to, the lady would not continue to be the speaker's wife and would bear to him no relation other than that of a cousin. The case is, therefore a striking illustration of the principle of Hanafi (Sunni) law contained in s. 146.

In the report of a case decided a few months earlier in Calcutta<sup>5</sup> the headnote is to the effect that the “mere pronunciation of the word ‘talak’ three times by the husband without being addressed to any person is not sufficient to constitute a valid divorce.” The mere pronunciation of that word would obviously be meaningless. It is clear that the intention to dissolve the marriage must be manifested (ss. 119 and 143, above). If ambiguous words are used, their effect depends upon the intention with which the words are pronounced (s. 146). If the words uttered are unambiguous, then according to strict Hanafi law, there is a divorce even though they have been pronounced under coercion (s. 123, above, and footnotes thereto).

In the decision last cited, certain remarks<sup>6</sup> may point to the conclusion that the High Court considered that the words uttered did not constitute a coherent and unambiguous statement to the effect that the marriage was dissolved, but that the words uttered were ambiguous, and that, therefore, their legal effect depended upon the intention with which they were pronounced.

<sup>1</sup> So in Roman law, acts done in anger were not effective, unless *per se verbum apud patrem animi factum*, Dig. XXIV, 23.

<sup>2</sup> As to the value and effect of such presumptions, etc., see ss. 56 and 57 above.

<sup>3</sup> *Hamid Ali v. Intanzen* (1878) 2 All. 71.

<sup>4</sup> *Furrukh Hussain v. Janu Bibee* (1878) 4 Cal. 388.

<sup>5</sup> The remarks referred to are to the following

effect: (1) “If the formula of divorce prescribed in Mohammedan law books has been really pronounced by the plaintiff, the marriage would have been probably dissolved”; (2) that the husband simply pronounced the word ‘talaq’ three times, and that (3) simply pronouncing the word ‘talaq’ is not sufficient to constitute a valid divorce.

General rule stated.

*Hamid Ali's case*

*Furrukh Hussain v. Janu Bibee* case considered.

## SECTION 116

The facts, however, found by the lower appellate Court, were that the husband said: "If she be not my wife I can give her 1,000 (or 20) talaks, so why not three, and having so said, pronounced the three talaks which are held to constitute one form of Mahomedan divorce." It is impossible to reconcile these findings with the view that the word 'talaq' was incoherently and meaninglessly uttered, without any other words in grammatical sequence, to the effect that the marriage had been dissolved. The learned Judges of the High Court apparently thought that by "pronouncing the three talaqs" the lower appellate Court meant, "pronouncing the word 'talaq' three times." This does not seem to have been the case. Hence, though the first portion of the head note above referred to, would be correct, it is difficult to consider it to represent the facts before the High Court. It is still more difficult to determine what facts the High Court considered itself to be adjudicating upon.<sup>1</sup>

Ibrahim v.  
Syed Bibi

Asha Bibi v.  
Kadir Ibrahim.

The case of 'Ibrahim v. Syed Bibi'<sup>2</sup> is a marked contrast, in regard to the precision with which the facts and the Hanafi law are therein stated. In 'Asha Bibi v. Kadir Ibrahim Rowther',<sup>3</sup> the principles of Hanafi law are once again stated with great care, and it is laid down in particular that the pronouncement of divorce need not be addressed to the wife, (in other words that the direct form of speech is not of the essence of the formula to be uttered for making a pronouncement of divorce). The actual words uttered in that case were explicit enough. They were addressed to the father of the wife and included the following: "It is 4 or 4½ (sic) since I married your daughter. You have now brought her away. This is the Talaku for your daughter. . . . Here-after you may marry your daughter yourself, or marry her to a Pallan. She has become my mother"

(b) *Whether the Divorce is Revocable or Irrevocable.*

Hanafi law.  
(b) Ambiguity  
as to whether  
revocable or  
irrevocable  
(i) Present or  
past tense

**147.** (1) Where the terms of a pronouncement of divorce are ambiguous, or silent, as to whether a revocable or irrevocable divorce is intended, a single revocable divorce is effected when the expression is such as to imply that a divorce has already been effected.<sup>4</sup> In all other cases an irrevocable divorce is effected.<sup>5</sup>

<sup>1</sup> The case has been dissented from in *Asha Bibi v. Kadir Ibrahim Rowther* (1909) 33 Mad 22. See also *Sarabi v. Ruberbi* (1906) 30 Bom. 537, 544.

<sup>2</sup> (1888) 12 Mad. 63.

<sup>3</sup> (1909) 33 Mad. 22, 26-28.

<sup>4</sup> *In re Abdul Ali Ismail v. his wife Husseinbi* (1883) 7 Bom. 180; *Sarabi v. Ruberbi* (1905) 30 Bom. 537.

<sup>5</sup> *Ball. I.* 230.

(2) Where a man divorces a wife with whom the marriage has not been consummated,<sup>1</sup> all the pronouncements of divorce following the first one that is effective are void.<sup>2</sup> SECTION 147.

*Explanation.*—There may be more divorces than one expressed in the same pronouncement, so that they are all effective simultaneously; or a divorce may be purported to have preceded the first one that is actually pronounced, in which case the earlier one will also be effective; or one or more divorces may all be made contingent on one condition, so that they are all effective at the same moment of time, viz., when the contingency arises.<sup>3</sup>

(11) When marriage not consummated presumption that the divorce is in the most approved mode.

(1) H says to his wife W, with whom he has not consummated the marriage: "Thou art repudiated, repudiated, repudiated." The first pronouncement takes effect as a divorce, and the next two are nugatory.<sup>4</sup> *Illustration.*  
(Hanafi law)

(2) If he says, "Thou art repudiated three times," three divorces take place.<sup>5</sup>

(3) If he were to say, "Thou art repudiated once before this repudiation," two divorces would take place.<sup>6</sup>

(4) If he says, "Thou art repudiated a thousand times," three divorces will take place; but if he says, "thou art repudiated once and a thousand times," there would be only one divorce.<sup>7</sup>

(5) If he says, "Thou art repudiated and repudiated and repudiated if thou enterest the house," there are three divorces if and when she enters the house.<sup>8</sup>

(6) H says to W his wife, "Thou art divorced," or "I have divorced." There is one revocable repudiation, whatever his intention may have been.<sup>9</sup>

(7) H says to W his wife, "Thou art repudiated and repudiated and repudiated." She is divorced three times, if the marriage has been consummated, and once if not consummated.<sup>10</sup>

(8) H is married to W by a regular marriage, and to X by an irregular marriage. If he pronounces a divorce in terms which are applicable to either, W, the regularly married wife, will become divorced.<sup>11</sup>

<sup>1</sup> In which case, as appears in s. 136 (2), a single divorce is effected in the most approved mode (viz. after the expiration of the *iddat*).

<sup>2</sup> Ball. I. 213.

<sup>3</sup> Ball. I. 227. See s. 5c, above.

<sup>4</sup> I. e., as many as possible, since there

cannot be more than three.

<sup>5</sup> Ball. I. 227, 235.

<sup>6</sup> Ball. I. 212.

<sup>7</sup> Ball. I. 213.

<sup>8</sup> Ball. I. 215.

**SECTION 147.** (9) H repudiates his wife W when she goes to Mecca " and she goes there some time after. The divorce is, according to Hanafi law, effectual since then.<sup>1</sup>

(10) H says to his wife W, "Thou art repudiated yesterday." She is divorced immediately if she was his wife the day before the statement is made, but not otherwise.<sup>2</sup>

See the illustrations following s. 149, below

(in) Effect of  
comparison,

**148.** It is a general principle, according to Abu Hanifa, that wherever the terms of a pronouncement of 'talaq' liken it to anything, it is irrevocable, whether mention be made of the greatness of the thing referred to or not; while according to Abu Yusuf the 'talaq' is irrevocable if magnitude is mentioned, and it is revocable if magnitude is not mentioned.<sup>3</sup>

*Illustrations.*

(1) H says to his wife W, "Thou art divorced or repudiated like the magnitude of the point of a needle, or of a mountain." The divorce would be irrevocable according to both Abu Hanifa and Abu Yusuf.<sup>3</sup>

(2) H says to his wife W, "Thou art divorced like the point of a needle or a grain of mustard seed, or like a mountain." The divorce would be irrevocable according to Abu Hanifa, but revocable according to Abu Yusuf.<sup>3</sup>

(3) H says to his wife W, "Thou art divorced thus," pointing one, or two or three fingers separately. There are one, or two, or three divorces respectively.<sup>4</sup>

(iv) Effect of  
description,

**149.** The following rules have been laid down with regard to the description of divorces contained in the pronouncement: (1) a description that is not applicable to divorces, must be taken as a mistake or redundancy, causing a revocable divorce to take place; (2) where the description is not an aggravation of the divorce, it renders the pronouncement revocable; but (3) where the description is aggravating, the divorce is irrevocable and single, unless three divorces are intended, in which case three will take effect.<sup>5</sup>

<sup>1</sup> Bail. I. 217.

<sup>2</sup> Bail. I. 221.

<sup>3</sup> Bail. I. 221. See s. 56, above.

<sup>4</sup> Bail. I. 225 (par. 2).

<sup>5</sup> Bail. I. 225 (par. 3).

(1) H says to his wife W, "Thou art divorced--a divorce that does SECTION 149. not affect thee or does not take effect," or "the best," or "the most excellent," or "the most beautiful" or "most just of repudiations"; There is one revocable divorce.<sup>1</sup>

(2) H says to his wife W, "Thou art divorced or repudiated the strongest of repudiations." The divorce is irrevocable and single, unless three are intended, when three will take effect.<sup>2</sup>

(3) H says to his wife W, "Thou art repudiated irrevocably," or "certainly" or "the most infamous of repudiations," or "bad'ri" repudiation," or "the hardest repudiation." There is one irrevocable divorce unless three are intended.<sup>3</sup>

#### (8) *Revocation of Divorce*

**150.** A revocable divorce may, at any time during the "iddat," be expressly revoked by the husband (provided that he is of sound mind) or by any agent duly authorised by him in that behalf. The husband may ratify an unauthorised revocation.

A divorce is revocable until the pronouncement is repeated three times, (or according to Hanafi law, if it is pronounced in such terms that it is interpreted as a triple pronouncement), after which the wife must be married to a second husband, and thereafter the second marriage must be consummated and then dissolved, before she can be remarried to her first husband.<sup>4</sup>

**151.** According to the Hanafi and Shiah law the revocation of a divorce may be implied or conclusively presumed from the conduct of the husband even though he is of unsound mind.<sup>5</sup> According to the Shafi'i law it must always be made in express terms, or by resumption of conjugal intercourse.<sup>6</sup>

(1) H pronounces a single revocable divorce against his wife W, and then says, "I have retained thee," or "my wife," or has sexual

<sup>1</sup> Bail. I. 225, 226.

<sup>2</sup> Bail. I. 226.

<sup>3</sup> Bail. I. 225 (par. 3.), 226 (par. 1).

<sup>4</sup> See s. 41, above.

<sup>5</sup> Bail. I. 285-286, 287; Hed. 106-107. The *Du'ayam-ul-Islam* adds that the revocation need not be communicated to the wife; on the

other hand, it is recommended that there should be witnesses to the act. These matters would be relevant only in connection with the question of fact whether there was a revocation or not.

<sup>6</sup> Hed. 103.

SECTION 151. intercourse with her, or kisses her with desire, or looks on her nakedness with desire. The divorce is cancelled under Shiah and Hanafi law.<sup>1</sup>

(2) H pronounces a divorce against his wife W while absent from her, and then enters her apartment on his return. It is a conclusive presumption of Shiah and Hanafi law that the pronouncement is revoked.<sup>2</sup>

Wishes of wife  
as to revocation  
of divorce.

The revocation of a divorce, it will be seen, is as entirely a matter for the husband, as is its pronouncement. The ultimate basis of the law is to be found in the following verse of the Quran:—

Contingent  
revocation  
invalid.

“But when ye divorce women and they have fulfilled their prescribed term, either retain them with kindness or dismiss them with kindness; and retain them not with violence, so that ye transgress; for he who doth this surely injureth his own soul.”—Quran, II. 231.

The gist of the verse is clear enough: though the husband has the right to revoke the divorce, he is enjoined to consider the feelings of his wife, and not to “retain” her against her wishes. Sale explains the words “and retain them not with violence” in a note to the following effect—“I. e., by obliging them to purchase their liberty with part of their dowry.” This gloss is not easily grasped unless it is remembered that the wife has to be paid her ‘mahr’ even if it is deferred, on the marriage being dissolved.

No contingent  
revocation

152. A divorce cannot be revoked contingently.<sup>3</sup>

(9) *Incidents of ‘Talaq.’*

(a) *As to Conjugal Relations.*

Result of one  
‘talaq.’

153. (1) When one single ‘talaq’ against a wife has been pronounced by her husband, and during the wife’s ‘iddat’ the pronouncement has not been revoked,<sup>4</sup> the separation of the husband and wife becomes irrevocable, and they cannot lawfully have conjugal intercourse with each other without remarriage;<sup>5</sup> but they may remarry immediately.<sup>6</sup>

Dissolution of  
marriage

(2) The same results follow where (a) two divorces are pronounced simultaneously; or (b) a single divorce having

Result of two  
‘talaq.’

<sup>1</sup> Had. I. 96; II. 126-127.

<sup>2</sup> Ball. II. 121 (*ftlh*).

<sup>3</sup> Ball. I. 287; II. 127.

<sup>4</sup> This includes the case where the pronouncement is irrevocable (though single), so that the husband could not have revoked it, it

he had desired to do so.

<sup>5</sup> Ball. I. 205, 290, 292; II. 42. Cf. s. 13, above.

<sup>6</sup> For a re-marriage besides the consent of the parties, there would have to be witnesses and a fresh *mahr* would have to be paid.

already been pronounced in the first instance, (the pro-SECTION 153. nouncement having been either revoked, or allowed to become irrevocable, and in the latter case the parties having remarried) if thereafter a second single pronouncement is made, and allowed to remain unrevoked during the 'iddat.'<sup>1</sup>

(3) Where three pronouncements of divorce have been made against a wife<sup>2</sup> (a) the separation of the husband and wife becomes irrevocable; (b) they cannot lawfully have intercourse with each other unless they are remarried; and (c) they are under a prohibition against remarrying each other, which prohibition is not removed except in the circumstances mentioned in clauses (a), (b) and (c) of s. 119, above.<sup>1</sup>

The legal results of,—

- (a) a triple divorce,
- (b) a single irrevocable divorce, and,—
- (c) a single revocable divorce after the expiration of the period of 'iddat,'—

are the same in regard to the necessity of the parties remarrying before they can again become husband and wife. The results are different, however, in this regard, that where there have been three pronouncements, the parties cannot remarry except after satisfying the provisions of s. 41, above.

The following extract from a modern book<sup>3</sup> refers to an incident throwing light on the subject under discussion:—"In illustration of this subject," says the learned author, "I may mention a case in which an acquaintance of mine was concerned as a witness of the sentence of divorce. He was sitting in a coffee-shop with two other men, one of whom had just been irritated by something that his wife had said or done. After a short conversation on this affair, the angry husband sent for his wife, and as soon as she came, said to her, 'Thou art triply divorced;' then addressing his two companions, he added 'You, my brothers, are witnesses.' Shortly after, however, he repented of this

*Illustration of incidents of divorce from Lane's Egyptians.*

<sup>1</sup> Bail I. 205, 206, 292; II., 12; Cf s. 13, above.

<sup>2</sup> Three pronouncements of divorce may be made (i) either simultaneously, or (ii) in the first instance a single pronouncement may be made, and the pronouncement may be either (a) revoked, or (b) allowed to become absolute and the marriage dissolved, and thereafter the parties may have remarried. Then a second

pronouncement may similarly have been made and followed by revocation or remarriage. Or two of the pronouncements may have been simultaneously made and revoked or followed by re-marriage; and then a third pronouncement.

<sup>3</sup> "An account of the manners and customs of the modern Egyptians" by Edward William Lane, Ch. VI. 1890, p. 161.

SECTION 153. act, and wished to take back his divorced wife ; but she refused to return to him, and appealed to the 'Shara Allah' (or Law of God). The case was tried at the 'Mahkeme.' The woman, who was the plaintiff stated that the defendant was her husband ; that he had pronounced against her the sentence of a triple divorce ; that he now wished her to return to him, and live with him as his wife, contrary to the law, and consequently in a state of sin. The defendant denied that he had divorced her. 'Have you witnesses' said the judge to the plaintiff. She answered, 'I have here two witnesses.' These were the men who were present in the coffee-shop when the sentence of divorce was pronounced. They were desired to give their evidence, and they stated that the defendant divorced his wife by a triple sentence, in their presence. The defendant averred that she whom he had divorced in the coffee-shop was another wife of his. The plaintiff declared that he had no other wife, but the judge observed to her that it was impossible she could know that ; and asked the witnesses what was the name of the woman whom the defendant divorced in their presence. They answered that they were ignorant of her name. They were then asked if they could swear that the plaintiff was the woman who was divorced before them. Their reply was that they could not swear to a woman whom they had never seen unveiled. Under these circumstances the judge thought it advisable to dismiss the case, and the woman was obliged to return to her husband. She might have demanded that he should produce the woman whom he proposed to have divorced in the coffee-shop, but he could easily have found a woman to play the part he required, as it would not have been necessary for her to show a marriage certificate, marriages being almost always performed in Egypt without any written contract, and sometimes even without witnesses.

"It not infrequently happens that, when a man who has divorced his wife the third time he wishes to take her again (she herself consenting to their re-union, and there being no witnesses to the sentence of divorce, he does so without conforming with the offensive law before mentioned) " i.e., the requirement of s. 41, above.

(b) *As to Rights of Inheritance.*

Rights of inheritance in case of death during 'iddat.'

154. Subject to s. 154A, below, if the husband or wife dies after 'talaq' has been pronounced and while the latter is in her 'iddat,'<sup>1</sup>—

<sup>1</sup> And see s. 155, below.



(1) where the pronouncement was revocable, <sup>1</sup>—they are reciprocally entitled to inherit; <sup>2</sup> SECTION 154.

(2) where the pronouncement was irrevocable, or where three pronouncements, not referable to any act proceeding from the wife, have been made (a) the husband does not inherit from the wife if she dies during her 'iddat; <sup>3</sup> (b) the wife does not, according to Hanafi and Shiah law, inherit from the husband, unless the pronouncement or pronouncements is or are made while the husband is in death-illness, and the wife has not expressly or impliedly consented to an irrevocable or triple divorce as the case may be; <sup>4</sup> according to Shafi'i law the wife does not inherit in any case after an irrevocable divorce. <sup>5</sup>

<sup>1</sup>. When divorce revocable.

<sup>2</sup>. When divorce irrevocable.  
(a) Husband's rights.  
(b) Wife's rights.

See s. 157, below, and the illustrations following it

**154A.** Where the marriage has been dissolved by an act proceeding from the wife, done while she was in death-illness and followed by her death during the period of 'iddat, the husband is entitled to inherit.

<sup>1</sup>. Dissolution of marriage at wife's instance.

See the illustrations following s. 157. below.

**155.** In order to determine, for the purposes of ss. 154, and 154A, above, whether or not a divorce has been pronounced during death-illness, (1) where the divorce is pronounced by a person holding an irrevocable power to divorce, it will be considered to be pronounced at the time when the power was given; (2) where it is pronounced by a person holding a revocable power to divorce, it will be considered to be pronounced at the time when it was actually pronounced. <sup>6</sup>

<sup>1</sup>. Time of coming into operation when divorce pronounced in exercise of power.

**156.** (1) According to Hanafi law, where the husband dies during his wife's 'iddat, after making three revocable, Presumptions as to death-illness.

<sup>1</sup> Whether the divorce is pronounced in death-illness or "in health"; the expression "in health" meaning in this connection, that the person is not in death-illness. see explanation to s. 395B, below.

<sup>2</sup> Bail. I. 277, II. 122.

<sup>3</sup> Bail. I. 278.

<sup>4</sup> Bail. I. 278, 280; II. 122, 124.

<sup>5</sup> Bail. I. 278.

<sup>6</sup> Bail. I. 284.

SECTION 156 or one irrevocable pronouncement of divorce, such pronouncement not being referable to any act proceeding from the wife,<sup>1</sup> they or it will be presumed (if the wife so affirms) to have been made in death-illness unless the contrary is proved.<sup>2</sup>

(2) According to Shiah law the presumption is that the pronouncement was made in health.<sup>3</sup>

See the illustrations following s. 157, below.

(Shiah law.)  
Wife's right  
to inherit after  
divorce in  
death-illness  
of husband.

157. According to Shiah law, where a wife is divorced by the husband while he is in death-illness and he dies<sup>4</sup> within a year of the pronouncement of divorce,<sup>5</sup> she inherits from him, whether the divorce was revocable or irrevocable, provided that she remains unmarried.<sup>6</sup>

Illustrations.

(1) H pronounces a revocable divorce against his wife, W. An impediment, which, at the date of the divorce, would have prevented W from inheriting is removed during her 'iddat,' and then H dies, while the 'iddat' is still unexpired. W is entitled to inherit from H.<sup>7</sup>

(2) H is separated from his wife, W, for impotence after the lapse of the year given to him for consummation;<sup>8</sup> and W exercises her option in 'marz-ul-maut,' and then dies within the 'iddat.' H does not inherit from W, the cause of separation having arisen before W's death-illness.<sup>9</sup>

(3) If H is separated from his wife, W, for impotence, while he is in death-illness, and he dies before the 'iddat' of W expires, W does not inherit from H, as her act brought about the divorce.<sup>9</sup>

(4) H slanders his wife, W, while in health, and takes the 'l'fān,'<sup>10</sup> against her in death-illness. W inherits if H dies in her 'iddat.'<sup>10</sup>

(5) If, during the death-illness of the husband, the 'ila' <sup>11</sup> or vow of abstinence is made, and he dies of the illness after the expiration of the period of the vow while the wife is in her 'iddat,' she is entitled to inherit.

(6) H, in his death-illness, is asked by his wife, W, for a revocable

<sup>1</sup> See s. 154 (2).

<sup>2</sup> Bail. I. 282; see s. 5B, above.

<sup>3</sup> Bail. II. 123-4. See the footnote to the word irrevocable in s. 151, (f), above.

<sup>4</sup> Death-illness or *marz-ul-maut* implies that the person in question never recovered from the illness: see s. 395B, explanation, below. If he recovers from the illness during which divorce was pronounced, she does not inherit unless it is a revocable divorce and he dies while she is in her 'iddat. See s. 154 (1), above.

<sup>5</sup> The *Da'awam-ul-Idān*, (a Shiah Tammil

text) omits the provision about death within a year. The presence or absence of the provision is submitted, not very important; it would seldom happen that a person should really be in death-illness and thereafter continue to live for a year.

<sup>6</sup> Bail. II. 122.

<sup>7</sup> Bail. I. 277.

<sup>8</sup> See s. 201, below.

<sup>9</sup> Bail. I. 281.

<sup>10</sup> See ss. 193, 194, below.

<sup>11</sup> See s. 158, below.

divorcee, and he divorces her irrevocably or three times : *W* is entitled SECTION 157. to inherit, if *H* dies during *W*'s ‘iddat.’<sup>1</sup>

(7) *H*, being in health, says to his wife, *W* : “ When the beginning of the month comes, thou art divorced,” and at the beginning of the month, *H* is in death-illness, and then he dies; *W*, according to Hanafi law, is not entitled to inherit.

(8) *H*, while in death-illness, pronounces a divorce conditionally on his wife, *W*, doing some act which it is in her power to do and doing as entering a house, and she does so, and thus, under Hanafi law effectuates a divorce; *W* is not under Hanafi law entitled to inherit.<sup>2</sup>

(9) *H*, having four wives, divorces them all during ‘*marz-ul-maut*,’ marries four others, and consummates the marriage with them, and then dies during the period of their ‘iddat.’ All eight are entitled to inherit.<sup>3</sup>

See also the illustrations to s. 641, below.

The author of the ‘*Da’ayam-ul-Islam*’ lays it down as being incumbent on the husband to give a ‘*mit’at*,’ or present to the wife on divorce. The value of the present must correspond to the means of the husband. This duty is based upon the Quran which requires the husband, if he “ dismiss ” his wife, to do so with kindness. The verse of the Quran is cited in the comment to s. 151, above.

### § 2.—Dissolution of Marriage by ‘*Ila*.’

158. (1) Where a husband, who has attained puberty, and is of sound mind,<sup>4</sup> swears by God that he will not have sexual intercourse with his wife for a period of four months or more, or for an unspecified period (or according to Hanafi, but not Shiah, law, where he vows that he will undergo a penalty should he have such intercourse) he is said to make ‘*ila*.’<sup>5</sup>

(2) In Shiah Ithna ‘Ashari law, ‘*ila*’ takes effect only where the marriage has been consummated.<sup>6</sup>

(3) In Shiah Isma’ili law ‘*ila*’ can be made only when the wife is not in her menses, and when the husband has not had intercourse with her since her last menstruation.<sup>7</sup>

<sup>1</sup> Bail. I. 280.

<sup>2</sup> Bail. I. 283.

<sup>3</sup> Bail. II. 124.

<sup>4</sup> Married permanently, and not by *mut’a* : Bail. II. 148.

<sup>5</sup> Bail. I. 294, *et seqq.* ; Hod. 109 ; Bail. II.

147-148. *Ila* is the Arabic for “swearing.” The husband who has made *ila* is called *muti*, and the wife with reference to whom it is made is called *mutia*.

<sup>6</sup> Bail. II. 148.

<sup>7</sup> *Da’ayam-ul-Islam* (Notes).

‘*Ila*’ a vow not to have conjugal intercourse.

## SECTION 158

*Illustrations*

(1) H says to W, his wife: (a) "I swear by God that I shall not approach thee;" or (b) "If I approach thee, pilgrimage or alms or fasting is incumbent on me."<sup>1</sup> The first is a valid 'ila' according to all schools, and the second according to Hanafi law.

(2) H says to his wife, W: "When I approach thee, prayer, or to follow a bier, is incumbent on me". there is no 'ila' as these duties are incumbent on all: nor if he says: "If I approach thee thou art divorced."<sup>2</sup>

Effect where  
'ila' is acted  
upon.

(Hanafi law.)  
Divorce

(Shafi'i and  
Shiah law.)  
Intervention  
of Court.

**159.** Where a husband, who has made 'ila,' abstains from intercourse with his wife for four months during the period therein comprised,—(1) according to Hanafi law the marriage is dissolved with the same legal results, as if there had been one irrevocable pronouncement of 'talaq' made by the husband;<sup>3</sup> (2) according to the Shafi'i and Shiah schools of law, the wife is entitled to apply to the Court for restitution of conjugal rights, and on her doing so, the husband has the option of either divorcing her, or resuming sexual intercourse, [and, *semble*, on his refusing to do either, the Court itself may dissolve the marriage.]<sup>4</sup>

How 'ila'  
may be  
cancelled

**160.** According to Hanafi law, 'ila' may be cancelled by the husband resuming intercourse with his wife within the period to which it refers, provided that he has not continued abstinent for four months during the said period; or by a verbal retraction thereof, provided that, at the time of such retraction, and during the whole of the unexpired period to which the 'ila' refers, sexual intercourse between the husband and wife is, and has been, impossible.<sup>5</sup>

Presumption  
as to avoidance  
of 'ila.'

**161.** Where, within the period of 'ila,' the husband asserts that he has avoided the oath or vow, it will be presumed<sup>6</sup> to be avoided, but after the said period, there is no such presumption unless the wife assents to it.<sup>6</sup>

<sup>1</sup> Bail I, 249; II 147-8, IIed. 109

<sup>2</sup> Bail I, 294; IIed. 109.

<sup>3</sup> Bail, II, 149 (*second*); IIed. 109. But

cf. "The judge has no power to compel him to do either (i.e., restitution or divorce) in

preference to the other;" Bail, II, 149, (par. I, II, 16, 17).

<sup>4</sup> Bail, I, 300, 301, IIed. 112.

<sup>5</sup> See s. 5c, above.

<sup>6</sup> Bail I 301.

§ 3.—‘*Khul’* and ‘*Mubaraat*.’

(1) *Definition and Form.*

162. (1) Marriage may be dissolved by an agreement <sup>1</sup> SECTION 162 between the parties, for a consideration paid, or to be paid, <sup>Dissolution of marriage by agreement.</sup> by the wife to the husband.

(2) Where the wife alone is desirous of having the <sup>Khul’ and ‘mubaraat’ distinguished.</sup> marriage dissolved, such an agreement is called a ‘*khul’*’;<sup>2</sup> where both parties are so desirous it is called a ‘*mubaraat*.’<sup>3</sup>

In the ‘*Da’ayam-ul-Islam*’ it is said that in a ‘*khul’*’ the consideration paid is the ‘*mahr*’ and something more; in ‘*mubaraat*’ it is less than the ‘*mahr*.’

163. In accordance with Hanafi law, ‘a ‘*khul’*’ or <sup>Form of ‘khul’ or ‘mubaraat’ in Sunni law</sup> ‘*mubaraat*’ is effected when the husband makes a proposal, for a consideration, to pronounce a ‘*talaq*,’ or otherwise to dissolve the marriage and the wife at the same meeting accepts the proposal;<sup>4</sup> the proposal and acceptance need not be in any special form of words,<sup>5</sup> the contract itself dissolves the marriage without a ‘*talaq*’ being pronounced.<sup>6</sup>

164. In accordance with Shiah law, ‘(1) an agreement <sup>(Shiah law.)</sup> by way of ‘*khul’*’ must be made in the presence of two <sup>Form of ‘khul’ witnesses.</sup> witnesses, and, where the marriage has been consummated, it must be made at a time when the wife is in a ‘*tuhr*.’<sup>7</sup>

<sup>1</sup> Should the question arise whether or not the wife has consented to the divorce, reference might be made to *Mauw Pa v. Ma Lon Ngale* (1911) 13 Bom. L. R. 464, 469 (P. C.), according to the Burmese Buddhist law the rights of the parties differ where a divorce is given with the consent of the wife, and where without it, and the Privy Council held that where the wife allows a decree for divorce to be passed against herself, it does not amount to consent to the divorce.

<sup>2</sup> This word is written “*khool*,” by Baillie in his Digest. Baillie represents the Arabic letter ‘*عين*’ by vowels marked with the circumflex. This mode of transliteration is misleading. The word *khul’* is, in Arabic, a monosyllable, the final letter being not a vowel, but the guttural consonant ‘*عين*’ which is usually represented in this work by an inverted apostrophe [ ‘ ]. See the footnote to the word

*sumat* in the comment to s. 96, above.

<sup>3</sup> Bail I, 303, ll 1, 2. The word is pronounced *mu-bar-ra-at*, the final two *a*’s are sounded separately, being each short, like the sound of *a* in *roman*.

<sup>4</sup> For Shiah law, see s. 164, below.

<sup>5</sup> Bail. I., 301, 311. As to the same meeting, see Bail. I., ll, 237, Med. 38, 87.

<sup>6</sup> Bail I., 301.

<sup>7</sup> In *Baiz-ul-Fatwa v. Lutefutoon-issa* (1861) 8 Moo. I A., 379, there was a “*khul-mah*,” but the husband pronounced a divorce, and the Privy Council held that the divorce was independent of the *khul*. The whole transaction was, however, vitiated by cruelty and ill-usage against the wife.

<sup>8</sup> For Sunni law see s. 163, above.

<sup>9</sup> I. e., a time when the menstrual courses are not on her.

SECTION 164. unless the husband is absent<sup>1</sup> from her,<sup>2</sup> (2) where the proposal for 'khul' is not made in an Arabic sentence containing that word, or its inflection, it must be followed by a 'talaq,' pronounced in due form by the husband;<sup>2</sup> (3) an agreement by way of 'mubara'at' requires the use of no special formula or words, but it must be followed by a 'talaq' in due form.<sup>3</sup>

Arabic  
formula.

Form of  
'mubara'at'.

(2) *Legal Effect of 'Khul' and 'Mubara'at'*

Legal effect  
of 'khul' and  
'mubara'at'.

165. (1) According to Hanafi and Shiah Isma'ili law, the dissolution of marriage on a 'khul' or 'mubara'at' has the same effect as a single irrevocable divorce.<sup>4</sup>

(2) According to Shafi'i law a 'khul' or 'mubara'at' is not considered as a divorce for reckoning the three divorces referred to in s. 41, above.<sup>5</sup>

(3) The Shiah 'Ithna 'Ashari' authorities are divided on the point<sup>6</sup> referred to in sub-section (2), but they are agreed that the wife may re-claim the consideration paid to her for a 'khul' at any time during her 'iddat,' and if she does so, the husband may revoke the 'khul' at his option.<sup>7</sup>

Right of  
wife during  
'iddat' to  
maintenance.

166. A 'khul' or 'mubara'at' does not, in the absence of express agreement, affect the wife's right to claim from the husband, during the period of her 'iddat,' maintenance for herself and for children borne by her to him, and wages for suckling such children, if she is required by him to do so.<sup>8</sup>

In the 'Da'ayam-ul-Islam,' a Shiah Isma'ili authority, it is stated that the wife has no right to maintenance during 'iddat.'

<sup>1</sup> Cf. the Shiah rule about the *askan* mode of divorce: comment to s. 136, above.

<sup>2</sup> Bail. II, 133-134. The *Da'ayam-ul-Islam* contains no reference to the Arabic language.

<sup>3</sup> Bail. II, 129-137. It will be seen, therefore, that in the Shiah law, *mubara'at* does not operate as a dissolution of marriage.

<sup>4</sup> Bail. I, 303; *Da'ayam-ul-Islam* (Notes). The result of sub-section (1) is that the parties cannot resume their marital state, unless there is a fresh marriage. Though the Shiah authorities are divided on the point whether or not a

*khul* is a divorce, they agree that it is irrevocable: Bail. II, 135; and, if the husband dies during the wife's 'iddat, she does not inherit unless the *khul* was agreed upon during *mar'at-naut*, Bail. II, 123.

<sup>5</sup> *Shark-i-Vijaya*, book on *Nikah*, chapter on 'khul', see s. II, above.

<sup>6</sup> Bail. II, 129.

<sup>7</sup> Bail. II, 135.

<sup>8</sup> Bail. I, 303-306: cf. ss. 294, 300, 316 (2) 317, below.

167. (1) The Hanafi authorities differ as to whether or not, in the absence of express agreement, the rights relating to dower are extinguished by a ‘khul’ or ‘mubaraat.’<sup>1</sup>

Effects of  
‘khul,’ and  
‘mubaraat,’ on  
dower.

(2) Abu Hanifa holds that such rights are extinguished by both ‘khul’ and ‘mubaraat’; and his opinion is adopted by the ‘Fatawa ‘Alamgiri,’<sup>1</sup> ‘Hidaya,’ ‘Dur-ul-Mukhtar,’ and ‘Sharh-i-Viqaya.’<sup>1</sup>

(3) Abu Yusuf holds that they are extinguished by ‘mubaraat’ alone,<sup>2</sup> and not by ‘khul.’<sup>1</sup>

(4) Imam Muhammad holds that they are extinguished by neither.<sup>1</sup>

It might appear at first sight that (contrary to Abu Yusuf’s view) the dower rights would be extinguished rather by a ‘khul’ (i.e. when the wife alone is desirous of separating) than by a ‘mubaraat’ (i.e. when both parties desire it: see s. 162, above).

Abu Yusuf’s view is, perhaps, based on the ground that where both parties agree to dissolve the marriage (i.e. in a ‘mubaraat’) they should be placed as nearly as possible in the position in which they would have been had they never married. On the other hand, as the husband can always dissolve marriage by ‘talaq,’ it is a necessary precaution that he should not be tempted to drive the wife into a request to divorce her so that he may gain pecuniarily.<sup>3</sup> At the same time, when the wife is trying to bargain for a release from an unwilling husband by a ‘khul,’ Abu Yusuf may have thought that it should be presumed that the husband will expressly provide for all the terms that he desires in his favour.

Reason for the  
distinction.

The first instance of ‘khul’ recorded in Islam is said to be that of the wife of Thabit ibn Qais, who asked the Prophet to get her husband to divorce her, on her giving him her garden. Thabit was very ugly, and his wife is reported to have said: “If I had had no fear of God, I should have struck him on the face whenever he approached me.”<sup>4</sup>

First recorded  
instance of  
‘khul.’

The effect of an agreement by way of a ‘khul’ in which express provisions with regard to the rights relating to ‘mahr’ have not been made, is not quite clear.

Effect of  
‘khul’  
on dower

There are two extracts quoted in the ‘Fatawa ‘Alamgiri’ which both bear on this point, but which appear to be incapable of reconciliation. The first<sup>5</sup> is taken from the ‘Muhit,’ and is an illustration of the rule in

Two contra-  
dictory ex-  
tracts cited  
in the ‘Fatawa  
‘Alamgiri’

<sup>1</sup> Ball, I, 304—306.

<sup>2</sup> See comment.

<sup>3</sup> Cf. Ball, I, 304, (par. 2.)

<sup>4</sup> *Sharh-i-Viqaya*, Vol. II Book of *Nikah*, ch. on ‘*Khul*’ (not cond.).

<sup>5</sup> Ball, I, 306 (par. 1.).

**SECTION 167.** accordance with the opinion of Abu Hanifa, *viz.*, that after a 'khul,' in the absence of express agreement, the wife cannot ask for her unpaid dower, nor, where dower has already been paid, can the husband demand re-payment of any part thereof, even though the marriage has been dissolved without being consummated. The second extract<sup>1</sup> is taken from the 'Wajiz-i-Kurduri' of which the effect is as follows: H marries W for a 'mahr' of Rs. 3,000 which is unpaid, and there is a 'khul' before consummation, in consideration of W (the wife) paying Rs. 1,000 (nothing being said in the agreement of 'khul' about the 'mahr'). In that event it is said that the Rs. 1,000 which are payable by W as consideration for the 'khul' are to be set off against the Rs. 1,500 due from H to W for her mahr,<sup>2</sup> and W is entitled to Rs. 500 from the husband—in other words, the dower rights are not extinguished by the 'khul.' This second illustration is in accordance with the opinion of Imam Muhammad,<sup>3</sup> (whose opinion, no doubt, the 'Kurduri' has adopted).

Second  
extract  
inserted  
probably  
through  
 inadvertence.

Except, however, for the quotation contained in the illustration which is above referred to as the second extract,<sup>1</sup> the 'Fatawa 'Alamgiri' has adopted the view of Abu Hanifa, and it would seem that the said second illustration has crept in by inadvertence,<sup>1</sup> a fact that is not inexplicable when it is remembered that that work is a digest of innumerable extracts from almost all the books of authority, ingeniously pieced together like mosaic.

<sup>1</sup> 'Khul' or 'mubara'at' does not effect,—  
(a) ordinary debts of husband and wife to each other,  
(b) nor any rights other than those depending on marriage.

Sir Roland Wilson seems to have committed an oversight in connection with this point. Under s. 31 of his valuable Digest he states that the 'Fatawa 'Alamgiri' "as rendered by Baillie is self-contradictory," not referring to the passages mentioned above, but to the following three sentences which occur in one paragraph *viz.*—(1) "'koolâ' and 'moobarat' cause every right to fall or cease, which either party has against the other, depending on marriage." (2) "When a 'khoolâ' is made by means of the word 'khoolâ' it does not occasion the release of any other debts than dower, and (3) "In like manner with regard to the word 'moobarat,' though there is a difference of opinion, the correct view is that it does not occasion the release of other debts than dower." These three sentences, it is submitted, are not contradictory to each other, but they supplement each other. Thus the first lays down that



“all rights depending on marriage” fall or cease in other words that SECTION 167. there is a dissolution of marriage. This does not mean that the rights of the wife to be paid her debts also cease; for a right to be paid her debts surely does not depend on her marriage. However, the question may sometimes arise whether in addition to what the wife has agreed to pay as consideration for the ‘khul,’ she is to be presumed to have also released her rights to be paid such of her debts as her husband owes her. the second and third sentences cited above, answer this question in the negative. Finally, the point may still have to be considered, whether ‘mahr’ is to be taken as a “right depending on marriage” (in which case it would “drop” under the first sentence) or a debt independently due, in which case it would under the second sentence be placed on the same footing as other debts, (and remain unaffected by the ‘khul.’) <sup>(a) a right arising from marriage, or (b) a debt</sup> ‘Mahr’ is, no doubt, a debt which often becomes payable, at least as to part thereof, only after a dissolution of the marriage, either by death or divorce, but on the other hand, in its origin it does depend on marriage. This ambiguity about the nature of the dower-debt is reflected in the fact that a dower-debt is placed in a category by itself, and is not considered on the same basis as other debts (see the second sentence cited above), and that there are some authorities who think that ‘mahr’ should be considered as a “right depending on marriage,” and not a debt is shown by the third sentence cited above. The majority hold, however, that ‘mahr’ in this respect also is to be considered as a debt like other debts. There can, nevertheless, be no doubt on the point that debts other than of ‘mahr’ are unaffected by ‘khul’ or ‘mubarat,’ just as such other debts are unaffected by other modes of dissolving marriage (as, for instance, by the death of the husband or wife). It is true that ‘mahr’ is in certain circumstances, extinguished as to half of it, when the marriage is dissolved, yet it is never suggested that a ‘talaq’ can affect in any manner any other debt due from the husband to the wife, e. g., for money lent to him by her.

### (3) Revocation of ‘Khul.’

168. Where the husband has made a proposal for a ‘khul’<sup>1</sup> he cannot retract it, even though he may have purported to reserve an option to himself to do so; but it is taken to be rejected unless it is accepted by the wife during the meeting at which she becomes aware of it.<sup>2</sup>

<sup>1</sup> Cf. s. 162, (2), above.

<sup>2</sup> Bail 1, 314.

## SECTION 169.

option  
reserved  
by the wife.

**169.** The wife may reserve an option to herself to withdraw within a specified period of time from a proposal of 'khul' made by herself.

Revocation of  
proposal by  
wife.

**170.** Where the wife has made a proposal for a 'khul' she may retract it at any time before it has been accepted by the husband, and it is cancelled by her rising from the meeting.<sup>1</sup>

Conditional  
or contingent  
'khul'

**171.** The husband may propose a 'khul' conditional or contingent on the happening of a future event, but the wife cannot make a proposal for such a 'khul'.<sup>2</sup>

No option to  
husband to,  
revoke 'khul'.

**172.** A 'khul' may not be agreed upon with an option to the husband to revoke it; and where the parties purport to agree to a 'khul' on such terms, according to Hanafi law, the 'khul' is absolute, and the option is void;<sup>3</sup> and according to Shiah law both the 'khul' and option are void.

Option to wife  
to revoke  
'khul'.

**173.** A 'khul' may be agreed upon with an option to the wife to revoke it.<sup>4</sup> According to Shiah law the wife has, during her 'iddat' (occasioned by, and following, a dissolution of marriage under a 'khul,') the right to demand repayment of the consideration which she has paid for the 'khul,' and if she does so, the husband has the option to revoke the 'khul'.<sup>5</sup>

(4) *Consideration of 'Khul'.*

Subject of  
consideration

**174.** Anything<sup>1</sup> that may be the subject of dower, may be the consideration of a 'khul'.<sup>2</sup>

Increase of  
consideration

**175.** The consideration for a 'khul' cannot be increased<sup>3</sup> after it has been once agreed upon.<sup>6</sup>

<sup>1</sup> Bail II, 29.

<sup>2</sup> Bail I, 314.

<sup>3</sup> Bail II, 135, 137.

<sup>4</sup> In Shiah law there is no such recommendation to limit the consideration for a

*khul*, as there is to limit '*mahr*' to a sum less than 500 *dirhams*: Bail, II 130; cf s. 96, above.

<sup>5</sup> Bail I 310; II 130.

<sup>6</sup> Bail, I, 307, cl. 4, 99, above.

176. Where the parties separate under a 'khul' on SECTION 176. a consideration to be determined thereafter, such consideration cannot, unless the wife agrees, be fixed at a sum exceeding the 'mahr' actually paid to the wife, nor, unless the husband agrees, at a sum less than such 'mahr'.<sup>1</sup>

Dower is standard of the consideration for 'khul'.

177. Where the parties have agreed to separate under a 'khul', without determining the consideration thereof, the wife is bound to restore the 'mahr,' or such part thereof as she has received from her husband.<sup>2</sup>

Restoration by wife of 'mahr' already received.

178. Where the 'khul' is in consideration of the whole of the wife's 'mahr,' or of specified property in value equal to the value of the 'mahr,' her right to demand payment of the 'mahr' from the husband is extinguished, and she must return it, if she has actually received it.<sup>3</sup>

Where consideration for the 'khul' is the whole of the dower, dower becomes extinguished or has to be returned.

179. Where the 'khul' is in consideration of a fraction of the 'mahr,' (1) if the wife has not been paid her 'mahr,' her right to demand payment of it is entirely extinguished, and, the husband has no claim against her for payment of the fraction of the 'mahr' so agreed to be paid by the wife as consideration for the 'khul'; (2) if the wife has been paid her 'mahr,' she must pay to the husband the fraction agreed upon (a) of the whole of the 'mahr' if the marriage has been consummated, or (b) of half of the 'mahr' if the marriage has not been consummated.

Where consideration for 'khul' is a fraction of the dower.

180. Where the wife makes a proposal to the husband for a 'khul' for a specified consideration, and the husband subsequently pronounces a divorce against her, which agrees with the wife's proposal in its being either single or triple as she proposed, the husband (if he so asserts) will, in Hanafi law, be presumed to have accepted her proposal for

Presumption as to divorce following a proposal for 'khul'.

<sup>1</sup> Bail. I. 311. As, in marriage, the "proper dower" is a standard for fixing the amount, due as *mahr*, (see s. 116, above,) so here it is the *mahr* agreed to in the contract of marriage

that is the standard.

<sup>2</sup> Bail. I. 311. (par. 1), cf. s. 176, above.

<sup>3</sup> Bail. I. 306-307

**SECTION 180.** a 'khul' and will be entitled to the consideration specified by the wife.<sup>1</sup> The Shiah authorities are divided on the point whether under the circumstances above referred to, the presumption is in favour of a 'khul' or of a 'talaq' without consideration.<sup>2</sup>

(5) *Exigibility of Consideration for 'Khul'.*

Consideration  
of a 'khul'  
promptly  
payable.

**181.** In the absence of an express agreement specifying a time for payment of the consideration for a 'khul' it will be payable immediately<sup>3</sup> but the dissolution of marriage is not contingent on the payment of the consideration.<sup>4</sup>

(6) *Persons Authorised to Enter into a 'Khul'.*

Competence.

**182.** A minor or insane person cannot validly effect a 'khul'.<sup>5</sup>

'Khul' under  
compulsion.

**183.** According to Hanafi law (but not according to Shafi'i or Shiah law) a 'khul' under compulsion or by a person in a state of voluntary intoxication is valid:<sup>6</sup> *sed quare*.

'Khul'  
through  
agents.

**184.** A 'khul' may be effected through agents on behalf of either party. It is doubtful whether for the purposes of a 'khul' one person may act as agent for both parties.<sup>7</sup>

'Khul' by guardian  
1. of minor  
wife.

**185.** The guardian of a minor wife may, according to Hanafi law, validly effect a 'khul' on her behalf, the consideration being payable by the guardian and not by the wife. Where the 'khul' provides that the consideration is payable by the wife, it is of no effect unless it is sanctioned by her,<sup>8</sup> *semble*, on her attaining puberty.<sup>9</sup> The

<sup>1</sup> Bail. I. 312-313s but see s. 5B, above.

<sup>2</sup> Bail. II. 130.

<sup>3</sup> Bail. I. 314.

<sup>4</sup> *Buz-ul-Rahem v. Zulfatunnissa* (1861)  
8 Moo. 11 A. 579; I. W. R. (P. C.) 57; 1 Ind  
Jur. (o. s.) 1; Sevestro's Reports of Indian  
Cases affirmed on Appeal to the P. C., VII, 261;

*cf.* s. 117, above.

<sup>5</sup> Bail. I. 319, II. 153.

<sup>6</sup> Bail. I. 318, 319.

<sup>7</sup> Bail. I. 319.

<sup>8</sup> Or majority see s. 5B, above.

<sup>9</sup> Bail. II. 123 (par. 2), 129 (par. 2).

Shiah authorities are divided on the point whether a SECTION 185. guardian can agree to a ‘khul’ on behalf of a minor wife.<sup>1</sup>

186. The guardian of a minor husband cannot validly 2 of minor husband effect a ‘khul’ on his behalf.

### § 4.- ‘Zihar.’

187. In Hanafi law ‘zihar’ is a declaration by the ‘zihar’ in Shari’ law. husband (he being adult and of sound mind<sup>2</sup>) that his wife<sup>3</sup> (or any undivided part of her person, or any member which implies the whole person) is to him like the back (or any other part which it is unlawful for him to see) of his mother (or of a ny other person whom he is prohibited from marrying).<sup>4</sup>

(2) In Shiah law ‘zihar’ is a declaration, made in the In Shiah law. presence of two just witnesses, by the husband<sup>5</sup> (he being adult and of sound mind), that his wife<sup>6</sup> is to him like the back<sup>7</sup> of his mother, (or of any other woman whom he is prohibited from marrying otherwise than by affinity or unlawful conjunction). Where the husband is not absent from his wife, and she is subject to menstruation, ‘zihar’ is, in Shiah law, effectual only if made when the wife is in a ‘tuhr’ during which there has been no connubial intercourse.<sup>8</sup>

The ‘Da’ayam-ul-Islam’ lays down with regard to the Shiah *‘ama’ili* law two further restrictions on ‘zihar:’ (1) the marriage must have been consummated; (2) there must be the intention to produce the effects mentioned in s. 189, below. So that, if the husband says to his wife that she is like his mother or sister, meaning thereby that she is as dear or kind to him, or as much respected by him, there is no ‘zihar.’

<sup>1</sup> Ball. I. 319.

<sup>2</sup> Ball. I. 321, 324 (par. 2). “The husband must be capable of making expiation, hence the *zihar* of a *zimmī*, a boy or an insane person, is not valid.”

<sup>3</sup> Even though she has been revocably divorced, provided that her ‘*iddat*’ has not expired: Ball I. 325.

<sup>4</sup> Ball. I. 321-322. See comment following s. 192.

<sup>5</sup> In accordance with the majority of Shiah authorities, he may be a *muḥṣan* husband: Ball.

II. 140. The point was considered doubtful and left undecided in *Luddun Sahiba v. Kumar Kudar* (1882) 8 Cal. 736; 11 Cal. L. R. 237.

<sup>6</sup> Not merely a part of her.

<sup>7</sup> No other part,—“except by a weak tradition.”

<sup>8</sup> Ball. II. 139-140. Where the marriage has not been consummated there is some doubt as to whether *zihar* may validly be made in accordance with Shiah law. But “inter opinions favour the view” that it is valid. Ball. II. 140.

## SECTION 188.

Restriction  
in point of  
time, place,  
condition  
or option.

188. 'Zihar' may be made subject to an option to revoke it, or restricting its legal effects to a specified period of time, or contingently on a condition being fulfilled; but in the absence of specific provision it is irrevocable, perpetual, and absolute.<sup>1</sup>

Legal effects  
of 'zihar.'

189. It is unlawful for a husband who has made 'zihar' to have sexual intercourse with his wife<sup>2</sup> (and under Hanafi law, it is so notwithstanding that the 'zihar' was made in jest, or under compulsion or mistake); and the wife may prevent<sup>3</sup> his having sexual intercourse with her, unless and until he makes an expiation, which may be done by freeing a slave,<sup>4</sup> or fasting for two months, or feeding sixty poor persons.<sup>5</sup>

Necessity  
for expiation.

Expiation becomes necessary after 'zihar,' and sexual intercourse is unlawful between the husband and wife till expiation is made; even though, after 'zihar,' he should divorce his wife irrevocably, and then re-marry her.<sup>6</sup>

Legal effect  
of 'zihar.'

190. The fact that 'zihar' has been made does not, of itself, dissolve the marriage, or disentitle the wife to claim restitution of conjugal rights, even though expiation has not been made.<sup>7</sup>

Suit by wife for  
restitution of  
conjugal rights  
after 'zihar.'

191. On a wife bringing a suit for restitution of conjugal rights against a husband who has made 'zihar,' and has not made expiation, he may be ordered to make the expiation: but he cannot be forced to divorce her.<sup>7</sup>

Presumption.

192. The husband's assertion that he has made the expiation will be presumed to be true.<sup>8</sup>

Instance of  
'zihar.'

The following is an instance of 'zihar': "Suleman said 'you are to

<sup>1</sup> Ball. I. 322, 324, 326, 325; II. 111.

<sup>2</sup> *Do'ayan-ni-Ist'ra* (Dicks).

<sup>3</sup> Cf. *Pearce Ali v. (Musummat) Ali Bibi* (1870), 11 P. R. 233, (No. 124, CIV. JUDICATURES) where the court refused to order restitution of conjugal rights as the husband had been guilty of apostasy. See ss. 50, 192, above.

<sup>4</sup> This provision has been allowed to remain

in the text, to explain its scope; moreover the parties may, when the events take place, be in a country where slavery exists; or the husband may get a slave outside India freed.

<sup>5</sup> Ball. I. 322-323; II. 139, 142.

<sup>6</sup> Ball. I. 325.

<sup>7</sup> Ball. I. 323; II. 142.

<sup>8</sup> Ball. I. 323 (par. 3). But see s. 5A, above.

me as the back of my own mother until after Ramadhan.' Then SECTION 192. Suleman slept with his wife when half of the month of Ramadhan had passed, and the Prophet enjoined him to make expiation."<sup>1</sup>

'Zihar' is a pre-Islamic institution, and, though, at its start, the formula does not seem to have been used except out of regard for the wife, and as a sign of the husband's respect for a woman whom he compared to his mother,<sup>2</sup> it had, it seems clear, degenerated by the time of the Prophet into an engine of oppression in the hands of the husband<sup>3</sup> It was not a divorce, and not necessarily followed by one, and its evil was, that while the husband had an excuse for refusing to give his protection to his wife<sup>4</sup> and for disclaiming the obligations of a husband, she, on her part, was still kept in bondage to him. The Quran removed the hardship of such a 'leonina societas,' or rather 'leonina dissolutio societatis,' and gave to the wife the option of having it determined for once, whether or not the husband wishes to dissolve the marriage.

Where the husband has used the formula with the intention of making it serve the purpose of the pronouncement of a 'talaq,' he is entitled to do so: he may (under Hanafi law) pronounce a divorce in terms as highly metaphorical as he chooses, and as the Prophet is reported to have said that "such a form of speaking was, by general consent, understood to imply a perpetual separation," these terms might have been interpreted into a pronouncement of 'talaq' in the form of a well understood figure of speech. Still the words had an evil association, and Islam entitles the wife to demand, that if the husband desires to divorce her, he should do so in more approved terms—in terms which leave no doubt as to their effect.

But the case is different where the husband makes 'zihar' without any intention of releasing the wife,—apparently, as a mere pretext for not fulfilling his obligations, and with a desire to keep her in cruel suspense.<sup>4</sup> In such cases his conduct could not be allowed to pass without some mark of disapprobation, by the religion which took women under its special protection.

Hence, where the husband makes 'zihar' with the intention of dissolving the marriage, he is asked by the law of Islam to do so in other and clearer terms: where he makes it without such intention, he is required to make an expiation for trying to over-reach his wife.

<sup>1</sup> *Mishcat-ul-Mashabih*, Book XIII, ch. xlii. part 2, Matthews, I, 122.

<sup>2</sup> Cf. Smith's "Kinship and Marriage in Ancient Arabia," 189n.; and the commentaries on Quran, XXXIII, 4.

<sup>3</sup> Quran, XXXIII, 4.

<sup>4</sup> So Shylock says, "I have an oath in heaven; shall I lay perjury upon my soul?—No, not for Venice."—*Merch. of Ven.*, IV., I, 228-230. One might exclaim: "Oh what authority and show of truth can cunning sin cover itself withal."—*Much Ado*, IV., I, 32, 33.

## SECTION 193.

'Zihar' not  
important  
in India.

Procedure in suit  
for restitution of  
conjugal rights  
after 'zihar.'

'Zihar' has hardly any importance so far as the law courts in India are concerned. The words do not come naturally to Indian Muslims, as they did to the Arabs, and a person wishing deliberately to give his wife a cause of action for restitution of conjugal rights in India, would probably adopt an easier, more usual, and better understood mode of doing so; still, it is difficult to anticipate, by reasoning, the course that such a person may adopt.

Should a person of sufficient acquaintance with the expressions and institutions of a distant country be desirous of trying the experiment, it is still possible that the wife may prefer not to sue for restitution of conjugal rights; but, if she does so, before the suit could come on for hearing, the husband would have plenty of time to make up his mind whether he should not settle the suit with the wife, or end it by divorcing her. If he does neither, the court would be bound by law to offer to the husband the option of divorcing or expiating, and, it is submitted, if necessary, to take evidence of the fact whether or not expiation has been made. As expiation has to be made by overt acts, there would probably be no more difficulty in deciding whether or not it had been made, than in deciding many of the questions that ordinarily come before the courts. In deciding whether a slave has been emancipated or sixty poor persons have been fed, no religious questions are involved. It is conceivable that a question might on some occasion arise whether a fast is proper. A fast is no doubt a religious institution, but the courts have to consider religious rites, and to decide upon them where civil rights are involved.<sup>1</sup> These remarks have seemed necessary as doubts have been expressed as to whether it would be possible for an Anglo-Indian Civil Court to give effect to the rules relating to 'zihar'; and the doubts are said to "arise from the nature of the prescribed expiation." "By what evidence," asks the learned author, "is the judge to satisfy himself either that the fasting has been made 'bonâ fide,' or that it is so impossible as to let in the last (and for a rich man the easiest) alternative,"<sup>2</sup> viz., of feeding sixty poor persons? The answer to these questions seems to be that 'bonâ fides' is not a necessary ingredient in the expiation, and even if it were, the fact of expiation having been made would, it is submitted, be sufficient to raise a presumption that it was made with 'bonâ fides.'<sup>3</sup>

The question is, however, of hardly any practical importance.

<sup>1</sup> As it did for instance in *Fort Karim v. Maula Boksh* (1891), 18 Cal. 418; 18, I. A. 59, and see *Krishnasami v. Krishnamacharyar* (1882) 5 Mad. 313.

<sup>2</sup> See R. Wilson "Anglo-Muhammadan Law," 117, n. 7.

<sup>3</sup> Cf. the cases under Hindu law relating to the motives with which adoptions are made. In *Velmuri v. Venkata Rau* (1876) 1 Mad. 174, 190; 4 I. A., 113, their Lordships of the Privy Council refer to the presumption to be made in such cases.



§ 5.—‘Li’ân.’

**193.** Where a Mussulman husband, being adult and sane, has made a statement <sup>1</sup> that his wife <sup>2</sup> has been guilty of adultery, <sup>3</sup> she has (if she has been regularly married to him and she has not been previously notorious for loose life, nor has borne a child of unknown paternity) <sup>4</sup> the option of applying to the Court to put the husband upon the alternative of either retracting the statement, <sup>5</sup> or swearing four times by God that she is guilty of adultery, and imprecating upon himself the curse of God if he accuses her falsely.

SECTION 193.

‘Li’ân’ explained.

1. Accusation by husband.

2. Application to Court by wife.

3. Oath and imprecation by husband.

On the wife’s exercising the said option, <sup>6</sup> intercourse between her and her husband becomes unlawful, <sup>7</sup> unless the husband in his turn chooses the alternative of retracting his accusation. <sup>8</sup>

4. Oath and imprecation by wife.

If the husband chooses the alternative of swearing with the imprecation above referred to, the wife has again the option of admitting her guilt, <sup>9</sup> or swearing, in the same mode, that she is innocent, with an imprecation upon herself if she be guilty.

Making such oaths and imprecations under the circumstances above referred to is termed making the ‘li’ân.’

On the husband and wife having both reciprocally made the ‘li’ân’ the husband has the option of divorcing the

5. Dissolution of marriage after mutual oaths and imprecations.

<sup>1</sup> According to Shaf’i and Shiah law a dumb husband may do it by signs, but in accordance with Hanafi law a dumb husband cannot make *li’ân*: *Ibid.* 125; *Bail.* II. 155. Under Shiah law the husband must allege that he caught the wife in the act, and so a blind husband cannot make *li’ân*, and it is also requisite by that system that there should be no other proof of the adultery: *Bail.* II. 152.

<sup>2</sup> Though the wife has been revocably divorced, provided she is in ‘*iddat*’, *Bail.* II. 153, but she must be permanently married and not be deaf or dumb: *Bail.* II. 155.

<sup>3</sup> The accusation may also be implied by denying paternity of a child borne by her: *Bail.* II. 152. *Cf.* s. 81, above.

<sup>4</sup> By Shiah law the wife must have been chaste, not notorious for her bad character, and the marriage must have been consummated. *Bail.* II. 152.

<sup>5</sup> Shiah law requires the use of Arabic language, unless the parties are unable to use it: *Bail.* II. 156 (par. 2).

<sup>6</sup> She may not exercise the option, in which case the husband’s statement does not prevent him from applying for restitution of conjugal rights: *Musanni Begam v. Muhammad Ruston Ali Khan* (1906) 29 All. 222, and see *Jann v. Reparee* (1865), 3 W. R. 98.

<sup>7</sup> But does not of itself “operate as a divorce”: *Jann v. Reparee* (1865), 3 W. R. 98.

<sup>8</sup> By retracting, he becomes, in Mussulman law liable to be punished criminally for slandering his wife. *Bail.* I. 333-336. Imputing unchastity to a woman was first made actionable in England, by 54 & 55 Vict. c. 51.

<sup>9</sup> In which case she would be criminally liable to be punished for adultery under Muhammadan law. *Bail.* I. 335-336.

## SECTION 193

wife, and if he refuses to do so, then, notwithstanding any agreement between the parties to forgive each other, or to release their liabilities, or otherwise to condone the alleged adultery, the marriage must be dissolved by the Court.<sup>1</sup>

Effect of such  
dissolution.

**194.** The effect of a dissolution of the marriage by the Court on a 'li'ân' having been made is the same as that of one irrevocable divorce.<sup>2</sup>

Procedure on  
'l'ân' in  
British India.

'Li'ân' is perhaps somewhat less inapplicable to the circumstances of British India than 'zihar.' Should a case in which it is involved come up before the Courts, ss. 8-12 of the Oaths Act, X. of 1873, partially provide a machinery for the enforcement of the law. For (*semble*) the wife by bringing a suit for dissolution of the marriage under this rule of law would be taken, by operation of law, to have made an implied offer under the Oaths Act, s. 9.<sup>3</sup> If the husband agrees to make the 'li'ân,' that would similarly be a counter-offer by him, and the wife's refusal to accept that offer<sup>4</sup> would naturally render her suit liable to be dismissed. Should, however, the husband retract the accusation, the wife's suit would, no doubt, fail, probably with the 'solatium' of costs. When, on the other hand, the husband does not agree to make the oath, and does not retract the accusation, it all becomes "part of the proceedings," (Oaths Act, s. 12) and it is submitted that the judge would then be authorised to dissolve the marriage on the ground of justice, equity, and good conscience.<sup>5</sup>

On the effect of 'li'ân' for disclaiming paternity, see s. 218, below.

### § 6.—Apostasy.

Adoption of  
Islam by one of  
the parties.

**194A.** Where persons, not governed by Muhammadan law, contract, or otherwise celebrate, a valid marriage, in accordance with a system of law other than Muhammadan

<sup>1</sup> *Hod.* 123-126; *Bail.* I. 333-337; II. 122, 123.

<sup>2</sup> *Ibid.* In Shiah law they are perpetually prohibited from intermarrying: *Bail.* II. 29 (para. 1), see above, s. 45.

<sup>3</sup> The commission which the judge is empowered to issue by the Oaths Act, s. 10, is also contemplated by at least the Shiah authorities: "It is not valid except in the presence of the judge or some one appointed by him for the purpose. Yet if the parties are content with a private person and take the *l'ân* before him it is lawful." *Bail.* II. 156.

<sup>4</sup> Under the Hanafi law the judge is empowered to compel the parties by imprisonment to take the '*l'ân*' or to retract: *Bail.* I. 335-336.

<sup>5</sup> If necessary the Courts will no doubt call in aid the maxim that *boni judicis est ampliare jurisdictionem*, and also reasoning similar to that *Vadaka Viti Ismai v. Odakri Birjakuti Umak* (1881), 5 *Mad.* 347. Proceedings of a like nature are not unknown in England. See *Wilkes v. Innes* (1808), 1 *Camp.* 364; *Daniel Pat.*, *ibid.* 366 n.; *Lloyd v. Wilan* (1794), 1 *Esp.* 178; *Price v. Hollis* (1813), 1 *M. & S.* 105.

law, the marriage and its dissolution will be subject, in SECTION 194A. British India, to the provisions of that other system of law, and not to the law contained in ss. 195-200, below, notwithstanding that one of the parties to the marriage has after being so married become a convert to Islam.<sup>1</sup>

Section 194A represents the decision in a recent case. The question is of a class which is often difficult to decide. In some of its aspects, considerations of justice, equity and good conscience are not inapplicable. The law to be enforced may, in other cases, be that of the defendant (see s. 8, above). Hence, it is not, perhaps, permissible to lay down a fixed rule to govern every case. But it seems desirable to draw attention in this work to the class of questions that may arise.

The rules of law that would be applied, by the Courts in a Muhammadan State, to a case where persons, who do not follow Islam, and who are married in accordance with their own non-Muslim law, do not apply in British India, inasmuch as, on this question, the law that prevails is the law of British India, and not Muhammadan law: the law of British India may generally be said to be, that the personal law of the parties should be enforced. In this last respect the Muhammadan law relating to 'zimmis' (non-Muslim subjects) exactly corresponds, in its latitude, to the law of British India. The Muhammadan law is thus stated by the author of the 'Hidaya': "We are commanded to leave them ('zimmis') at liberty in all things which may be deemed by them to be proper according to their own faith."<sup>2</sup>

Muhammadan law on this point may be divided, in the first instance, under two heads: (1) the law that has to be enforced by the Government; (2) the law that has to be observed by an individual Muslim, wherever he be. The first is for the guidance of a Muslim State. It, in effect, lays down the policy that a Muslim sovereign must observe towards its non-Muslim subjects. Beyond referring to what has been just cited, showing that the policy which a Muslim sovereign is required to adopt, is, in substance, the same that the British Government has adopted, it is not necessary to deal with that head.

With reference to the second of the two heads mentioned above, where persons, who have married under a non-Muslim system of law, adopt Islam, the rules contained in the texts of Muhammadan law are

<sup>1</sup> *Budaman Routh v. Fatema Bibi* (1914), 26 Mad. L. J. 280; *Government of Bombay v. Ganga* (1880) 4 Bom. 330; *Administrator-General v. Anandharani* (1886) 9 Mad. 466; *In the*

*matter of Rama Kumari* (1891) 18 Cal. 264; *Emperor v. Lazar* (1907) 30 Mad. 550; *Sundari Lalani v. Pabamari Lalani* (1905) 32 Cal. 871.  
<sup>2</sup> Hed; 75

SECTION 194A again not applicable. The reason is that the Muslim texts contemplate a State religion. In India there is no State religion

In other words, the rules that are applicable in British India to converts to Islam from another religion, who were married prior to their conversion, may be somewhat different from the rules that would be applicable to such converts in a Muslim State, as the laws of every religion are enforced in British India on a footing of equality. The rule of Muhammadan law is that when a non-Muslim is converted to Islam, he should appear before the 'Qazi's' Court and ask that his or her spouse should be required to adopt Islam. On the spouse refusing to do so, the 'Qazi' is empowered to dissolve the marriage.

Apostasy  
of husband  
marriage.

195. Subject to Act XXI. of 1850,<sup>1</sup> where either party apostatises from Islam<sup>2</sup> the marriage becomes null and void.<sup>3</sup>

Where, however, the parties had been married according to Hindu law, and the woman adopted Islam, it was held that her marriage was governed by Hindu law, that, accordingly, the marriage was not dissolved by her adoption of Islam, and that she could not subsequently marry a Muslim husband.<sup>4</sup> See s. 194A, above.

On the other hand, where a Muslim husband adopted Christianity it was held that his marriage with a Muslim wife became null and void and that if the woman purported to re-marry during her 'iddat' though her marriage was invalid under Muhammadan law, she could not be said to have had a husband living, and could not be charged with bigamy.<sup>5</sup>

Effect on  
dower :  
1. of husband's  
apostasy.

196. Where a marriage is made void by the apostasy of the husband, (1) if it has been consummated, the wife is entitled to the whole of her 'mahr' ; (2) if it has not been consummated, she is entitled to half of the 'mahr'.<sup>6</sup>

<sup>1</sup> The Act is given in full above, under s. 1 and see *Nawroz v. (Musummat) Aziz Bibi* (1876), 11 P. R. 253, No. 124, CIV JUTS where the effect of this Act is discussed with great learning. Boulton and Campbell, JJ., held (*Lindsay J. diss.*) that the Act does not affect the Muhammadan law by which apostasy deprives the husband of the right to sue for restitution of conjugal rights.

<sup>2</sup> Disrespectful language against the Prophet and his law uttered by the husband in a fit of anger, without any intention to apostatise, does not dissolve the marriage; (*Musammatt) Nani Jan v. Husain Bakhsh*

(1891) 26 Punj. Rec. 502 (No. 106).

<sup>3</sup> As distinguished from "dissolved," see *Bail. II 266*, ss. 196, 201 (comment), above.

<sup>4</sup> *Budanna Roster v. Fatema Bibi* (1911) 26 Mad. L. J. 260.

<sup>5</sup> *Abdul Ghani v. Aziz-ul-Haq* (1911) 39 Cal. 409; *Amir Beg v. Saman* (1910) 7 All. L. J. 956; *Imam Din v. Hasan Bibi* (1905) 41 Punj. Rec. 309, (No. 85).

<sup>6</sup> *Bail. I. 182*, II. 23, 125, 127. In India, however, difficult questions may arise as to the effect of this rule. See *Mad. 6* and comment to s. 9, above.

197. The wife is entitled to no part of the 'mahr' where the marriage becomes void by her apostasy.<sup>1</sup>

SECTION 197.  
2. of wife's  
apostasy,

198. Where both parties apostatise together and come back to Islam, the marriage is re-established.<sup>1</sup>

Apostasy of  
both together.

199. According to Shiah law where the marriage has been consummated, it does not become void by apostasy until after the expiration of the 'iddat.'

(Shiah law.)  
Marriage  
subsists during  
'iddat' if  
consummated.

200. Where the marriage becomes void by apostasy the effect, in accordance with the exposition of Hanafi law by Abu Hanifa and Abu Yusuf, is the same as that of a divorce; Imam Muhammad dissents from this view of Hanafi law.<sup>2</sup> In Shiah law on an act of apostasy being committed, the person is taken to have died, and the same legal results follow as on his death.<sup>3</sup>

(Hanafi law)  
1. dissolution  
after apostasy  
has effect of  
div.

Syed Ameer Ali in his learned work<sup>4</sup> states that the lawyers of Balkh and Samarqand hold that when a woman abjures Islam for a scriptural or revealed religion like Judaism or Christianity her renunciation of the faith does not dissolve the marriage; but the Allahabad High Court (Stanley, C. J., and Banerjee, J.) in a recent case<sup>5</sup> felt themselves unable to disregard the view expressed in Baillie<sup>6</sup> and two previous decisions<sup>7</sup> and did not therefore give effect to Syed Ameer Ali's view.

(Conversion of wife  
to a scriptural  
religion)

## § 7.—Nullification of Marriage for Physical Defects, etc.

### (1) Hanafi Law.

201. In accordance with Hanafi law,—

(Hanafi law.)

(1) The wife is entitled to apply to the Court for dissolution of the marriage on the ground of her husband's continued impotence<sup>8</sup> from the time of the marriage, provided that she was not aware of it before the marriage.<sup>9</sup>

Application by  
wife for dissolution  
on husband being  
impotent.

<sup>1</sup> See p. 250, Nu. 6.

<sup>2</sup> *Ibid.* 66.

<sup>3</sup> *Baill.* II. 268 (par. 4).

<sup>4</sup> "Mahomedan Law" (3rd Ed.), p. 432.

<sup>5</sup> *Antia Beg v. Sumar* (1910), 33 All. 90.

<sup>6</sup> *Baill.* I. 182; *Ibid.* 66.

<sup>7</sup> *Zulurdasi Khan v. His wife* (1870), 2 N. W. P. 370; *Imam Din v. Hassan Bibi* [1906]

*Punj. Rec.* 309.

<sup>8</sup> Impotence is physical inability to have sexual intercourse with women generally or any particular woman: *Baill.* I. 345. On impotence *quoad hanc*, see *G. v. M.* (1885) 10 App. Cas. 171, (per Dr. Lushington and Lord Watson); *S. v. E.* (1892) 10 Bom. 639.

<sup>9</sup> *Baill.* I. 345, 346, 348.

SECTION 201. (2) On such an application being made, where the husband admits, or it is otherwise proved, that he has never had sexual intercourse with her, the application will be stayed for such a period as shall include one calendar year, during which the husband is not prevented either by illness or want of access, from having intercourse with the wife.

(3) Where it is proved that the wife has had sexual intercourse with some man, it will be presumed that the husband had intercourse with her, if he so asserts.<sup>1</sup>

Annulment  
of marriage  
distinguished  
from divorce.

Under Hanafi law there is no power in the husband to annul or cancel<sup>2</sup> the marriage. Annulment of the marriage differs from divorce apparently only in regard to rights relating to 'mahr' and in the fact that an annulment does not count as a divorce for establishing prohibition.<sup>3</sup> See also the comment to s. 69, above, for the distinction between avoidance and annulment of marriage.

If no consum-  
mation for  
one year  
marriage  
to be dissolved

202. Any time after the expiration of the period of one year referred to in s. 201 (2), if it is proved that there has not been sexual intercourse between the husband and wife, she has the option of having the marriage dissolved by the Court, unless the husband elects to divorce her himself.<sup>4</sup>

(Hanafi law.)  
Effect of such  
dissolution.

203. The dissolution of a marriage under s. 202, above, has the same effect as one irrevocable divorce.<sup>5</sup>

(Hanafi law.)  
'Mahr' and  
'iddat' after  
such dissolu-  
tion

204. Where the marriage has been dissolved under s. 201 or 202, above, if there has been valid retirement between the parties, the wife is entitled to her whole 'mahr,' and she is under the obligation to observe 'iddat.' Where there has not been valid retirement she is under no obligation to observe 'iddat'; and is entitled to half her 'mahr,' if any has been specified; otherwise to a present.<sup>6</sup>

The amount of 'mahr' that becomes payable under various circumstances, will appear from the tabular statement following s. 103, above.

<sup>1</sup> See s. 5, above.

<sup>2</sup> Which is the expression that Baillie uses;  
see s. 118, above.

<sup>3</sup> Cf. *Asha Bibi v. Kaur* (1909) 33 Mad. 22.

<sup>4</sup> Baill. I. 347.

<sup>5</sup> Baill. I. 347.

<sup>6</sup> Or *mal'ut*. See s. 102 (b), above.

(2) *Shiah and Shafi'i Law.*

SECTION 20

**205.** Under Shiah and Shafi'i law <sup>1</sup> a marriage may be annulled by the wife (without the intervention of the Court) on any of the first three grounds mentioned below ; and under Shafi'i law also under the fourth ground :—

(1) the insanity of the husband, whether or not he has lucid intervals, and whether it comes on before or after the contract, and whether before or after consummation .<sup>2</sup>

(2) the fact that the husband is a eunuch, provided that he was so prior to the marriage contract ; according to the opinion of some Shiah Ithna 'Ashari authorities (not endorsed by the ' Sharaya'-ul-Islam ') even if it supervenes ;<sup>3</sup>

(3) the husband's impotence with reference generally to all women, whether it comes on before or after the marriage is contracted, provided that the marriage has never been consummated ;<sup>4</sup> or

(4) the husband's inability to maintain his wife.<sup>5</sup>

There are contradictory Shiah Ithna 'Ashari traditions as to whether supervenient disability on the part of the husband to maintain his wife confers on her the power of cancelling the marriage. According to the most generally received traditions it does not.<sup>6</sup>

**206.** In Shiah Ithna 'Ashari and Shafi'i law a marriage may be annulled by the husband (without the intervention of the Court) on the ground of any of the following physical or mental defects in the wife :—(1) total insanity,<sup>7</sup> (2) leprosy whether black or white<sup>8</sup> or causing the members to wither away<sup>9</sup> ( ' juzam '), (3) structural defects preventing sexual intercourse ;<sup>10</sup> provided that according to the best supported Shiah Ithna 'Ashari authority the ground of avoidance has existed before the marriage was contracted.<sup>11</sup>

<sup>1</sup> The law as laid down in the *Da'ayam-ul-Islam* (a Shiah Isma'ili authority) generally seems to be in agreement with the *Sharaya'-ul-Islam*.

<sup>2</sup> Ball. II. 59-60 ; Hed. 128.

<sup>3</sup> Hed. 142; see the comment to s. 210, below.

<sup>4</sup> Ball II. 34.

<sup>5</sup> Ball. II. less 60.

<sup>6</sup> Ball. II. less 60. (*Bars*) in Arabic.

<sup>7</sup> *Juzam* in Arabic.

<sup>8</sup> In Arabic *karn, ifcam, ratak*. Ball. II. 60, 61.

<sup>9</sup> Ball. II. 61 (*Juraf*).

(Shiah and Shafi'i law.)  
Avoidance of marriage of wife.

Insanity of husband.

Husband a eunuch.

General impotence of husband.

(Shafi'i law.)  
Inability to provide maintenance.

(Shiah and Shafi'i law.)  
Annulment of marriage by husband for wife's—  
total insanity  
leprosy.

structural defects.

**SECTION 206.** According to some Shiah Ithna 'Ashari authorities the marriage may be avoided at any time before consummation, notwithstanding that the ground of avoidance arises after the marriage was contracted, and according to them in such a case half the 'mahr-ul-mithl' is due whether or not any 'mahr' has been specified.<sup>1</sup>

(Shiah and Shafi'i law)  
Order of Court not necessary to avoid marriage.

**207.** According to Shiah Ithna 'Ashari and Shafi'i law either party may annul the marriage on any of the grounds stated in s. 205, or 206, and the marriage is then dissolved without any order of the Court; provided, first, that there is no delay<sup>2</sup> in exercising the option after the ground comes to the knowledge of the party purporting to annul it;<sup>3</sup> and secondly, that where the ground for annulling the marriage is the impotence of the husband, the wife must apply to the Court to fix a period of time for establishing his impotence; and if no sexual intercourse takes place during the period so fixed, then the wife may annul the marriage without any further order of the Court.<sup>4</sup>

Application to Court necessary if ground impotence

**208.** In Shiah Ithna 'Ashari and Shafi'i law the annulment of a marriage under s. 205, 206 or 207 does not amount to a divorce for the purposes of s. 41, above.<sup>5</sup>

(Shiah and Shafi'i law)  
Such avoidance does not count as divorce for prohibition  
(Shiah and Shafi'i law)  
Effect on dower rights of such avoidance.

**209.** According to Shiah Ithna 'Ashari and Shafi'i law, where the marriage is annulled by either party on the grounds referred to in s. 205 or 206 without having been consummated, no portion of the 'mahr' is due,<sup>6</sup> unless the marriage is annulled for impotence, in which case the wife is entitled to half of her 'mahr'.<sup>7</sup> Where the marriage is annulled after consummation the whole 'mahr' is due.<sup>8</sup>

<sup>1</sup> Bail II, 66

<sup>2</sup> Cf. cases on acquiescence in English law, and *per* Lindley L.J. in *re Sharpe* [1892] 1 Ch. at 168, on "staleness of demand as distinguished from the Statute of Limitation," "analogy to which may furnish defence to equitable claim," and *Lindsay Petroleum Co. v. Hurd* (1871), L. R. 5, P. C. 221, 230. *Erlanger v. New South Wales Phosphate Co.* 3 App. Cas.

1218, 1279

<sup>3</sup> Bail. II, 61 (second)

<sup>4</sup> Bail. II, 61-62

<sup>5</sup> Bail. II, 61.

<sup>6</sup> Bail. II, 62, "the husband has, however, right of recourse against the person by whom he was deceived." Compare the effect of fraud on marriage, s. 72, above.

<sup>7</sup> Bail II 63; cf. table following s 103, above.



§ 8.—*Dissolution of Marriage by Court.*

SECTION 210.

**210.** According to Hanafi law a marriage may be dissolved by the Court where (1) the marriage is irregular; or (2) a person having an option to avoid a marriage has exercised it; [or (3) parties are married between whom prohibition by fosterage is established;]<sup>1</sup> or (4) the marriage having been contracted by non-Muslims, the parties adopt Islam.<sup>2</sup>

(Hanafi law)  
Dissolution by  
Court in case  
of irregular  
marriage.  
Option.

"A man is not to be separated from his wife for inability to maintain her."<sup>3</sup>

**211.** According to Shiah Ithna 'Ashari law, where the husband is missing, and no intelligence has been received of his place of residence, and his wife is not maintained by some one on his behalf; she may apply to the Court to have her marriage dissolved; on which the Court will postpone the application for four years, in order that enquiries may be made about the husband; and if no intelligence is received of him at the end of the said period, the Court will order the wife to observe 'iddat' as for his death: and on the completion thereof the marriage will be dissolved, and she will be entitled validly to marry again.

(Shiah law)  
When husband  
missing for  
four years

*Explanation.*—Where, previous to the expiration of the 'iddat' above referred to, the husband returns, the marriage will not be dissolved, and the parties will continue to be husband and wife.<sup>4</sup>

**212.** In divorce proceedings between husband and wife, instituted in the Courts of British India, the husband is not liable, as such, for the costs incurred by or on behalf of the wife, even though she be not possessed of sufficient property to bear them herself.<sup>5</sup>

Husband not  
liable for  
wife's costs  
in matrimonial  
proceedings.

**212A.** The Courts of British India may refuse to

Refusal of conjugal  
rights to cruel  
husband.

<sup>1</sup> See s. 87, above, and cf. s. 83 (1) (b).

<sup>2</sup> Ibid. 62-66; Bail. I. 178-187; II. 30.

<sup>3</sup> Bail. I. 443, and see s. 205 (4), above; ss. 294, et seq., below.

<sup>4</sup> See ss. 289, 290, below.

<sup>5</sup> Bail. II. 165-166.

<sup>6</sup> A. v. B. (1896), 21 Bom. 77, and the comment to s. 24, above.

**SECTION 212A.** grant restitution of conjugal rights to a husband who is  
 Cruelty of husband. so cruel as to cause physical danger to the wife ; and, in  
 cases of less cruelty, may put him on terms before granting  
 restitution of conjugal rights. *Quære*, whether in any case  
 the Courts may select a house other than the husband's as  
 a proper residence for the wife [or dissolve the marriage  
 altogether].<sup>1</sup>

<sup>1</sup> *Hussaini Begum v. Muhammad Rustam Ali Khan*, (1906) 29 All 222 ; (*Moonshie*) *Buzloor Rubeem v. Shumsoonissa Begum* (1867) 11

Moo. L. A. 531 ; *Muhammad Abdul Rahman v. Taslim-un-nissa* (1905) 2 All. L. J. 608.

## CHAPTER VI

### PARENTAGE.

#### § 1.—*Preliminary.*

**213.** When one person is considered in law to be the father<sup>1</sup> or mother<sup>2</sup> of another, paternity or maternity of the latter is said to be established in the former. establishment of paternity and maternity

##### 1. PATERNITY IN LAW

A man may be the actual begetter of a child and yet not in law its father according to law *e.g.*, for purposes of inheritance, guardianship, etc. Thus, according to Shiah law the child of illicit intercourse is not "related in law" to its father,<sup>3</sup> so that it seems even to have been suggested by some authority that it is not beyond doubt whether a man is prohibited from marrying his own child born by illicit intercourse. The rule is different with reference to a mother and her son. Hence it will be observed that establishment of parentage is a very different notion from establishment of "legitimacy" under English law. paternity or maternity and legitimacy

##### 2. ORIGIN AND DEVELOPMENT OF THE MUHAMMADAN LAW OF PARENTAGE

Previous to Islam it seems probable, that the customary rules relating to parentage, prevalent in Arabia, were as elastic, and as much in favour of the man in power, as those about marriage and divorce. It must have been a source of strength, in those unsettled times, to have sons, real or adopted, able to bear arms, and there seem to have been few, if any, counter-balancing duties. The feelings of the mothers were as usual, neglected: rights they had none. Pre-Islamic customs as to maternity

The change brought about by Islam was directed to strengthening the tie of natural relationship, and imposing duties on it. The actual father's claim over his own child could not be contested by a stranger, but where a person claimed to be the father, and there was no one to dispute his assertion, nor any ground for disbelieving the claim, it was allowed. strengthening of family tie by Islam, and imposition of duties

It will be useful to state the law in the shape of the strict rule which it was the aim<sup>4</sup> of Islam to see enforced, and then to state the

<sup>1</sup> Bail, II. 14.

<sup>2</sup> See s. 211, below

<sup>3</sup> Bail II. 14 (f. 7)

<sup>4</sup> See the Introductory Chapter

**SECTION 213.** modifications that came to be introduced in later times. These modifications are based on various presumptions, of which the origin may be traced in the principle that a person will be presumed to be acting lawfully, unless the contrary is proved. The rigorous rule of Islam was probably as follows: "Parentage is only established in the real father and mother of a child, and only if the child is begotten by them in lawful wedlock." In enforcing this rule, various presumptions were no doubt given effect to, which may also be stated categorically: First presumption: A child's mother is presumed not to have been guilty of adultery, if she is married. Second presumption Where a man says that a child has been begotten by him, and no other person claims to be its father and the child itself does not dispute it, and the ages of the two persons are such that they may be father and child, they are (subject to the next-mentioned presumption) presumed to be such. Third presumption: Such a statement as that mentioned above, cannot be presumed to be true when it implies that the mother of the child has been guilty of 'zina,' and which therefore accuses her of a crime<sup>1</sup> imposing upon her serious penalties; though, no doubt, if it is untrue he imposes upon himself liability to be punished for slander.

Strict rule aimed at by Islam.  
Presumptions—  
1) against adultery.  
(ii) as to truth of claim to paternity—unless that involves adultery.

Law of parentage arose through rules of evidence which developed into rules of substantive law.

It would, therefore, appear that the rules of parentage arose as rules of evidence. Whatever their origin, they now form part of the Muhammadan law of inheritance and marriage, and not of adjective law.<sup>2</sup> This process by which a rule of evidence passes into the realm of substantive law, is not by any means rare, and even as regards so integral a part of the substantive law of England as the doctrine of consideration, Lord Mansfield remarked: "I take it that the ancient notion about the want of consideration was for the sake of evidence only,"<sup>3</sup> and "In one sense," it has been said, "everything is form, which the law requires in order to make a promise binding, over and above the mere expression of the promiser's will. Consideration is a form as much as a seal."<sup>4</sup>

### 3. LEADING IDEAS INVOLVED IN THE LAW OF PARENTAGE

Analysis of Ideas—

The questions arising with reference to the law of parentage may be stated under the following heads: (1) What are the legal effects of

parentage and filiation, (*e.g.*, with reference to inheritance, maintenance, SECTION 213. guardianship of person, property, and marriage) (2) Whether parentage in law, as distinct from natural parentage, is recognised; in other words, whether legal parentage can be established over other people's children, (*e.g.*, by adoption). (3) Whether the law recognises actual parentage of only one class, or of several classes and grades, with varying legal effects, and whether it distinguishes in each case between the relation that the father and mother respectively bear to the child [*e.g.* between the parentage of (*a*) children born in lawful wedlock (*b*) the issue of irregular marriages, (*c*) children whose parents are not, though they could be, legally married, and children whose parents could not, even if they had desired to do so, have been legally married, such children again may be re-divided as the issue (*i*) of adultery and (*ii*) of incest or adultery.] (4) Whether a relation, in its inception illegitimate, can be legitimated (*e.g.*, by the subsequent marriage of the parents or acknowledgment, etc.)<sup>1</sup> (5) Whether the subsequent legitimization of a relation, that in its inception was illegitimate, has the same legal effect as a relation that was from its inception legitimate. (6) Whether a man is permitted to acknowledge the natural parentage of a child without taking upon himself some or all of the burdens of legal parentage, and, if so, what is the position of a child so acknowledged. (7) Whether a person can disown the paternity of his actually begotten child, of any or all the classes referred to under the third main head above; and, if so, whether he can degrade a child from a higher to a lower class of filiation.

Legal effects, artificial parentage (adoption).

Different classes of actual parentage.

Legitimation.

Effects of legitimization.

Partial legitimization.

Disowning.

It need hardly be said that not all these matters find a place in the body of Muhammadan law, nor are all covered by the sections of this chapter. Some preliminary analysis of ideas is, however, necessary in as much as those who are familiar with one legal system are apt to consider that the notions underlying the expressions "legitimacy" "parentage," "acknowledgment," etc., prevalent in that system, are the same as those prevalent in Muhammadan law, whereas in truth each expression connotes in each system of law some one or more of the elementary ideas indicated above.

## § 2.—*Establishment of Parentage.*

214. (1) Maternity is established under Muhammadan law only in the woman who gives birth to a child; it cannot be disclaimed.<sup>2</sup>

Maternity.

<sup>1</sup> *E.g.*, in Roman law it could also be done by a rescript of the Emperor, or by a testament confirmed by the Emperor: Hunter,

"Roman Law," 203

<sup>2</sup> Baill. I. 389, 111 H.-d. 351, 136.

## SECTION 214.

Illegitimate  
children

(2) In Hanafi law maternity is established in the case of every child. In Shiah law it is established only where the child is begotten in lawful marriage.<sup>1</sup>

The present section might have been worded thus :—“No woman is in Muhammadan law considered to be the mother of a child who has not actually begotten him; and in Shiah law a woman who gives birth to a child without being married to the person by whom the child is begotten, is not considered to be the mother of the child.”

## Paternity.

**215.** Paternity<sup>2</sup> is (subject to ss. 216 to 220, below) established in the husband<sup>3</sup> of the child's mother, where,—

(1) the child is born not earlier than six lunar months after<sup>4</sup> its mother has contracted (and, according to Shiah law, consummated) marriage with her husband; and

(2) in case the marriage has been dissolved—within the following periods respectively after its dissolution, *viz.*,—

(a) according to Hanafi law, two lunar years,<sup>5</sup>

(b) according to Shafi'i and Maliki law, four lunar years,<sup>6</sup>

(c) according to Shiah law, ten lunar months;<sup>6</sup>—provided that the woman has, in each case, remained unmarried after the dissolution of her first marriage.<sup>6</sup>

*Explanation.*—For the purposes of this section a person is considered the husband of a woman who has only the semblance of a right.<sup>7</sup>

<sup>1</sup> Cf. s. 213, above, and comment thereto.

<sup>2</sup> Courts lean most strongly in favour of legitimacy, until convinced by most conclusive proof to the contrary. The absence of a marriage certificate amongst Muhammadans does not matter: *Mona v. Ismail* (1909), 12 Bom. L. R. 169, 174.

<sup>3</sup> The rule applies, though there is only “semblance of right,” on which see ss. 14, 81, above, and also in the case of an irregular marriage. *Bail. L.* 157. *Ata Muhammad Chaudhry v. Saqul Bibi* 8 All. L. J. 933; 7 Ind. C.A. 820, (1910). In *Abdul Kacaz v. Aga Mahomed Jaffer* (1893), 21 Cal. 666; 21 I. A. 56, this point seems to have been overlooked. But, of course, the rule does not apply to children born in *int. Mahomed Ullahdad v. Mahomed Ismael* (1888) 10 All. 289, *Mardan*

*Sahab, Ganauasahab v. Rajakusahab Kashimsahab* (1909) 41 Bom. 111; 11 Bom. L. R. 117; *Indusana Rowther v. Fatma Bi* (1911) 26 Mad. L. R. 260; [1914] Mad. W. N. 278; 15 Mad. L. T. 107.

<sup>4</sup> *Bail. L.* 90.

<sup>5</sup> *Ibid.* 137; *Bail. L.* 390, 391, 393, 391, *Bail. L.* 90, 14, 153 (penultimate sentence), *Minkarat-Talibin*, 259 (Bk. 29, s. 1), *Jestcutt Singar Ubbu Singar v. Jet Singar Ubbu Singar* (1841) 3 Moo. L. A. 245, 6 W. R. (r.c.) 46.

<sup>6</sup> Two other views are mentioned in the *Sharaya*, one cutting down the longest period of gestation to nine months, and the other extending it to one year. The latter view is stated to be exploded and abandoned: *Bail. L.* 90.

<sup>7</sup> *Bail. L.* 157, ss. 14, 81, above.

*Quære*, whether the rules stated above are altered or abolished by the Indian Evidence Act, s. 112<sup>1</sup> to any, and if so, to what extent.<sup>2</sup>

(1) On the 1st of January 1900, H marries W, the parties being governed by Hanafi law,—

(a) W gives birth to a child, C, within 6 lunar months from 1st January 1900: the paternity of C is not established in H.

(b) H divorces W on 1st January 1901, without consummation, and W gives birth to C, within six months from 1st January 1901. H's paternity is established; if C had been born less than six months after 1st January 1901, the paternity of H would not have been established.

(c) H divorces W on 1st January 1901, the marriage having been consummated, and W gives birth to C within two<sup>3</sup> lunar years of 1st January 1901. The paternity of C is established in H.

(d) H dies on 1st January 1901; then, whether or not the marriage has been consummated, if W remains unmarried and gives birth to C within two<sup>3</sup> lunar years of H's death, the paternity of C is established in H; unless six months before C's birth W had declared her 'iddat' to have expired.<sup>6</sup>

(2) H consummates<sup>4</sup> his marriage with W, the parties being governed by Shiah law on the 1st of January, 1900 —

(a) W gives birth to a child, C, within six lunar months from 1st January 1900. The paternity of C is not established in H.

(b) H dies on the 1st of June 1900, and W gives birth to C on the 1st of April 1901, more than ten lunar months after 1st June 1900 when H died. C is illegitimate in Shiah law<sup>8</sup> [but legitimate in Sunni law].

#### 1. CONFLICT BETWEEN EVIDENCE ACT AND MUHAMMADAN LAW OF PARENTAGE

It is unsettled whether the rule of Muhammadan law as given in ss. 215--221 must be taken as in force in British India, or as repealed by the

<sup>1</sup> Which is as follows: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

<sup>2</sup> In *Rahmat Ali v. Musst. Allahdi* [1884] 19 Punt. Rec., (No. 1), and *Waras Muhammad v. Ali Baksh* [1891] 26 Punt. Rec., 375 (No. 76) it was held that the Muhammadan

law has been abolished by s. 112.

<sup>3</sup> *Id.* I. 391.

<sup>4</sup> *Id.* I. 391, II. 1-6. In Shiah law the same would hold, *Id.* II. 92—but only if there has been consummation: *Id.* II. 90, 91, 11. Cf. the illustration to s. 218, below and footnotes thereto.

<sup>5</sup> Four years under Shafi'i or Hanballi law.

<sup>6</sup> *Id.* I. 391.

<sup>7</sup> *Id.* II. 91. See also *id.* (1) (b) to s. 215.  
<sup>8</sup> *Id.* II. 91. *Quære*, what law would govern the case if one of the parties to the marriage were Sunni and the other Shiah?

## SECTION 215.

1. Muhammadan law required to be administered.
2. Legislature may alter or abrogate Muhammadan law even through an Act dealing with evidence.
3. Rules other than those of evidence not affected by Evidence Act unless expressly repealed.

Indian Evidence Act, s. 112. The difficulty of deciding the question was pointed out as early as in 1888, by Mahmood, J.<sup>1</sup> It has been contended that s. 112, though placed in the Evidence Act, deals with a branch of substantive law, and that as there are statutory provisions later in date than the Evidence Act requiring Muhammadan law to be administered, s. 112 does not apply in so far as it conflicts with the provisions of Muhammadan law.<sup>2</sup> This contention has been met by the statement<sup>3</sup> that the Indian Evidence Act supersedes the rules of Muhammadan law; and that, whatever be the collocation of s. 112, it has to be applied to Muhammadans as well as to all others, and must be taken to have altered the substantive Muhammadan law on the points it covers; that as to the statutes requiring the administration of the Muhammadan law of marriage and parentage, though they were passed after the Indian Evidence Act<sup>4</sup> they do not require Muhammadan law to be administered in its entirety, but in so far only as the same has not been altered or abolished by legislative enactments.

It seems, however, to have been overlooked that by s. 2 (1) of the Indian Evidence Act only rules of evidence (not contained in a Statute, Act or Regulation) are repealed: in other words, those rules are not repealed by the Evidence Act, which are not rules of evidence, though they be contained elsewhere than in a Statute, Act or Regulation. Moreover, the last clause of s. 103 of the Evidence Act saves presumptions of law. So that the question whether the rules of Muhammadan law relating to parentage are altered or abolished by Legislative enactment depends upon whether the rules are rules of evidence: and again they may not be so altered or abolished if they are presumptions of law saved under s. 103.

It has seemed advisable in the last paragraph to deal with the question narrowly as one purely of the interpretation of the Act. A minute examination of the language of the Act would only be necessary if the matter arose before a Court presided over by a judge taking as great delight in dialectical reasoning as Mahmood, J. Another circumstance making a minute examination of the Act a matter mainly of academical interest is that—whether casuistically these rules are to be considered part of the substantive or of the adjective law,—they are

<sup>1</sup> *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1888) 10 All. 289, 339.

<sup>2</sup> Wilson, "Anglo-Muhammadan Law," s. 83.

<sup>3</sup> Mulla, "Mahomedan Law" (3rd Ed.) 139-140, (4th Ed.) 147.

<sup>4</sup> The High Courts are, of course, governed by their Charters, which are of much earlier date, and this portion of Sir B. Wilson's argument does not apply to the jurisdiction of the

High Courts. The Privy Council decision in *Muhammad Ismail Khan v. Lalt Shoo Mukh* (1913) 17 Cal. W. N. 97; 15 Bom. L. R. 76, shows that the applicability of Muhammadan law in India is based on principles of justice, equity and good conscience, and is less dependent on the stringent interpretation of the enactments constituting the Civil Courts. See the comment to s. 10, above.



sufficiently associated with questions of fact, to allow, in most cases, of SECTION 215. decisions being arrived at, based on the particular facts, irrespective of the dry question of law. One means of applying the Muhammadan law, and yet coming to the same conclusion as that to which the Indian Evidence Act would bring, is to accept the presumptions of law, but to allow them to be rebutted by evidence in the manner suggested in some of the following paragraphs. Judges inclined otherwise than Mahmood, J., would in all probability feel little temptation to turn to the rules of Muhammadan law and to go through the circuitous and involved method suggested above, for arriving at a conclusion reconcilable with the information that Science now places before us. The general intention of the Legislature seems to be clear enough: that the Indian Evidence Act s 112 should govern questions arising with reference to persons of every denomination in British India. That section, based as it is on the most modern information, gives effect to the same principles, on which the rules of Muhammadan law are grounded; and its general application has the additional advantage of removing difficulties about the choice of law that would arise if the Muhammadan law were to be applied in cases between parties who are not both governed by the same school of Muhammadan law.

In reply to a critic who has suggested that the Muhammadan law relating to the presumption of parentage is "absurd," and should therefore give place to the Indian Evidence Act, Sir Roland Wilson answers that it is not less absurd to presume that a child born a day after marriage is legitimate (as is done by English law and the Indian Evidence Act): it would, therefore, be an unsafe assumption to make that because a rule seems absurd to a particular learned person, therefore it is not enforceable: it is enough that it has not seemed absurd to the legislator. The policy that underlies these presumptions equally of Muhammadan law, of English law, and of the rules laid down in the Indian Evidence Act, has also been overlooked. If, indeed, the critics of Muhammadan law took a little more pains to examine it, and to compare it with other systems, they would find that in a great number of cases the same principles make their appearances with variations in most systems of law, but a rule that appears incomprehensible or absurd in an imperfectly understood system, is recognised in another system, with which the critic is more familiar, as the embodiment of public policy; and it is a truism that the most ignorant are the harshest and the severest in their strictures.

The reasons why some of the Muhammadan lawyers stretched the length of the period of gestation to two and four years, are not difficult

The policy of law underlying the presumptions relating to paternity.

Policy of Muhammadan law.

**SECTION 215.** to surmise. There was, no doubt, an initial want of scientific knowledge of physiology, though the latest scientific authorities show that it is always subject to doubt.<sup>1</sup> Added to this was the desire not to take any risk of bringing down on the head even of an erring woman, the extremely severe punishment that adultery involved.<sup>2</sup> English lawyers would, one should have imagined, be familiar with the process by which the rigour of the law is lessened by fictions and technicalities which are the more admired the more far-fetched they are.

## 2. THE RULE OF PURE MUHAMMADAN LAW

Points of difference between Muhammadan law and the Indian Evidence Act s. 112.

Muhammadan law in its strictness differs in three points from the Evidence Act: (1) The presumption arises six months after marriage, and not before. (2) It continues not only during 280 days after dissolution of marriage, but during the periods respectively mentioned in s. 215 of this work, *i.e.*, 2 years, 4 years, and 10 months respectively. (3) The rule of Muhammadan law seems to be a rebuttable, not a conclusive, presumption. But see below.

It is unnecessary further to refer to any but the third point.

Presumption of Muhammadan law is not conclusive. Enforceability of 'Ifân' in British India.

That under Muhammadan law the presumption of paternity may be rebutted in one mode, *viz.*, 'Ifân,' is clear. It has been questioned whether the special mode in which alone, in Muhammadan Law, it could be rebutted by the father, can be given effect to in British India. It has been already submitted that it can.<sup>3</sup> If, however, it is held that the rules of making 'Ifân' are not applicable in British India, the Courts would, no doubt, permit another procedure to be followed, preserving at the same time the substantive requirements of the law, *viz.*, a solemn denial of paternity, coupled with an accusation of adultery against the wife. The accusation of adultery, it is true, is implied in the denial of paternity, but its specific mention is of importance where the Muhammadan law of slander prevails.<sup>4</sup>

Whether the presumption be rebutted otherwise than by making 'Ifân'.

The question whether the presumption may be rebutted in any mode other than by making 'Ifân' is not likely to arise. On principle it would appear, that, if it is established that the presumption is not a conclusive one, (capable as it is of being rebutted at least in one mode) it may under the law of British India, equally be rebutted in other ways.

<sup>1</sup> See Taylor, "Medical Jurisprudence" (5th Ed., 1905), II. 60, *supra*. At p. 63 it is stated. "It is not in our power to fix" the limit to gestation; and cases are recorded of its being prolonged to 324 days; see also Lyon, "Medical Jurisprudence" (1889) 343; Barry, "Legal Medicine" (1903), II. 104, 106.

<sup>2</sup> See also comment to s. 213, above.

<sup>3</sup> See the comment to s. 194, above, and the Oaths Act, there cited.

<sup>4</sup> Cf. Hord. 135 (col. 1, par. 1), 136 (col. 1, par. 2). See footnotes to the 2nd & 3rd paragraphs of s. 193, above.

There are, again, the further points to be considered, whether the SECTION 215. presumption of paternity can be rebutted only by the putative father, or Can the presumption be rebutted by other parties, and whether the right of other parties to rebut the presumption (if any) may be exercised while the father himself is on other than the putative father's scene.

If it is held that the presumption in question is a rebuttable one, Practical effect of the rule in British India would be that after the expiration of 280 days succeeding the dissolution of the marriage, formal evidence would be considered sufficient to counterbalance the presumption. The Calcutta High Court, before the passing of the Evidence Act, declined to follow this part of the rule of Muhammadan law as being "contrary to the course of nature and impossible." The Court referred in the decision to the *Hidayat*, but did not consider the question in all its bearings, nor the full effect of its ruling. The actual decision, however, in that case is consistent with the Muhammadan law, if the presumption is held to be rebuttable.

### 3. EFFECT OF THE EVIDENCE ACT, 1872, ON MUHAMMADAN LAW

Assuming that the Indian Evidence Act supersedes Muhammadan law, we are faced by questions of varying degrees of importance regarding the manner in which the former should be interpreted and applied to persons governed by the Muhammadan law of marriage. In s. 112 it is assumed that the proposition that "a child born during the continuance of a valid marriage" is "legitimate," has as clear and definite a meaning, and, presumably, the same meaning, in Muhammadan law as it has in English law. What is the effect to be given to the words "a valid marriage" in Hanafi law?—in which marriages are divided into two classes, usually styled the valid and the invalid, but which are referred to in this work as regular and irregular marriages; and power is given to the man that is regularly married to disclaim a child of his wife, by 'ilfán,' but not to one irregularly married. Is any distinction to be preserved? Similarly, the Shiah 'Ithna 'Ashari' law also recognises two classes of marital relations, the permanent and the temporary ('mut'á'). The latter is generally spoken of as a "marriage" in books written in English, because it permits a relation in many respects similar to that of the ordinary marriage; but it is said in a work of great authority<sup>2</sup> that "the name of wife does not in reality apply to a woman contracted

<sup>1</sup> (*Mir Askruf Ali v. (Mir) Ashad Ali*, (1871) 16 W. R. 260.

<sup>2</sup> *Bail. II.* 344-345. The passage here translated does not occur in the *Sharay' ul-Islam* but is taken from the Digest of Sir W. Jones,

which is composed of extracts from a commentary on the *Mafatih*, and a work called the *Kaifi*, besides extracts from the *Sharay' ul-Islam*. *Bail. Vol. II.* p. xxvii.

SECTION 215, in *moota*, for of these a man may possess more than four at a time. . . . Since then . . . these women are not in reality wives, it follows that they cannot be included in the law of marriage, nor comprehended in the sense and intention of the sacred text already quoted," *i.e.*, she is not a "wife" for purposes of inheritance.<sup>1</sup> Shall the connection by 'mut'a' then be held to fall within the expression "valid marriage" in the Indian Evidence Act, s. 114, or, if not, will the Muhammadan law of paternity be followed in regard to 'mut'a' but not in regard to the regular marriage?

It will be seen that if the section is held to apply to all these classes of marriages, we nullify the distinction between a valid (or regular) and an invalid (or irregular) marriage, and between a permanent marriage, and 'mut'a'; and if we so interpret the section we practically substitute for the words "valid marriage" the words "any connection between persons of the opposite sex, which the law permits without penalising, and from which legal rights and liabilities flow."

2. As to legitimacy.

Next with reference to the interpretation of the words "legitimate son,"—legitimacy attaches to the child, and is a qualification of the relation subsisting between itself and not only both its parents, but all its other blood relations.<sup>2</sup> The Muhammadan texts, on the other hand, speak of the relation, and not of the person; and in particular they speak of two distinct relations, *viz.*, paternity and maternity: as to maternity, there is, at least in Hanafi law, nothing like an illegitimate mother;<sup>3</sup> hence, to qualify the term mother with the epithet "legitimate" or "illegitimate" is to employ an additional word that in this context can have no meaning in the Hanafi law; with reference to paternity, the law gives to the man in certain cases the power of establishing, and in others of disclaiming, paternity, though his disclaimer has no effect on the child's relation to its mother. In fact, acknowledging paternity is the nearest approach in Muhammadan law to adoption,<sup>4</sup> and the disclaimer of parentage the one mode of disinheriting a child born to one's wife. Is the whole Muhammadan law of disclaiming parentage repealed by s. 112?

3. Whether any portion of Muhammadan law unaffected by s. 112.

Then again the section does not purport to lay down that legitimacy cannot be established under any other circumstances than those mentioned

<sup>1</sup> And yet women contracted by *mut'a* have been held to come within the term "wife" in the Criminal Procedure Code, s. 488, and maintenance has been ordered in their favour. See below, s. 291 (3).

<sup>2</sup> Cf. Bail, I. 433 a, 1. Cf.

<sup>3</sup> The Shiah law authorities recognise the difference between a mother by marriage and by illicit intercourse, in so far that the latter cannot inherit from her child, nor *vice*

*versa*: Bail, II. 305 (par. 4).

<sup>4</sup> In the case of the child of a slave-girl owned by two men jointly, paternity could be established in either owner: Bail, II. 92-93, 93 (par. 2). A woman cannot acknowledge a child without the assent of her husband: Bail, I. 404. And in regard to "semblance of right" the husband's knowledge and state of mind are alone considered, Bail, II. 92-93, 172.

in the section,<sup>1</sup> nor that the absence of the circumstances mentioned SECTION 215. in the section shall be conclusive proof that the child is "illegitimate." Unless words to this effect are read into the section it would appear that in the case of birth after the expiration of 280 days, there is nothing to prevent the Muhammadan law having its effect. So that even if the section be held to apply, still without doing violence to it, paternity can, in the case of a child that is governed by Shiah law be presumed to be in the late husband of the mother, if it is born between 280 days and 10 months after the dissolution of the marriage, and a similar presumption may be admitted as to a child governed by Hanafi law who is born between 280 days and two years after the dissolution of the marriage—unless in either case the putative father disclaims the child by 'li'ân.

Presump-  
tions after  
280 days  
have  
expired

This leads to another point of distinction between the Indian Evidence Act and Muhammadan law which has been already referred to, viz., that while the presumption of s. 112 is irrebuttable that of Muhammadan law is rebuttable, though under strict Muhammadan law it could be rebutted only in one way—by 'li'ân.

P. 3. Presump-  
tion of Evidence  
Act is  
conclusive,  
that of  
Muham-  
madan law is  
rebuttable.

#### 4. CONCLUSION.

It is difficult to resist the conclusion that the Indian Evidence Act, s. 112, was drafted without giving a thought to the framework in which it would have to be set, if it is to displace the Muhammadan law on the same point. But this oversight can hardly be a ground for disregarding its provisions. The uncertainty and difficulty of applying an Act of legislature does not have the same effect on its provisions as similar defects in a contract.<sup>2</sup>

Evidence Act  
applies, but  
the presump-  
tion of  
Muhammadan  
law after  
expiration  
of 280 days  
is in fact.

As has been already submitted, the section does not seem to affect the presumption of Muhammadan law after the period of 80 days but that presumption is rendered weak, and almost nugatory by the knowledge of physiological facts that we now possess.

**216.** According to Hanafi law, where, after dissolution of her marriage, a woman has married again, and a child is born to her at such a time that its paternity may be established, (in accordance with the rule contained in s. 215, above) in favour both of a husband regularly married, and of a husband irregularly married, preference will be given to the paternity of the former; provided that

(Sunni Law)  
Presumption  
in favour of  
paternity of  
husband by  
marriage.

<sup>1</sup> See p. 261, n. 1.

<sup>2</sup> *Manchester Ship Canal v. Manchester Racecourse Co.* [1900] 2 Ch. 352, [1901] 2 Ch.

37; and see per Warrington, J., in *Ryan v. Thomas*, Solicitor's Journal for 25th March 1911, at p. 364.

Section 216. paternity will be ascribed to an irregularly married husband, where, if that is not done, the child must be held to be born of illicit intercourse.<sup>1</sup>

(Shiah law)  
Where  
husband  
had no access  
to the wife

217. According to Shiah law paternity is not established where it is shown that the husband had no access to the wife, or that the husband was not able to have sexual intercourse at any time when the child could have been begotten.<sup>2</sup>

### § 3.—Disclaimer of Paternity.

Disclaimer of  
paternity by  
'I'p'an.'

218. (1) Where the marriage is valid and regular,<sup>3</sup> the husband may, by making 'I'p'an,' disclaim the paternity of a child born to the wife, and thus prevent it from being established;<sup>3</sup> provided that he has not previously acknowledged its paternity, nor acquiesced<sup>4</sup> in its being attributed to him.<sup>5</sup>

(2) Where the parties are Shiahs, who have contracted a 'mut'a,' paternity may, in some cases, be apparently disclaimed even without the husband taking the 'I'p'an.'<sup>6</sup>

(3) Paternity cannot be disclaimed except as provided in this section.<sup>7</sup>

#### Illustration

If consummates<sup>8</sup> his marriage with W on the 1st January 1900, W commits adultery and gives birth to C on 1st August 1900. H's paternity is established, and he can only disclaim it by 'I'p'an'.<sup>9</sup>

Treatment of a son born of a wife of lower degree with less care, kindness and consideration than treatment of a son whose mother was a high born person, is no evidence that the former is illegitimate.<sup>10</sup>

<sup>1</sup> Bail I 395-396. Cf. *Roshan Jehan v. Enak Hosein*, and *Enak Hosein v. Roshan Jehan* (1886) 5 W. R. 5, affirmed by P. C. in *Khajooronissa v. Roshan Jehan* (1876) 2 Cal 181; 3 I. A. 291; 26 W. R. 36.

<sup>2</sup> Bail II 153. Cf. Indian Evidence Act, s. 112.

<sup>3</sup> Where the marriage is irregular, the husband cannot disclaim the child by *I'p'an*. Paternity is a burden on the father, so in Shiah law the child of a woman married during *'iddat* is affiliated to the husband. Bail, II, 26 (second). In England parents cannot be compelled to statements that might bastardize their children: see *Ashford v. Perregé* (1855) 11, A. C. 1; *Poulett* [1903] A. C. 395; *Burnaby v. Baillie* (1889) 12 Ch D 282.

<sup>4</sup> As to the lapse of time required for presuming acquiescence, Abu Hanifa is said to have considered this as governed by "custom," "what is usual," or "in the discretion of the judge." Abu Yusuf and Muhammad fixed 40 days: Bail, I, 396.

<sup>5</sup> Bail I, 390, 391, 393, 394, 413, II 91, 43.

<sup>6</sup> Bail, II, 43 (*aff*), 91 (par. 2). See above s. 193, on *I'p'an*; and s. 25 on *mut'a*.

<sup>7</sup> Bail I 340 (*ff*, 30-35).

<sup>8</sup> "Consummates" because the illustration is from a Shiah authority. A Sunni text would say "contracts": see 215 (1), & s. 217, above.

<sup>9</sup> Bail, II 91.

<sup>10</sup> *Said Husain Khan v. Hashim Ali Khan* (1916) 38 All. 627, 658.

**219.** Paternity cannot be disclaimed or renounced after it has once become established.<sup>1</sup>

SECTION 219.  
Disclaimer of  
paternity  
after acknow-  
ledgment.  
Acknowledg-  
ment after  
disclaimer.

**220.** According to Shiah law where paternity has been disclaimed by 'I'ân, it may nevertheless be subsequently established by the husband of the mother acknowledging it;<sup>2</sup> provided that in such a case the father has no right to inherit from the child.<sup>3</sup>

**221.** Where a child is born to a widow after she has made a declaration that her 'iddat' has expired<sup>4</sup> (such a declaration having been made at a time when the 'iddat' may reasonably be considered to have expired),<sup>5</sup> paternity of the child is not established in the widow's husband, unless it is born within six months of such declaration, and within two years or four years or ten months of the death of the husband, according to Hanafi, Shafi'i, and Shiah law, respectively.<sup>6</sup>

Paternity of  
a widow's  
child born  
after 'iddat.

#### § 4.—Acknowledgment of Paternity.

**222.** Paternity of a child is established in any man who acknowledges it<sup>7</sup> with the intention of admitting that it has been established;<sup>8</sup> provided that each of the following

1. Establishment  
of paternity  
by acknow-  
ledgment of  
the father.

<sup>1</sup> Bail I. 408. In *Asraf-ud-daula Ahmad Hussain v. Hyder Hussain Khan* (1866), 1 Moo. I.A. 91 a formal deed of renunciation was put forward, but was taken into consideration merely to disprove the allegation that it had been preceded by an acknowledgment. See also *Muhammad Allahabad v. Muhammad Ismail* (1888) 10 All 289, 340. In *Sadiq Hussain Khan v. Hashim Ali Khan* (1916) 48 All 627 (P.C.) the father after acknowledging the son, omitted the name of the son in an autobiography in which he enumerated his heirs; and stated that none but the son mentioned were his children, but this was held not to affect the previous acknowledgment.

<sup>2</sup> See s. 222, below.

<sup>3</sup> Bail II. 14 (par. 4). The instance refers only to acknowledgment by the father, but if it is established in any other way, the same results would no doubt follow.

<sup>4</sup> The 'iddat can only expire if the widow is not with child. See s. 39, above.

<sup>5</sup> Bail I. 304; see also Bail. I. 34, last sentence.

<sup>6</sup> Bail. I. 391; (1 & 215, above). There does not seem to be any reference to this point in the *Shariya-ul-Islam*.

<sup>7</sup> The most recent Privy Council case on acknowledgment and legitimacy is *Sadiq Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 627, in which *Muhammad Allahabad Khan v. Mahomed Ismail Khan* (1888) 10 All. 289, and *Mahomed Ismail Khan v. Lalla Begum* (1884) 8 Cal. 422; 9 F. A. 8, were followed. The very full judgment of Karanah Hussain J., on regular and irregular marriages in *Abi Muhammad Chaudhri v. (Musammat) Sayyid Bibi* (1910) 8 All. L. J. 950, may also be referred to.

<sup>8</sup> An admission of paternity made casually, and not intended to have a serious effect, is not "sufficient" to confer the status of legitimacy". *Asraf-ud-daula Ahmad Hussain v. Hyder Hussain Khan* (1866) 11 Moo. I. A. 49, 101. *Abdul Karim v. Aga Mahomed Bandanum* (1893) 21 Cal. 666, 678, 21 I. A. 56. *Badassa Rowther v. Fatma Bi* (1911) 26 Mad. I. J. 260; [1911] M. W. N. 278; 13 M. L. T. 107. For Shiah law see *Minhaj-ut-Talibin* 186 (Bk. 3, p. 5).

SECTION 222 conditions is fulfilled: viz., that (1) the paternity of the child is not established in anyone else;<sup>1</sup> (2) the ages of the parties are such that they may be father and child;<sup>2</sup> (3) the child confirms or acquiesces<sup>3</sup> in the acknowledgment, if it is of an age to do so;<sup>4</sup> (4) the man could lawfully have been the husband of the child's mother<sup>5</sup> at the time when the child was begotten<sup>6</sup> (it not having been proved that the child is the offspring of illicit intercourse);<sup>7</sup> and (5) the acknowledgment is not merely of sonship, but of legitimate sonship (the fact, however, that the acknowledgment was of legitimacy as well as of sonship, may be inferred from circumstances justifying that inference).<sup>8</sup>

Rule stated by  
Privy Council.

The rule has now been stated, by the Privy Council, in the following terms: "No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible."<sup>9</sup>

Distinction  
between  
formal and  
informal  
acknowledgment of  
paternity.

The distinction between casual and deliberate, or formal and informal, acknowledgments<sup>10</sup> would be unnecessary if Muhammadan law were enforced in its entirety: for, under it, unlawful intercourse is punishable as such, and acknowledgment has always serious consequences: if it does not establish paternity, it imposes the liability to be criminally punished for 'Zina' or slander.<sup>11</sup> The introduction by the Courts of British India of this distinction, however, it is submitted, aids in

<sup>1</sup> Hed. 130, Bail 1 108, *Nurehunnissa v. Zameerun* (1860) 11 W. R. 122, 1 Beng. L. R. (APP. CAS) 55, affirmed on appeal *Jachia v. Nurehunnissa* (1860) 12 W. R. 197, *Muhammad Alahdad Khan v. Muhammad Ismael Khan* (1888) 10 All. 280 317, 335, *Usman Aliqui v. Valli Mahomed* (1915) 40 EOR 28.

<sup>2</sup> I.e., the man must be at least 12½ years older than the child, according to Bail 1 408.

<sup>3</sup> *Kedarnath v. Donath* (1874) 49 W. R. 502, *Gemda Bibee v. Janab Ali* (1866), 5 W. R. 172, 1 Ind. N. S., 43; *Fazzerian Beebee v. Gemah Beebat* (1868) 10 W. R. 469, *Witherston v. Wazir Hossain* (1871) 15 W. R. 403.

<sup>4</sup> See comment on s. 223, below.

<sup>5</sup> *Waherudin v. Wasee Hussain* (1911) 15 W. R. 403.

<sup>6</sup> Hed. 130, Bail 1 401, and see comment

<sup>7</sup> *Trimmakka Akatloo v. Kattumanesa Khaton* (1899) 24 Cal. 120. See, however, comment to s. 84, above.

<sup>8</sup> *Un-cupura v. Valli Mahomed* (1915) 40 EOR 28.

<sup>9</sup> *Saidi Hussain Khan v. Hashim Ali Khan* (1913) 28 All. 627, 661.

<sup>10</sup> *Ashrafud-daula Akmed Hossain v. Hyder Hossain Khair* (1866) 11 Moo. 1 A. 94; *Abdul Ras. A. v. Abu Mahomed Bandanum* (1893) 21 Cal. 966, 978, 21 F. A. 56.

<sup>11</sup> Thus it has not seemed necessary to introduce any rule in the Indian Evidence Act, that a confession must be made with the intention that it should have a serious effect, though it has been necessary to prevent extortion of confessions see the footnotes to the second and third paragraphs of s. 193, above.



giving effect to the intention of Muhammadan law. In conformity with SECTION 222, the above, it has been held that acknowledgment as a child, 'prima facie,' means acknowledgment as a legitimate child.<sup>1</sup> The acknowledgment itself need not be of such a character as to be evidence of marriage.<sup>2</sup> Compare s. 81, above, for presumptions of marriage.

Cases have come before the Courts in which it has been held that *the intention*, where the mother is a prostitute, the child cannot be acknowledged,<sup>3</sup> nor where she is the sister of the acknowledger's wife,<sup>4</sup> nor where she has another husband.<sup>5</sup> The question whether "the offspring of adulterous intercourse could have been legitimated by any acknowledgment" left undecided by the Privy Council in 1883,<sup>6</sup> was answered in the negative seventeen years later,<sup>7</sup> when it was decided that paternity can neither be established in the case of a child of fornication nor of a bastard. The law had been stated in the same terms by MAHMOUD J.<sup>8</sup>

The cases mentioned in the footnote have reference to the effect of acknowledgment of the paternity of a child under s. 222, and of evidence for the purpose of disproving it.<sup>8</sup>

**223.** Statements by a member of the family touching *Proof of paternity* the sonship or heirship of a person are good evidence of the family reports concerning him.<sup>9</sup>

**224.** Where a man has openly treated another as his *Presumption of acknowledgment* child it may be presumed<sup>10</sup> that the former has acknowledged the parentage of the latter.<sup>11</sup>

<sup>1</sup> *Furqan Beeber v. Onidah Beeber* (1868) 19 W. R. 168, 11 Beng. L. R. 60, n.; *Sadek Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 627 650, (P.C.).

<sup>2</sup> *Mahomed Ali v. Wajee Begum* (1871) 15 W. R. 104.

<sup>3</sup> *Dhan Bibi v. Lalun Bibi* (1900) 27 Cal. 801; *Ghazizadeh Ali Khan v. Kaur Fatima* (1910) 32 All. 345; *Marian Sahib v. Rajasahib*, (1909) 31 Bom. 111.

<sup>4</sup> *Azzamissa v. Karimnissa* (1895) 22 Cal. 130; see however the comment to s. 83, above.

<sup>5</sup> *Luqat Ali v. Karam-ul-issa* (1893) 15 All. 396.

<sup>6</sup> *Sablat Hussain v. Mahomed Yusuf* (1883) 10 Cal. 663, 668; 11, 1 A. 31; *Muhammad Ismat-ullah Khan v. Lall Begum* (1881) 8 Cal. 422, 424.

<sup>7</sup> *Muhammad Altabad Khan v. Muhammad Ismat* (1883) 10 All. 289, 337.

<sup>8</sup> *In the matter of the Petition of Najibunnissa* (1860) 4 Beng. L. R. (A.C.) 55; 11 W. R. 426, affirmed on appeal, *Jatib v. Najibunnissa* (1860) 12 W. R. 497. *Naba Kaut Roy Chowdhry v. Mahab Bibee* (1873) 20 W. R. 161,

*Muhammad Altabad Khan v. Muhammad Ismat Khan* 10 All. 289. See also *Muhammad Ismat v. Lall Begum* (1881) 8 Cal. 422; 9 I. A. 8; *Sablat Hussain v. Mahomed Yusuf* (1883) 10 Cal. 663, 11 I. A. 31.

<sup>9</sup> *Sadek Hussain Khan v. Hashim Ali Khan*, (1916) 38 All. 627, 661 (P.C.).

<sup>10</sup> The presumption is, of course, rebuttable: *Bittolun v. Kauloon Balaun v. Lloyd* (1876) 25 W. R. 141, see proviso (3) to s. 81, above and foot-note thereto.

<sup>11</sup> *Mahomed Gouhar Ali Khan v. Haratunnissa* (1865) 2 W. R. 52, upheld on facts (by P.C.) (*Khajah*) *Habebuddin v. (Kajaj)* *Gouhar Ali Khan* (1873) 18 W. R. 23, *Koushan Jehan v. Lall Hussain* (1866) 5 W. R. 5, affirmed (by P.C.) *Khoparunnissa v. Roushan Jehan* (1876) 2 Cal. 184, 3 I. A. 291, 26 W. R. 36; *Muhammad Ismat Khan v. Fidaunnissa* (1881) 3 All. 723 (P.C.); *Fatullah v. Miran Sahib* (1864) 2 Bom. H. C. R. 257; *Mahomed Azmat v. Lall Begum* (1881) 8 Cal. 422, 9 I. A. 8; *Mahomed Baiker Hussain Khan Bahadur v. Shurfoonnissa Begum* (1860) 8 Moo. I. A. 136, 159, 3 W. R. (P.C.) 37.

## SECTION 225.

§ 5. *Adoption and Muhammadan Law.*

Adoption not known to Muhammadan law.

**225.** Subject to s. 226, below, paternity or maternity cannot be established in a Mussulman who purports to adopt another,<sup>1</sup> nor is the latter considered in Muhammadan law to be the child of the former.<sup>2</sup>

The Quran on adoption.

A form of adoption seems to have been in vogue in Arabia before the following verse from the Quran was promulgated -

Quran IV. 1-5.

"Nor hath He made your adopted sons your (true) sons. This (is) your saying in your mouths :<sup>3</sup> but God speaketh the truth, and He directeth the (right) way. Call (such as are adopted) the sons of their (real) fathers : this (will be) more just in the sight of God. And if ye know not their fathers, (let them be) your brethren in religion, and your companions : and it shall be no crime in you that ye ere (in this matter) : but that (shall be criminal) which your hearts purposely design for God is gracious (and) merciful."—Quran, IV., 1-5

Reason for abolition of adoption

The form of adoption prevalent in Arabia previous to Islam seems to have been mainly based on a sense of comradeship in arms, or of the common tie of bloodwit and blood-feud. It was this tie that continued to take the place of blood relation even in the early days of the Prophet's preaching -

Quran VIII, 73.

"They who have believed, and have fled their country, and employed their substance and their persons in fighting for the religion of God, and they who have given (the Prophet) a refuge (among them) and have assisted (him), those (shall be deemed) the one nearest of kin to the other" - Quran, VIII., 73.

Strengthening tie of blood.

This was abrogated by a later verse when the Prophet could enforce the new policy of preferring the tie of the family to the tie of war, -

Quran VIII. 76.

"Those who are related by consanguinity (shall be deemed) the nearest of kin to each other (preferably to strangers) according to the book of God" - Quran VIII. 76

And by the verse.

Quran XXXIII, 6

"Those who are related by consanguinity (are) nigher of kin the one of them unto the others, according to the book of God, than the other true believers, and the 'muhajirun.' " Quran, XXXIII., 6.

<sup>1</sup> *Muhammad Ali Akbar Khan v. Muhammad Ismail Khan* (1888) 10 All. 289, 340 *Jeswant Singh v. Jet Singh* (1884) 3 Moo. 1 A. 245, *Ghosh and Nandi Jan v. Faroo Jan* (1893) 20 L. A. 193, 199, 21 Cal. 149.

*Muhammad Umar Khan v. Muhammad Nazulus Khan*, (1911) 39 Cal. 118, 122, 39 L. A. 19, [1912] Mad. W. N. 77, 9 All. L. J. 137.

<sup>2</sup> Cf. s. 24 (5) & n. thereto

<sup>3</sup> I. e., mere unmeaning words.

These verses show the connection between acknowledgment of parent- SECTION 225.  
age, adoption and comradeship in arms, and the reason for the rule  
requiring the acknowledged child, when he is old enough, to consent to  
the acknowledgment of his parentage.<sup>1</sup> They also show that this rule of  
the law sprang from the same theory as that which gave birth to the rule  
relating to the "acknowledged heir" or the "heir by contract" (C. S. 634.  
below). It was the same policy that, on the one hand, replaced the tie  
of blood-feuds by that of blood relation, and, on the other, required that  
a disclaimer of parentage should be restricted by the imposition of heavy  
penalties, unless it be done to renounce a child that was the offspring  
of adultery,—a policy, by which, finally, kinship was not allowed to  
be created by the mere use of the words son and father. See *Quran*, IV  
4-5, quoted above.

Acknowledg-  
ment and com-  
panionship  
in arms.

Similarly, in England it has been held that adoption, in the sense of English law,  
is a transfer of parental rights and duties in respect of a child to another  
person; that their assumption by him, is not recognised by the law of  
that country, and a contract to maintain another's child as though it  
were the promiser's own, relieving the real parent from all liability and  
responsibility for its bringing up and maintenance, will not be enforced,<sup>2</sup>  
—though a relative or a stranger may place himself 'in loco parentis'  
towards a child, and certain legal consequences as between the parties  
result from that position.<sup>3</sup> See, however, the comment to s. 260, below.

226. Under the Oudh Estates Act,<sup>4</sup> every Muham-  
madan 'taluqdar,'<sup>5</sup> grantee,<sup>6</sup> heir, or legatee,<sup>6</sup> referred to  
in the Act, and every widow of such 'taluqdar,' grantee,  
heir, or legatee, with the consent in writing of her deceased  
husband, has, for the purposes of the said Act, power to  
adopt a son, whenever, if he or she were a Hindu, he or she  
might adopt a son. Such a power is exercisable only by  
writing duly executed and attested in the manner required  
by the said Act.

Oudh Estates  
Act:—  
Legislative  
power  
to adopt.

227. A convert to Islam from Hinduism may give  
Right to give  
a Hindu son  
in adoption.

<sup>1</sup> See s. 222 (3), above.

<sup>2</sup> *Humphreys v. Polak* (1901) 2 K. B. 853, (C. A.) In this case the illegitimate mother sued the adoptive parents for breach of contract to maintain the child.

<sup>3</sup> See *Re O'Hara* (1900) 2 Ir. Rep. 232, 241-244, per FitzGibbon, L. J.

<sup>4</sup> Act I. of 1860, s. 29. It applies only to the estates referred to in the Act.

<sup>5</sup> *I.e.*, one whose name is entered in the first, fifth, or sixth list, mentioned in s. 8 of the Act.

<sup>6</sup> *I.e.*, a person (other than a widow) who inherits property, or to whom property is bequeathed under the Oudh Estates Act.

SECTION 227. in adoption his son who is still a Hindu, or may authorize his being given in adoption.<sup>1</sup>

Adoption.

"Where the parties are Brahmans, not Rajputs, and 'dattahoma'<sup>2</sup> is essential, then," it has been observed, "possibly the father, after becoming Mahomedan could not sanction his brother to be present at the giving during the 'dattahoma.'"<sup>3</sup>

Law of adoption not part of inheritance or succession retained on conversion.

228. A convert to Islam from Hinduism, who alleges that he has, by the customs of his caste or community, retained the Hindu law of adoption, must prove it, and proof of the retention of the law of inheritance and succession does not imply that the law of adoption has also been retained.<sup>1</sup>

"Adoption," said Chandavakar, J., "is not necessarily inheritance or succession, although it leads to inheritance or succession. The Mahomedan law does not recognise adoption. The presumption is that as a necessary consequence of conversion to Mahomedanism, the law of adoption recognised by Hindu law and usage has been abandoned by the Girasias. Therefore, those who allege that the usage and law in question had been retained must prove it."<sup>4</sup>

<sup>1</sup> *Shankaraj Umashing v. Santabai* (1901) 25 Bom. 551, 555. A person professing Islam and yet giving his son in adoption as a Hindu is so opposed to Islam, that it might appear as though such circumstances would never arise. But cases apparently of still greater improbability have come before the Court, e.g., of a Muslima family which in matters of worship has adopted Hindu religion. *Aizwa Eiba v.*

*Munshi Sharaf Ahmad* (1913) 17 Cal. W. N. 121, (P.C.)

<sup>2</sup> *Dattahoma* is the "cerificial burning of the clarified butter in accordance with the practice of the Hindu religion." *Bai Gangadhar Tulak v. Shri Shrinivas Pandit* (1915) 39 Bom. 441, 452 (P.C.)

<sup>3</sup> *(Bai) Muchhrai v. (Bai) Hurbai* (1911) 35 Bom. 264; 13 Pom. L. R. 251, 256.

## CHAPTER VII.

### GUARDIANSHIP

#### § 1.—*Preliminary.*

**229.** (1) In accordance with Muhammadan law, minority, in the case of persons of either sex, continues during the period of life preceding the attainment of puberty; and a person who has not attained puberty is considered to be a minor.

(2) Under the Indian Majority Act and the Guardians and Wards Act, every minor of whose person or property a guardian<sup>2</sup> has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, is deemed to have attained his majority when he has completed his age of twenty-one years, and not before; . . . every other person domiciled in British India is deemed to have attained his majority when he has completed his age of eighteen years, and not before; but nothing contained in the Indian Majority Act affects—

- (a) the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption;
- (b) the religion or religious rites and usages of any class of His Majesty's subjects in India; or
- (c) the capacity of any person who before the said Act came into force had attained majority under the law applicable to him.

(3) In this Chapter unless there is anything repugnant in the subject or context, "a minor" refers to a person

<sup>1</sup> In England a minor may be adjudged of full age by Act of Parliament; his status cannot be changed in any other way: Halsbury, "Laws of England," XVII. 126. A person who is not a minor may, by acquiescing in being treated like one, estop himself from being considered of

full age. *Khalil Kishor Doss v. Begum Gannat Shah* (1868) 9 W. R. 571. As to the converse case see *Mahomed Bibi v. Dhanoojee* (1902) 30 Cal. 539, 545, and cases there cited.

<sup>2</sup> This does not include a guardian for the infant, see the Civil Procedure Code.

## SECTION 229. who has not attained the age of majority under the Indian Majority Act.

Absolute and qualified disabilities of minors.

Though the power of legal action possessed by minors is very limited, and their interests are carefully protected by law, since they are regarded as of immature intellect and imperfect discretion, the law does not impose upon them an absolute disability as regards all civil acts. There are matters in regard to which they are only under qualified disabilities. It has already been pointed out<sup>1</sup> that there is no specific provision of statutory law in British India placing minors, in express terms, under "a general incapacity to exercise the rights of citizenship and to perform civil duties"<sup>2</sup>

Capacity may vary at different ages—for different transactions.

Again, a person who is under the age of majority, may still have the power to perform some specified juristic acts, though such a power is generally given to him only on his attaining a fixed age, falling short of the age of full majority.

Even as regards the branch of law dealing with the custody of a minor's person different considerations prevail (under certain circumstances) at different ages. Thus, the Indian Majority Act emancipates the minor, as a rule, as soon as he attains 18 years of age, but if there is a guardian appointed by the Court, or his property is under the supervision of the Court of Wards, the age of minority is prolonged to 21 years.

English law.

Similarly, in England, "guardianship in socage" lasts only till the infant attains 14 years, after which age the infant may choose his own guardians.<sup>3</sup>

"Guardian."

230. In this Chapter unless there is anything repugnant in the subject or context, "guardian" means a person having the care of the person of a minor,<sup>4</sup> or of his property, or both his person and property.<sup>4</sup>

### 1. SCOPE OF THIS CHAPTER

Scope of this chapter.

It is not the object of this Chapter to state the general law of British India referring to guardians and wards: yet, where the general law is intermixed with the special provisions of Muhammadan law, it has been considered best to state the whole of the law, and not to give it piece-

<sup>1</sup> See s. 5A, above, and comment thereto.

<sup>2</sup> Cf Halsbury, "Law of England," XVII.

<sup>3</sup> 130.

<sup>4</sup> See ss. 232, 234, below.

<sup>5</sup> Sect. 230 is taken verbatim from s. 4 (2) of the Guardians and Wards Act VIII. of 1890 (referred to, in the foot-notes to this Chapter, as the

G. & W. Act). As to "guardians for marriage" see ss. 59, seq. above; and *Monian Bibi v. District Judge of Birkum* (1914) 20 Cal. L. J. 91. Generally, the word "guardian" standing alone means guardian of the person: *Rimington v. Hartley* (1880) 14 Ch. D. 630, 632, per Jessel, M. R.

meal; and the Guardians and Wards Act has, therefore, been frequently referred to at length. That Act leaves to the Court the choice of the person who should be appointed guardian, in the case of an application being made to it, fettering the discretion of the Court mainly with the object of seeing that the persons entitled, by the personal law of the minor, to be his guardians are not, without some good cause, deprived of that right.<sup>1</sup> The first point, therefore, to which attention has to be given, is to discover who the persons are that are entitled by Muhammadan law to be guardians.

## SECTION 230.

Guardians and Wards Act does not affect Muhammadan law as to persons primarily entitled to be guardians.

## 2. CLASSIFICATIONS OF THE LAW OF GUARDIANSHIP.

The law of guardianship applicable to Muslims in British India may be arranged under various categories. Thus the subject may be dealt with, successively, with reference to (1) guardians of the person; and (2) guardians of property. Or the subject may be divided in the following manner: The law relating to (1) guardians by operation of law; (2) guardians by testamentary appointment; (3) guardians appointed by other instruments; (4) guardians appointed by the Court.

Classifications based on  
1. Nature of guardian's authority.  
2. Source of his authority.

Whichever classification is primarily adopted, the subject has to be re-divided in accordance with the other category, and a certain amount of repetition is necessitated. On the whole it has seemed more convenient to follow, in the main, the second classification of the subject mentioned above, which depends on the source from which the guardian derives his authority, but even that classification has not been rigidly adhered to, sacrificing logical accuracy to convenience.

Arrangement of the Chapter.

## 3. GENERAL CONSIDERATIONS BEARING ON THE SUBJECT.

The following remarks of Professor Holland<sup>2</sup> may appropriately form the preface of any treatment of the subject: "The right of a tutor or guardian . . . is, of course, given to him not for his own benefit, but for that of his 'pupillus,' or ward<sup>3</sup> whose want of understanding he supplements, and whose affairs he manages. It is an artificial extension of the parental power, and may be conferred (1) by the last will of the

Nature of right of guardianship.

<sup>1</sup> Sir Courtenay Ilbert, in introducing the G. & W. Act, said: "Nothing can be further from my intention than to interfere with native customs or usages, or to force Hindu or Muhammadan family law into unnatural conformity with English law. . . . It is not intended by this Act to make any alteration in Hindu or Muhammadan family law." Sir R. K. Wilson has collected some interesting extracts from the discussions on the Act when it was first introduced: "Anglo-Muhammadan Law" s. 97. In another place the same author remarks that "the Act does not

require or permit the Court to subordinate the law to which the minor is subject, to the consideration of what will be for his or her welfare. Its plain meaning is exactly the reverse," *ib. p.* 180, see s. 262, below.

<sup>2</sup> "Jurisprudence," 157. They are quoted with the kind permission of the author. The numbers have been added by me.

<sup>3</sup> "The Lord's Wardship in Chivalry without account of profits was on the contrary for his own benefit."

## SECTION 230.

How conferred

parent,<sup>1</sup> (2) by a deed executed by him,<sup>2</sup> or (3) by a judicial act,<sup>3</sup> or (4) by devolution on certain defined classes of relatives,<sup>4</sup> or (5) may vest in a tribunal, such as the Court of Chancery.<sup>5</sup> According to some systems, the guardian cannot refuse to accept the office which is regarded as being of a public character.<sup>6</sup> In French law a 'subrogé tuteur' is appointed

Termination of authority.

by the family council as a check on the 'tuteur.'<sup>7</sup> The right terminates on the death of the tutor or ward, on the resignation or removal of the former,<sup>8</sup> on the marriage of the latter;<sup>9</sup> or his attainment of a certain age.<sup>10</sup> By the older Roman law a woman was under perpetual guardianship.<sup>11</sup>

Emancipation of ward.

Under those systems which release the ward at an early age, generally at fourteen in the case of a boy, and twelve in the case of a girl,<sup>12</sup> from the superintendence of a guardian, he may be placed for a further period under the lighter control of a 'curator,' whose duties cease when the ward attains the age of full majority.<sup>13</sup> Such curators, and the curators or committees of lunatics or persons interdicted as prodigals, are generally appointed by a court of justice.

Infringement of right of guardianship

"The right is infringed by any interference with the control of the tutor or curator over the person<sup>14</sup> or property of the ward, lunatic, or prodigal."

## 4. THE QURAN AND 'SUNNA' ON MINORS, ORPHANS, AND LUNATICS

The Quran's exhortations to be just and equitable.

The Quran contains the following precepts relating to minors and persons of weak intellect—

"And give the orphans when they come of age, their substance, and render them not in exchange had for good, and devour not their substance by adding it to your own substance: for this is a sin.

And if ye fear that ye shall not act with equity towards orphans (of the female sex), take in marriage such other women as please you.

And give not unto those who are weak of understanding the substance which God hath appointed you to preserve for them, but maintain them thereout, and clothe them, and speak kindly unto them.

<sup>1</sup> See ss. 257-260, below.

<sup>2</sup> "See Stat. 12 Geo II. c. 24, s. 8, as varied in favour of the mother by 19 & 20 Vict. c. 27."

<sup>3</sup> See s. 261, below.

<sup>4</sup> See ss. 233-244, below.

<sup>5</sup> Or the Court of Wards, see s. 261, below.

<sup>6</sup> Cf. s. 267, below.

<sup>7</sup> "Code Civile," art. 420.

<sup>8</sup> See G. & W. Art. ss. 38-42.

<sup>9</sup> Cf. s. 256, below.

<sup>10</sup> Cf. ss. 277, 278, below.

<sup>11</sup> Cf. s. 278, below.

<sup>12</sup> See s. 5A, above, and s. 278, below.

<sup>13</sup> The control naturally exercised by the

father over children after they have attained majority or puberty gives rise to moral obligations, though not always amounting to legal duties, yet hardly less dutifully observed.

<sup>14</sup> "On the writ of 'ravishment of ward,'" see 2 Inst. 410. "When the tutelary right has been vested in a Court, any infringement of it becomes a matter of public law. Thus interference with a ward of Chancery is treated as 'contempt of Court.'" *E.g. In re H's Settlement* [1900] 2 Ch. 260, a ward of Court was committed to prison because he "interfered with the Court's control" over himself, by marrying without its sanction.



And examine the orphans until they attain (the age of) marriage; SECTION 230. but if ye perceive they are able to manage their affairs well, deliver their substance to them; and waste it not extravagantly or hastily because they grow up. Let him who is rich abstain (entirely from the orphan's estate), and let him that is poor take (thereof) according to what shall be reasonable. And when ye deliver their substance unto them, call witnesses (thereof) in their presence: God taketh sufficient account (of your actions)."—Quran IV, 2 5

The following tradition traces the history of the guardian's duty: "Ibn-'Abbas said, 'When these revelations came down, *viz.* "Meddle not with the substance of the orphan, otherwise than for the improving thereof,"<sup>1</sup> and "Surely they who devour the possessions of orphans unjustly, shall swallow down nothing but fire into their bellies and shall broil in raging flames,"<sup>2</sup> all those who had orphans in their care went home, and separated their own food from that of the orphans, and also their water, fearful lest they might be mixed. Then, when the orphans left any of their meat or drink, it was taken care of, for them to eat afterwards, or spoil. Then this method was unpleasant to the orphans, and they mentioned it to the Prophet, then God sent down this revelation, "O Muhammed, they will ask thee concerning orphans, answer, to deal righteously with them is best, and if ye mix your things with theirs, verily they are your brethren"<sup>3</sup> Then they mixed their meat and drink together.'<sup>4</sup>

Traditions about guardianship of property.

**231.** Guardianship of the person is referred to in Muslim books on law as 'hizanat' or custody.

Guardian of the person: 'hizanat' or custody.

The right to 'hizanat' or custody must be distinguished from the duty to maintain, on which see the next Chapter.

**232.** The Muslim jurists seldom (if ever) contemplate any person being appointed specifically as the guardian of a minor's property, which is ordinarily assumed to be in the charge and under the control of the executor [or administrator]<sup>5</sup> of the minor's father. Executors may be ap-

Guardians of property in Muhammadan law

<sup>1</sup> *I.e.* Quran VI., 152.

<sup>2</sup> *I.e.* Quran IV., 9.

<sup>3</sup> *I.e.* Quran II., 221.

<sup>4</sup> *Miscat-ul-Masabih*, Book XIII. Ch. xvii, part 3; Mathew, II. 142-143. Compare with this Homer, *Iliad*, XXII. *ad fin.*, containing from the lips of Andromache, "the description of the utter and hopeless destitution of the orphan boy,

despoiled of his paternal inheritance and abandoned by all the friends of his father, whom he urgently supplicates and who all harshly cast him off."—Grote, *Hist.*, II. 123 Ch. XX.

<sup>5</sup> The Arabic word *wasī* includes executors as well as administrators. See the Chapter on Administration, below, *Ball.* I. 129, 685; II. 248.

SECTION 232. pointed to take charge of specific portions of the estate of the deceased.<sup>1</sup> The guardian of the minor's person is not necessarily the guardian of his property.<sup>2</sup>

**232A.** There are special "guardians for marriage" under Muhammadan law,<sup>3</sup> and it has been held<sup>4</sup> that the Guardians and Wards Act, s. 24, does not give to the guardian under the Act the power of disposing the ward in marriage.<sup>5</sup>

The right of contracting a minor in marriage inheres in a line of guardians different from those to whom the management of the minor's property and person are respectively entrusted and although the intervention of the guardian for marriage is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward.<sup>4</sup> See also ss. 59 and 230, above.

Joint  
guardians.  
Shiah law.

**233.** The 'Sharaya'-ul-Islam,' one of the most authoritative texts on the Shiah Ithna 'Ashari law, does not seem to contemplate joint guardians of the person;<sup>6</sup> there does not seem to be any indication of the view of the Sunni authorities on the point.

Sunni law.

Appointed by  
Court.

It will be observed that the Guardians and Wards Act, s. 15 (1) contemplates the possibility of the personal law of a minor not permitting the appointment of joint guardians even by the Court. See s. 263, below.

<sup>1</sup> Cf. G. & W. Act, s. 15 (5): "If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties;" the Hanafi Jurists find dissenting views on this point: Bail, I. 671.

<sup>2</sup> Cf. G. & W. Act, s. 15 (4): "Separate guardians may be appointed or declared of the person and of the property of a minor."

<sup>3</sup> See ss. 59-68, above. See also the gloss to the *Bahr-ur-Raiq*, cited *Atmanessa v. Abdul Nohhan* (1916) 43 Cal. 407, 480, 481.

<sup>4</sup> *Monijun Bubi v. District Judge of Birbhum* (1914) 42 Cal. 351; 20 Cal. I. J. 91, 94; Cf. *In re H's Settlement* (1900) 2 Ch. 260, noted in the footnote to the third head of the Comment to s. 230.

<sup>5</sup> The words in s. 24 of the G. & W. Act are: "Such other matters as the law requires."

<sup>6</sup> Bail. II. 96, where it is suggested that "where there is a combination of persons equal in degree . . . the right to the infant's custody is to be determined by casting lots between them" This seems a crude method, but it is a device that has not been scorned by the Legislature of British India: see *Punjab Jaws Act*, s. 9, cited under s. 552, below; and it may often be the means of preventing parties from rushing to the Court merely because there is no *modus vivendi* ready at hand. Where the intervention of the Court is called in aid, under the G. & W. Act, s. 17 (1) the Court may apparently choose the person whose appointment would be most in the interests of the child; Cf. *Bindo v. Shan Lal* (1906) 29 All. 210; *re Gulbai & Lulabai*; (1907) 32 Bom. 50. But see *Andiappa v. Nallendra* (1915) 39 Mad. 473.

**234.** The Muhammadan law relating to the guardian-ship of persons of unsound mind, is, with the necessary changes, to the same effect as the law relating to the guardianship of minors.<sup>1</sup>

Guardianship  
of persons of  
unsound mind.

The sections of this chapter, however, have been framed with reference only to minors, as the authorities refer in direct terms only to minors. In the case of lunatics the law in British India is in part laid down in Legislative enactments and where the person exercising control over the person or property of another derives his authority from the Court, he may obtain special directions from the Court at the time of his appointment, or subsequently.<sup>2</sup>

Enactments  
relating to lunatics.

## § 2.—Persons Entitled to be Guardians by Law.

### (1) Sunni Hanafi Law.

#### (a) Custody during Infancy: the Mother and Females.

**235.** According to Hanafi law the mother<sup>3</sup> is entitled<sup>4</sup> to the custody of a male child<sup>5</sup> until he attains the age of seven years;<sup>6</sup> and of a female child<sup>5</sup> until she attains puberty.<sup>6</sup>

(Hanafi law.)  
Mother  
guardian  
during child's  
infancy.

Where the husband and wife are living together, the child must stay with them, and the husband cannot take the child away with him, nor can the mother, even during the period that she is entitled to the custody of the child, take it away without the permission of the father.<sup>7</sup> Where the child is with one of its parents, the other is not to be prevented from seeing and visiting it.<sup>8</sup>

<sup>1</sup> See Quran IV., 4, quoted in the comment to s. 230, above; Hed. 524-525; Bail. I., 4, 208, 209, 403, 530, 552, 660; Bail. II., 4, 7, 8, 107, 208, 214, 248, 249. See also *Musammât Mehr Bibi v. Chanan Din* (1917) 52 Punj. Rec., 209; and *Umet Begam v. Kesho Das* (1908) 30 All. 462 which latter case must, however, be read subject to *Matadin v. Ahmed* (1911) 84 All. 213 (p.c.).

<sup>2</sup> In *Muhammad Kahu Khan v. Saifulla Khan* (1884) 22 Punj. Rec. 103 (No. 91), questions arose with reference to a lunatic's rights of inheritance and his representation in a suit based on them.

<sup>3</sup> In England, prior to, and apart from, the Guardianship of Infants Act, 1886 (49, 50 Vict. c. 27, s. 5), the mother had no right, as against the father, with respect to the control and custody of the child; Halsbury, "Laws of England," XVII., s. 254, p. 108.

<sup>4</sup> As to her rights as against the husband of the minor, see s. 256, below; and *Nur Kadir v. Zulckha Bibi* (1885) 11 Cal. 649; *Korban v.*

*King-Emperor* (1904) 32 Cal. 444, cf. s. 249 (3), below, and footnote thereto.

<sup>5</sup> Bail. I. 431, 438; Hed. 131; *Zarabibi v. Abdul Rezzak* (1911), 12 Bom. L. R. 891.

*Yamamandi v. Mutsaddi* (1913) 15 L. 4, 73-3.

<sup>6</sup> Cf. s. 234, above.

<sup>7</sup> Bail. I. 435; Hed. 130. This would follow from the general rule that the wife's movements during coverture are under the control of her husband: s. 24 (2), above. But Bail. I. 435 calls attention to the fact that the texts do not expect the child to be taken out of the place where the marriage took place. This is probably a survival of Pre-Islamic tribal custom having the force of law. It may have some application in India, if either parent desires to prevent the other from removing the child to such a distance as to exclude the former from visiting it. Cf. the English Guardianship of Infants Act, 1886, ss. 5 & 9.

<sup>8</sup> Bail. I. 435.

## SECTION 235

Natural guardian, strict sense of the term

The person who is entitled by the general law to the custody of the child is frequently referred to as the "natural guardian" to distinguish him from a guardian appointed by the Court, and from a testamentary guardian. "Guardianship by nature" is, however, a term of art in English law, and means in its strict sense, "the natural paternal jurisdiction between the age of discretion and the age of 21 which the law will recognise" over the heir-apparent.<sup>1</sup> The expression is employed now in England in the same unrestricted sense as in India.<sup>2</sup> The father's and mother's right to the custody of a child of tender age has been referred to as "guardianship for nurture."<sup>3</sup> It is to be observed, that "in the laws of England there are three manners of guardianship, viz., by common law, by statute law, and by custom. By the common law there are four manners of guardians, viz., guardian in chivalry, guardian by nature, as the father of the eldest son, guardian in socage, and guardian 'per cause de nurture.' According to the strict language of 'our' law only an heir-apparent can be the subject of guardianship by nature."<sup>4</sup>

It has been said that under Muhammadan law the mother is not the natural guardian of her children's property,<sup>5</sup> though she is often treated as such. See s. 259, below.

(Hindu law.)  
Persons entitled to custody in the absence of the mother.

**236.** In the absence, or on the disqualification, of the mother, the custody of the child—until, being a male, he has attained the age of seven years, or being a female, she has attained puberty,<sup>6</sup>—belongs to the following persons in the order of priority in which they are mentioned below,—

- (1) the mother's mother ;<sup>7</sup>
- (2) the father's mother ;<sup>8</sup>
- (3) the mother's grandmother how high-soever ;
- (4) the father's grandmother<sup>8</sup> how high-soever ;
- (5) the full sister ;
- (6) the uterine sister ;<sup>9</sup>

<sup>1</sup> Per Bowen, L. J., in *Agar-Ellis*; *Agar-Ellis* v. *Loxley* (1883) 24 Ch. D. 317, 335, 336.

<sup>2</sup> *Id.* Halsbury's "Laws of England" XVII, s. 293, p. 122.

<sup>3</sup> Halsbury's "Laws of England," XVII, s. 255, and per Lord Chancellor King, "The father is entitled to the custody of his own children during their infancy not only as guardian by nurture but as guardian by nature." *Ex parte Hopkin*, (1732) 3 P. Wms. 154.

<sup>4</sup> Co. Litt. 886 Harg. aa. 12, 13, quoted "Simpson on Infants" (3rd Ed., 1909) 105, 106.

<sup>5</sup> Per Rampini and Pratt, JJ., *Mahna Bibi v. Banker Behari Bhusu* (1902) 29 Cal. 473.

<sup>6</sup> Cf. s. 234 above, Bail. I. 431.

<sup>7</sup> So the maternal grandmother has, during the period of life mentioned in s. 236, priority over the father. *Bahadur Ali v. Mussumat Bai* [1910], 15 Panj. Rec. 154, (No. 48) *Bhoocha v. Elahi Bai*, (1885) 11 Cal. 574 failing the father's mother, the mother's mother's mother would be entitled: Bail. I. 452.

<sup>8</sup> See comment.

<sup>9</sup> See comment.

- (7) the daughter of the full sister, how low-soever ; SECTION 236.  
 (8) the daughter of the uterine sister, how low-soever ;  
 (9) the full maternal aunts, how high-soever ;  
 (10) the uterine maternal aunt,<sup>1</sup> how high-soever ;  
 (11) the full paternal aunt,<sup>1</sup> how high-soever.

The inclusion here of the paternal grandmother and paternal aunt <sup>2</sup> Paternal grandmother (second and eleventh in the list above) is anomalous, ... the principle in this kind of guardianship being that the custody of an infant belongs of right to its mother's relations ... But if the paternal aunt and grandmother are not mentioned here by mere inadvertence, there is no reason why the consanguine half-sister should not come in between the uterine sister (sixth in the list above) and the daughter of the full-sister (seventh) and similarly the other consanguine half-relations (half-sister of the father, etc). <sup>3</sup> Consanguine half-sister, and aunts.

The effect of this section, it will be noticed, is that if before the age at which the father is entitled to the custody of his child, the mother dies, then the nearest female relation is entitled to the same privilege as the mother;—proximity being considered on the same principles as for guardianship for marriage and for succession, viz. (descendants<sup>4</sup> first), then ascendants, and finally collaterals. The influence of 'qiyas'<sup>5</sup> or analogy in the development of Muhammadan law is evident in the similarity of these principles. The rules by which the mother's rights of guardianship devolve are analogical to the rules by which the father's rights devolve, and these last again are based on the Pre-Islamic law of succession.<sup>6</sup> <sup>7</sup> Devolution of mother's right to custody. <sup>8</sup> Analogy of law of succession.

**236A.** The father has no power to appoint a testamentary guardian of his minor child of the age referred to in s. 236, above, so as to derogate from the rights of the persons therein mentioned to act as guardians.<sup>7</sup> <sup>9</sup> Testamentary guardian.

**237.** In the absence, or on the disqualification, of the mother and the females mentioned in s. 236, above, the father and the males mentioned in s. 239, below, are entitled <sup>10</sup> (Sunni law). <sup>11</sup> Right of males if no female entitled

<sup>1</sup> See comment.

<sup>2</sup> Ball, I. 432 (l. 8).

<sup>3</sup> Cf. Ball, I. 432, (ll. 8-11) and see the translation from the *Shari'ah-Vagaya* in the comment to s. 239A, below; see also the *Mishaj-at-Talibin*, a Shafi'i text.

<sup>4</sup> Minors cannot, but lunatics may, have

descendants whose right to guardianship would have the first place.

<sup>5</sup> See the Introductory Chapter.

<sup>6</sup> The matrilineal system was not unknown in Arabia.

<sup>7</sup> *Bahadur Ali v. Mussamat Bivi* (1910) 51 Punj. Rec. 154 (No. 48).

SECTION 237. to the custody of the child;<sup>1</sup> provided that they are not otherwise disqualified<sup>2</sup> from taking charge of the child.

(b) *Custody after Infancy. The Father and Male Agnates.*

(Sunni law.)  
Father's right  
to custody  
when it arises.

**238.** The father becomes entitled to the custody of a male child after he has attained the age of seven years;<sup>3</sup> and of a female child<sup>4</sup> after she has attained puberty.<sup>5</sup>

(Sunni law.)  
Right to  
custody in  
absence of  
father.

**239.** In the absence of the father, and subject to s. 239A, below, the following persons are entitled, (in the order of priority in which they are mentioned below, to the custody of a child,<sup>6</sup> after it has attained the age at which the father becomes entitled to its custody,—

- (1) the nearest paternal grandfather;<sup>7</sup>
- (2) the full brother;
- (3) the consanguine half-brother;
- (4) the full brother's son;
- (5) the consanguine half-brother's son;
- (6) the full brother of the father;
- (7) the consanguine half-brother of the father;
- (8) the son of the father's full brother;
- (9) the son of the consanguine half-brother of the father.<sup>8</sup>

Testamentary  
guardian.

**239A.** It is doubtful whether the father has any right to appoint a testamentary guardian of the person of his minor children so as to derogate from the rights of the paternal grandfather [or any of the other relations mentioned in s. 239, above] when he is living and competent to act as guardian.<sup>9</sup>

Whether  
guardian  
appointed  
by father's  
will takes  
precedence  
over grand-  
father.

The question whether under strict Muhammadan law the father's "executor" (*i.e.*, guardian appointed by the will of the father) has priority over the grandfather, is doubtful. In Baillie, I., 665, the executor is defined as "an 'ameen' or trustee appointed to superintend,

<sup>1</sup> Bail. I., 433.

<sup>2</sup> Cf. *cf.* s. 241, below.

<sup>3</sup> *Idu v. Amir* (1886) 8 All. 322; H.J. 129.

Bail. I., 434.

<sup>4</sup> Cf. s. 234, above.

<sup>5</sup> Hed. 129; Bail. I., 434.

<sup>6</sup> Cf. s. 234, above.

<sup>7</sup> The husband of a minor girl's sister is not entitled to be appointed guardian of the person or property of the minor: *Asghar Ali v. Hamida Begum* (1914) 36 All. 280; (*Musammat*) *Hurunnissa Biber, re*, (1913), 18 Cal. W. N. 853.

<sup>8</sup> Hed. 138; Bail. I., 433.

<sup>9</sup> See ss. 237, 238, below.

protect and take care of his property and *children* after his death,"<sup>1</sup> and SECTION 239. Macnaghten<sup>2</sup> refers to the following passages from the 'Sharh-i-Viqaya,' viz., "He to whom the father has entrusted the disposal of his family and fortune, is his executor," and "The guardianship of a minor belongs first to the father, next to his executor, next to the paternal grandfather."

The question is unlikely to arise in British India in this form. Assuming that the pure Muhammadan law is doubtful, should the matter come before the Courts they would, no doubt, act in accordance with justice, equity and good conscience, no less than with the rule laid down in the Guardians and Wards Act by giving great weight to the desires of the deceased parent. In cases likely to cause disputes it would be desirable to obtain the Court's sanction or for the testamentary guardian to get himself declared or appointed as such.

The law as to the right of custody is thus stated in the 'Sharh-i-Viqaya':<sup>3</sup> "For the education of a minor (1) the *mother* has the first claim, but she cannot be compelled to undertake its custody [in case she refuses to do so, for the refusal probably be on account of her inability to undertake it; but where there is no one else to undertake it, she should be compelled] whether she has separated from her husband or not. And when the mother is not available, i.e., she is either dead, or has married a stranger, [or is otherwise disqualified from acting as a guardian in consequence of her renouncing Islam, or getting depraved in character, and the like] then (2) the *maternal grandmother* is entitled, how high-soever she be, [for this reason that the right is inherent, in mothers, so that] if the mother is absent, it will go to the mother's mother, and if the mother's mother is absent, it will go (3) to the *father's mother*, and then (4) to the *sisters*, the full sisters are entitled first then the uterine, and then the consanguine, and (5) then the *maternal aunt* in the same priority, [and according to one tradition the maternal aunt is preferred to the sister, for the Prophet said that the mother's sister takes the place of the mother . . .], then follow the full sisters of the mother and the uterine half-sisters, the uterine half-sister of the mother, and then the consanguine half-sisters of the mother; [for this reason that in this matter the mother has the prior right, and consequently the relations through her are given

'Sharh-i-Viqaya,' Persons entitled to custody.  
1. Mother.

2. Mother's mother.

3. Father's mother.

4. Sister.

5. Maternal aunt.

(i) Full sister of the mother.

(ii) Uterine half-sister.

(iii) Consanguine half-sister.

6. Paternal aunt.

(i) Full.

(ii) Uterine.

(iii) Consanguine.

<sup>1</sup> This passage does not occur in the *Fatawa 'Alamgiri* as is pointed out in Bail. I. 665 n. See also *Fatawa 'Alamgiri*, Book on *Talaq*, Ch. XVI, on *Hizanat*, corresponding to Bail. I. 433 and consisting of an excerpt from the *Kaif*.

<sup>2</sup> Sixth precedent on guardians, p. 310. See also Case 1, p. 304.

<sup>3</sup> *Sharh-i-Viqaya*, Book on *Talaq*, Ch. on *Hizanat*, Vol. II, p. 168 (Lucknow Ed. 1313 A.H.). The portions enclosed in square brackets are from *Findat-ul-Ri'aya*, a commentary on the *Sharh-i-Viqaya* (which itself consists of a commentary on the *Viqaya*. *Sharh* means commentary).

**SECTION 239.** preference over those on the father's side], then (6) the *sisters of the father*, full, then uterine, then consanguine.

Freedom.  
Marriage.  
Falling women  
agnates—

1. Father.
2. Paternal grand-father
3. Full brother.
4. Consanguine half-brother.
5. Sons of full brother
6. Sons of consanguine half-brother.

"And this is on the condition that the women are free; for a slave and 'umm-i-valad' are not entitled to custody [as they have no leisure from their service], and if a woman marries one who is not prohibited from marrying the minor, that woman loses her right of custody, but if such a marriage is dissolved, then the right reverts to that woman. If there is no woman either from the paternal or maternal side, then the right of bringing up is in the agnates in the order of priority mentioned in the chapter on inheritance, [that is to say the father comes first, then the paternal grandfather how high-soever, then the full brother, then the consanguine<sup>1</sup> half-brother, then the sons of the full brother, then the sons of the consanguine half-brother, and, similarly their descendants how low soever, then come the paternal uncle, and then the paternal uncle's son]. But a female minor will not be under the guardianship of an agnate who is not prohibited from marrying her, e.g., her emancipator or the son of a paternal uncle, nor one depraved in character."

#### (2) *Shiah Law.*

##### (a) *Parent's Right to Custody*

(Shiah law.)  
Mother's right  
to custody in  
infancy

**240.** According to Shiah Ithna 'Ashari law, the mother<sup>2</sup> has the right to the custody of a male child<sup>3</sup> until he attains the age of two years;<sup>4</sup> and of a female child<sup>5</sup> until she attains the age of seven years.<sup>6</sup>

In the 'Da'iyam-ul-Islam' (a Shiah Isma'ih authority), however, it is stated that the mother has the prior right to the custody of a child (of either sex) till it is able to take care of itself, so that it can eat, drink and dress without the help of others; and that this happens about the age of 7 to 8 depending upon the intelligence of the child, and upon its capacity to take care of itself.<sup>7</sup>

(Shiah law.)  
Father's right  
at later age.

**241.** After the child<sup>3</sup> attains the age mentioned in the last section, the father has, in Shiah Ithna 'Ashari law, the right to the custody of the child.<sup>8</sup>

<sup>1</sup> Uterine brother/sister of course not agnates and so had no place in the present list.

<sup>2</sup> As against the opinion of the other *Ik'ham-ul-Bayn* (1884) 7 Cal. 141, and see note to s. 212, below, also *Layla Begum v. Mahomed Amir Khan* (1887) 11 Cal. 615 (*obiter*).

<sup>3</sup> Cf. s. 231, above.

<sup>4</sup> *Ibid.* 11, 95, cf. s. 231, above.

<sup>5</sup> *Ibid.* Two other opinions are mentioned, fixing the age respectively at ten years, and at puberty, but the opinion said to be "more agreeable to traditional authority" is seven years.

<sup>6</sup> *Da'iyam-ul-Islam* (Notes).

<sup>7</sup> *Ibid.* 11, 95; *Re Petition of Mahomed Amir Khan, Layla Begum v. Mahomed Amir Khan* (1887) 11 Cal. 615.



**242.** In the absence of either the father or the mother, the other parent has the right to the custody of a minor child,<sup>1</sup> whatever its sex and age.<sup>2</sup> SECTION 242.  
(Shiah law.)  
Survivor of  
parents.

Hence the maternal grandmother cannot, if the parties are governed by Shiah law, claim the custody of a female child 3½ years old, during the life-time of the father : *Illustration.*

(b) *Custody in the Absence of Parents under Shiah Law*

**243.** In the absence of both parents, the father's father is entitled to the custody of the children.<sup>1</sup> (Shiah law.)  
Father's father.

**244.** In the absence of both parents, and of the father's father, it is doubtful who are preferentially entitled to the custody of the children.<sup>1</sup> (Shiah law.)  
Persons entitled  
after  
grandfather.

The 'Sharaya-ul-Islam' mentions the following cases though some doubt is expressed as to all of them, viz. (1) The consanguine half-sister is preferred to the uterine half-sister. (2) The paternal grandmother is preferred to the maternal grandmother. (3) The grandmother is preferred to the sister. (4) The paternal and maternal aunts are equally entitled. It would seem that these preferences can only serve as guides to the Court in selecting the guardian, without fettering its discretion.

#### SUMMARY OF THE PRINCIPLES OF SUNNI AND SHIAH LAW RELATING TO THE RIGHT OF GUARDIANSHIP

*Custody under Sunni law.* (1) In early years the female relations are entitled to the custody of the child, and the first one so entitled is, of course, the mother. (2) Then the male agnates commencing with the father are entitled. (3) Failing qualified male agnates, the Court must appoint a female as guardian to a female.

*Custody under Shiah law.*—(1) The first right is that of the parents, with priorities between them on the basis that the mother should be entitled during infancy, and later on the father. (2) Failing the parents, the father's father is entitled. (3) Failing the father's father, the other relations are entitled with some doubt as to their priorities.

<sup>1</sup> Cf. n. 234, above.

<sup>2</sup> Ball II, 95; *Re Elrahim M. Hassan Sher-bano v. Aybi* (1908) 11 Bom. L. R. 75. *Davar, J.*, held in proceedings under the Criminal Procedure Code, s. 491, that the mother was not deprived of her right to the custody of the child, as there was no specific appointment of guardians

by the will of the father, he left the question open whether even such specific appointment when arbitrarily and capriciously made, could deprive the mother of her right of guardianship.

<sup>3</sup> *Salmunnisa v. Suddat Hussain* (1914) 36 All. 466.

<sup>4</sup> Ball II, 95; cf. 234, above.

**SECTION 244.** *Guardianship of Property under sunni law.* (1) As to the person of a minor very remote blood relations are also entitled to be guardians. (2) As to the property of the minor, only the father and grandfather, and persons appointed by them, are entitled.<sup>1</sup>

*Guardianship of Property under Shiah law.*—Only the father and grandfather, and persons appointed by them, are entitled to be guardians either of property or of the person.

It may be conjectured that the pre-Islamic custom recognised no distinction between the two classes of guardians and that Islam introduced the restriction against remote relations being in charge of the property. The injunctions of the Qur'an have been interpreted by the Sunni authorities as referring to guardianship of property and not to the custody of the person; hence the pre-Islamic rules about guardianship of the person have remained practically undisturbed, so far as the Sunni law is concerned.<sup>2</sup> The Shiahs make no distinction between male agnates and females in guardianship any more than in inheritance.

### § 3.—*Disqualifications: Loss of Right of Guardianship.*

#### (1) *General Disqualifications.*

##### (a) *Age.*

Minor  
incompetent.

**245.** A minor is incompetent to act as guardian of any minor other than his own wife or child.<sup>3</sup>

Muhammadian law disqualifies a minor from acting as a guardian for marriage<sup>4</sup> or as executor, though it is not quite clear whether, while a minor acts in the capacity of executor, and until he is removed, his acts are void or operative. The current opinion is that they are not void.<sup>5</sup>

##### (b) *Religion.*

Preference to  
Muslim  
parent.

**246.** Subject to s. 248, below, if either parent is not a Muslim, the other is entitled to the custody of the child, whatever its age.<sup>6</sup>

Non-Muslims  
disqualified.

**247.** Subject to s. 248, below, no person who is not a Muslim is entitled, under Shiah law, to the custody of a child.<sup>7</sup>

Caste  
Disabilities  
Removal Act.

**248.** *Quære*, whether the provisions of s. 246 and 247,

<sup>1</sup> U. I. *Abul Amir & Ash Behari Pat* (1880) 6 Cal. 1, B. 413 (uncle cannot be guardian of property).

<sup>2</sup> See the Introductory Chapter, above, on the *Sunnat-ul-taqir*, and pre-existing customs.

<sup>3</sup> G. & W. Act, s. 21, cf. s. 224 above. In

Hindu joint families a managing member may act as guardian for a member of that family, *ibid*.

<sup>4</sup> Bail. I. 47; II. 4.

<sup>5</sup> Bail. I. 669; II. 4, 248-249.

<sup>6</sup> Bail. II. 95. Cf. s. 234, above.

<sup>7</sup> Cf. ss. 234, 246, above.

above, are abrogated either entirely, or in so far as they affect SECTION 248. the right of apostates to the custody of children, by the Caste Disabilities Removal Act, XXI. of 1850.<sup>1</sup>

The question in this section involves the point whether the right to the custody of a child is such a "right" as is contemplated by Act XXI of 1850. It has been held that the appointment of a guardian to a minor is not a matter of private right "as between the parties, and that, therefore, it is not a question that can be settled by reference to arbitration."<sup>2</sup> Moreover, Act XXI of 1850, in its terms, applies only to those who have renounced or been excluded from the communion of religion, or been deprived of caste, and cannot therefore apply to one who is born a non-Muslim.<sup>3</sup> Besides, where an apostate is the person that, but for his change of religion, would be entitled to be the guardian, is it still in the discretion of the Court to appoint another person, on the strength of the Guardians and Wards Act, s. 17 (2), which requires the religion of the minor to be considered in the appointment of guardians? The Courts, as a rule, have not troubled themselves about such technical details, but, in cases of doubt, have fallen back on the principles that the paramount consideration to be regarded is that of the welfare of the ward.<sup>4</sup> On this point, however, see the comment to s. 262, below.

### (2) Disqualifications Affecting Females.

**249.** The mother, or any other female who would otherwise be entitled to the custody of a child,<sup>4</sup> loses that right in Muhammadan law— (1) if she is immoral, or has committed adultery,<sup>5</sup> or some criminal offence;<sup>6</sup> or (2) if

Mother and females when disentitled to custody

<sup>1</sup> Act XXI of 1850 is given in full in the comment to s. 1, above. In the G. & W. Act, s. 17 (2) the religion of the minor is mentioned merely as one of the considerations to be regarded in the appointment of a guardian, but on the other hand in the first paragraph of the same section, "consistency with the law of the minor," is insisted upon. See s. 262, below.

<sup>2</sup> *Mahadeo Prasad v. Baideshi Prasad* (1908) 30 All 147.

<sup>3</sup> The point was raised in *Lakshman v. Abdulla* Bom. H. Ct., O. O. C. J. Judgment delivered by Bauman, J. on 11th January 1917 (unreported). The Judgment does not refer to the contention that the Act applies to non-Muslims as well as apostates, as it became clear in the course of argument that it did not apply, but the decree read with the pleadings clearly shows the conclusion at which his Lordships arrived.

<sup>4</sup> In *Budlo v. Sham Lal* (1896) 29 All. 210 maternal grandmother appointed in preference to father though it was conceded that "there was nothing against the father" on the ground that the girl could be happier with her grandmother, reversing the lower Court—*see quere*: see *Anthuppa v. Nathunarra* (1915) 39 Mad 473, which descends from *Budlo v. Sham Lal*; *Re Gulabai a Lalai, Dhakibai* (1907) 32 Bom. 50.

<sup>5</sup> *Rao T. Lal, Abasi v. Duane* (1878) 1 All. 298 (prostitute). In *Musunnat Shahjehan Begum v. Dattul Munia* (1850) 5 S. D. A. (S. W. P.) 39, custody was given to an unmarried female living with a Christian. In England the father's adultery does not disqualify him, if he does not bring the child into contact with the woman: *Re Greenhill* (1836) 1 A. & E. 610.

<sup>6</sup> *Ch. G. & W. Act*, s. 19 (1).

SECTION 249, she is incapable of taking care of the child;<sup>1</sup> or (3) if she marries a man who is not related to the child within the prohibited degrees;<sup>2</sup> provided that after the dissolution of such a marriage, her right to custody revives,<sup>3</sup> or (4) subject to s. 248 above, if she apostatizes from Islam.<sup>4</sup>

The Guardian and Wards Act, s. 41 (1) (d) and (e) seems to assume that the father's and husband's rights alone revive after once being lost in favour of another. It may be that the Act wished to avoid that the custody of the child should be changed after being once fixed, save in the two cases specially excepted; or (as is more likely) that it was drafted on the assumption that no other person had a legal right to custody.

\* *Pardanishin* 'as guardian of property.

**250.** A woman is not disqualified from being the guardian of a minor's property, because she is a '*pardanishin*.'<sup>6</sup>

In view of the important rights relating to guardianship that the mother has in Muhammadan law, the proposition given above might seem too obvious to be inserted here; but, it will be remembered, that Muhammadan texts refer to the mother merely in regard to the guardianship of the person. Compare s. 259, below.

### (3) *Disqualifications Affecting Males.*

Male within prohibited degrees cannot have custody of female.

**251.** No male is entitled to the custody of a female minor,<sup>7</sup> who is not related to her by consanguinity<sup>8</sup> within the prohibited degrees,<sup>9</sup> or who is a profligate.<sup>10</sup>

<sup>1</sup> Cf. G. & W. Act, s. 34 (b) (c) (d) and (e). Bail J 131. "A person is not worthy to be trusted, who is continually going out, and leaving her child home." Cf. *Durr-ul-Mukhtar*, 80 *Jamiatunnayya Isha* v. *Hajjuddin* (1911) 10 Ind Cas. 901. In England, parents lose their right if they have abandoned or deserted the child, cf. Halsbury, "Laws of England," XVII, s. 246.

<sup>2</sup> As in *Bhambha v. Elahi Bux* (1885), 11 Cal. 571. *Everdeen v. Kapp* (1884) 10 Cal. 15. *Bodhan Bibee v. Fuzululloh* (1873) 20 W. R. 111. Bail J. 432; Hed 138, but not by divorce *Zarabibi v. Abdul Razzak* (1910) 12 Bom. L. R. 891.

<sup>3</sup> See comment.

<sup>4</sup> Bail J 132, Hed 139. For the Shari Law see s. 246, above. The G. & W. Act, s. 17, mentions the religion of the minor as one of the considerations to be regarded in appointing or desisting a guardian: see s. 262 below.

<sup>5</sup> Cf. s. 251, above.

<sup>6</sup> *Lacnicot Kumar v. Gundappa Pundarik* (1911) 38 Cal. 187.

<sup>7</sup> *Asghar Ali v. Hamida Begum* (1914) 36 All

280. *Mussumat Hurunnessa Bibee, re*, (1914) 18 Cal. W. N. 854. In the latter case Chaudhury, J., cites *Law Lex*.

<sup>8</sup> See ss. 26 *et seq.*, above.

<sup>9</sup> Hed 118, 139, Bail J 433. The husband of a minor girl's sister is not entitled to be appointed guardian of the person and property of the minor. *Asghar Ali v. Hamida Begum* (1914) 36 All 280. (*Mussumat Hurunnessa Bibee, re*, (1914) 18 Cal. W. N. 854. Cf. the similar restriction as to females, s. 249 (4), above.

<sup>10</sup> Bail J. 433 (last line), 434 (par. 4). The Muhammadan Law is fairly definite as regards profligates, the *Qazi* having jurisdiction to subject them to inhibition. But in British India those rules can have hardly any operation. The Courts in England may deprive the husband of his right to custody, if he has been convicted of an aggravated assault upon his wife, or has deserted her. Summary Jurisdiction (Married Women) Act, 1895 Cf. also the Prevention of Cruelty to Children Act, 1894, s. 6, by which the child may be taken away from both parents.

The Shiah law, it will be remembered, does not recognise any SECTION 251. guardians, as of right, except the parents and grandfather. It is submitted, that there being no special mention of this disqualification either in the Shiah books or in the Guardians and Wards Act, the Court, in appointing a guardian amongst Shiabs, will not consider this rule as implying absolute disqualification, though it may consider it in choosing from rival claimants.

**252.** Where there is no male agnate entitled to the <sup>Court of Court</sup> custody of a female,<sup>1</sup> who has attained puberty,<sup>2</sup> any <sup>to appoint</sup> female may be appointed by the Court as her guardian. <sup>to male</sup> <sup>it is</sup> <sup>order to be</sup> <sup>guardian of</sup> <sup>female</sup>

The Court is required by the Guardians and Wards Act, s. 17, to be guided, in appointing or declaring a guardian, by what appears to be for the welfare of the minor "consistently with the law to which the minor is subject." See the comment to s. 251, above.

The restriction imposed by the rule of Hanafi law given in s. 252, is of the same nature as that imposed by Act XI. of 1858 (s. 27) and Act XX. of 1864 (s. 31), which governed the law of guardians and minors prior to Act VIII. of 1890. By the said Acts (now repealed), only a female could be appointed the guardian of a female; which, it will be observed, went beyond<sup>3</sup> the Hanafi law, inasmuch as the restriction imposed by the latter is only against such males as are not within the prohibited degrees, and it is only when there are no such males that the exclusive right is given to females.

#### (4) *Disqualifications Affecting Parents.*

**253.** The Court will not interfere with the father's <sup>father when</sup> guardianship of his children except on the ground<sup>4</sup> of (a) <sup>disqualified.</sup> his unfitness in character and conduct; <sup>5</sup> (b) unfitness in external circumstances; <sup>5</sup> (c) waiver of his rights; <sup>3</sup> (d) agreement; <sup>5</sup> or (e) the father being out of jurisdiction, or intending to go out of it.<sup>5</sup>

<sup>1</sup> Ball, l. 435, n. 1, suggests that the same rule must apply to a male child who is born in *zina*, and whose paternity is not established in anyone; for he has no relations in law. But the Hanafi law recognises the mother's relation to her illegitimate child - see s. 214, above; hence she would be entitled to custody till it is 7 years old - s. 235, above.

<sup>2</sup> Cf. s. 234, above.

<sup>3</sup> See *Puseehun v. Kaja* (1883) 10 Cal. 15.

under Act XX. of 1864 the paternal uncle was held disqualified, though the girl had attained an age when the male agnates are entitled to custody: the paternal uncle, being within the prohibited degrees, would not be disqualified under Hanafi law.

<sup>4</sup> See Simpson on "Infants;" (3rd ed. 1909), 130-116, on which s. 253 is based.

<sup>5</sup> See comment to ss. 253 & 262.

## SECTION 253.

By unfitness  
of conduct

"When the natural guardian ceases to be a natural guardian, and shows by his conduct that he has become an unnatural guardian,"<sup>1</sup> he loses his right; as for instance, by cruelty to his wife or children,<sup>2</sup> or by felony;<sup>3</sup> or adultery.<sup>4</sup> Though adultery by itself is no disqualification, if the woman is not brought into contact with the child;<sup>5</sup> nor is mere harshness;<sup>6</sup> nor bad temper;<sup>7</sup> nor intemperance,<sup>8</sup> nor the mere fact of his marrying a second wife.<sup>9</sup>

Poverty no  
disqualification,  
but desertion  
or bad character  
or mis-  
application of  
property are.

More poverty is no ground for disqualifying the parents,<sup>10</sup> unless it is accompanied by desertion<sup>11</sup> or bad character.<sup>12</sup> So a Hindu mother has been held to lose her right as against Christian missionaries, by not contributing to the expenses of the child for eight years,<sup>13</sup> and a Chinaman not to be entitled to be restored to the custody of a child kept with Roman Catholics for a year and a half.<sup>14</sup> On the other hand, where a father had become a convert to Christianity from Hinduism, and had left the child in the charge of its Hindu grandfather and uncle, for six years, he was held to have lost the right to the custody of the child.<sup>15</sup> See the comment to s. 262, below pp. under the heading "Welfare of the minor how considered."

Waiver.

The leading English case on the point of the parents' waiving or losing their rights is *Lyons v. Blenkin*,<sup>17</sup> in which Lord Eldon laid down the principle that if the father's conduct has raised in the minds of the children expectations, founded on a particular species of maintenance and education, which he himself cannot afford, he cannot afterwards claim such rights over them as will alter the course of their lives, habits, and connections. Where the father in the exercise of his discretion as guardian entrusts the custody of his children to another, the authority he thus confers is revocable, and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary take such custody and education once more into his own hands. It, however, the authority has been acted upon in such a way, as in the opinion of the court exercising

<sup>1</sup> Per Bowen, L. J., in *re Agre-Elles*, *Agre-Elles v. Lascelles* (1889) 21 Ch. D. 317, 317.

<sup>2</sup> *Ex parte Warner* (1792) 1 B. R. C. 100, *Whitfield v. Hales* (1806), 12 Ves. 192.

<sup>3</sup> *Ex parte Barclay* (1838) 6 Dowd. 311.

<sup>4</sup> *Harde v. Harde* (1849) 2 Ph. 786.

<sup>5</sup> *Bell v. Bell* (1827) 2 Sm. 355; *Mitch v. Mitch* (1867) L. R., 1 P. & D. 157; *R v. Goodhall* (1846) 1 A. & E. 610.

<sup>6</sup> *Bibb v. Lord Willoughby* (1816) 7 T. R. 15.

<sup>7</sup> *Re Curtis* (1878) 28 L. J. (Ch.) 158.

<sup>8</sup> *Re Goldsmith* (1876) 2 Q. B. D. 75.

<sup>9</sup> *Andropetti v. Netherland* (1816) 10 M. & C.

6 P. & F. 105; V. C., *Re Curtis* (1878) 28 L. J. (Ch.) 158, 161.

<sup>10</sup> *Ex parte Agre-Elles* (1830) 1 Russ. & M. 199, *ex parte Smith*, ib. 375 (1825).

<sup>11</sup> *Ex parte Warner* (1792) 1 B. R. C. 100.

<sup>12</sup> *Ex parte Monmouth* (1808) 15 Ves., 115.

<sup>13</sup> *Ex parte Sutherland* (1891) 16 Bom. 307.

<sup>14</sup> *Yoshi Tsune* (1897) 23 Cal. 290.

<sup>15</sup> *Madan Lal Seng v. Nandipal Chaudhary Seng* (1918) 25 Cal. 881. Compare the comment to s. 262, below.

<sup>17</sup> (1821) Jac. 215, 255, 263, and cf. Halsbury's Laws of England, XVII. s. 251.

the jurisdiction of the Crown over infants to create associations or to give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such court will interfere to prevent its revocation."<sup>1</sup>

The Muhammadan law allows terms to be introduced in the marriage contract, and there may be an agreement between the parents relating to the custody of children.<sup>2</sup>

The rule of English law that going out of jurisdiction deprives the father of his right to custody, may have to be modified to suit "Indian society and circumstances."<sup>3</sup> It may have more direct applicability where the property is in the charge of the Court of Wards, or the father leaves British India, and not merely the jurisdiction of the Court where the minor resides.<sup>4</sup>

**254.** The mother does not (subject to s. 255, below) lose her right to the custody of her children by being divorced by the father of the children.<sup>5</sup>

**255.** On the mother being divorced and marrying a second husband,<sup>6</sup> she loses her preferential right to the custody of her children (under s. 235, or 242, above), and the father becomes entitled thereto, whatever be the age of the children; but on the death of the father,<sup>7</sup> or on the mother being divorced by her second husband,<sup>8</sup> her right revives.

#### (5) Disqualifications Affecting the Husband.

**256.** The Muhammadan law does not give to the husband the right to the custody and possession of a wife who is under the age of puberty, unless she is, in the opinion of the Court, of such an age as to permit of the marriage being consummated:<sup>9</sup> *semble*, under the Guardians and

<sup>1</sup> *Annie Besant v. Narayanas* (1914) 38 Mad. 807, 819 (P.C.); 41 I. A. 314, 321. A very full report is given in 27 Mad. L. J., APPX.

<sup>2</sup> See s. 24 (7) above; cf. 35 Vict. c. 12, s. 2.

<sup>3</sup> See s. 12, above, and comment thereto.

<sup>4</sup> Cf. s. 235, above. As to guardians appointed by the Court, see G. & W. Act, s. 39 (A). See also Emigration Act XXI. of 1883, ss. 6 (3), (4); 33; 35 (1). For English law see *Re Suttor* (1860) 2 F. & F. 267; *Re Thomas*, 22 L. J. (O.L.) 1075; *Re Fynn* (1848) 2 De G. & S. 457.

<sup>5</sup> *Shah-i-Yaqub*, Vol. II., Book on *Tahiq*,

chapter on *Hizanat* (init.); *Emperor v. Ayubhai* (1904) 6 Bom. L. R. 536; *Zarabibi v. Abdur Razak* (1910) 12 Bom. L. R. 891, 894.

<sup>6</sup> *I.e.*, after a divorce; see s. 254, above.

<sup>7</sup> *Ball*, II. 95, 96 ("third"). The mother also loses her right to custody in Shiah law if she refuses to nurse the child without being paid for it at a higher rate than a stranger demands for the service. *Ball*, II. 96 (*Arst*).

<sup>8</sup> *Ball*, II. 96 (*third*). There is some difference of opinion on this point.

<sup>9</sup> See, s. 21 (1) above, and comment thereto.

SECTION 256. Wards Act, s. 19 (a),<sup>1</sup> the husband would, in the absence of special circumstances, be considered by the Court to be unfit to be the guardian of the person of the wife, unless, under Muhammadan law, he would be entitled to her custody.<sup>2</sup>

guardian not  
to be appointed  
by the Court  
in certain  
cases.

The Guardians and Wards Act, s. 19 (a) is as follows: "Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the person—(a) of a minor who is a married female, and whose husband is not, in the opinion of the Court, unfit to be guardian of her person."<sup>3</sup> Compare s. 234, above.

It may be noted that in England, as soon as a daughter is married, the father's "natural jurisdiction over her, and right to her custody during her infancy," is determined;<sup>4</sup> a binding marriage can be contracted by a male of the age of fourteen years, and a female of twelve; a marriage by an infant of more tender years is not void, but voidable by the infant upon attaining the age for contracting marriage.<sup>5</sup>

#### § 4.—Guardians of Property: Testamentary Guardians.

(Sunni law)  
Guardian of  
property—  
father's and  
grandfather's  
right to appoint  
testamentary  
guardians of  
the property  
of his minor  
children.

257. According to Hanafi law, the father is the guardian of the property of his minor children;<sup>6</sup> after the father's death, it is part of the duty of the father's executor,<sup>7</sup> to act as such guardian; after the father's executor the paternal grandfather is entitled; after the paternal grandfather, his executor;<sup>8</sup> and after the last, the Court<sup>9</sup> may take charge of the property of a minor, or appoint a guardian for the purpose of doing so.<sup>10</sup>

(2nd head); cf. also G. & W. Act, s. 41 (1) (d), (e); and *Wazeer Ali v. Kaim Ali* (1873) 5 N.W.P. 106; *Nur Kuter v. Zulekha Bibi* (1885) 11 Cal. 640; *Korban v. King-Emperor* (1904) 32 Cal. 444. In *In re Mahon Bibi* (1874) 13 Beng. L.R. 160, the father had apostatised from Islam, and the mother was living with him; custody was, in the circumstances, given to the husband though the wife was only 10 years old. In *In re Khatza Bibi* (1866) 5 Beng. L.R. 557, the husband had not paid the *mahr*, and so could not have been entitled in any case to her custody: see s. 106, above.

<sup>1</sup> Set out in the comment.

<sup>2</sup> *Dunn v. Abdulla* (1804) 20 Punj. Rec. 97 (No. 35).

<sup>3</sup> See *Andappa v. Nallendran* (1915) 39 Mad. 173.

<sup>4</sup> Halsbury, "Laws of England," XVII s. 251, p. 105.

<sup>5</sup> *Ibid.*, XVII, s. 156, XVI, s. 494.

<sup>6</sup> Cf. s. 234, above.

<sup>7</sup> *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 83, 84. An executor may be appointed for a limited purpose, or on condition that he shall not be executor in other matters (Bail I. 671); and, presumably, in this manner a testamentary guardian may be appointed. There is some doubt in *Shiah* law on the point whether the father can appoint a guardian in the lifetime of the grandfather, see s. 258, below.

<sup>8</sup> *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 83, 84.

<sup>9</sup> *Husein Begam v. Zia-ul-mis Begum* (1882) 6 Bom. 167; see comment to a 11A, above, and to s. 284A below.

<sup>10</sup> Bail. I. 530, 529-531; 689; *Hed. 555* see *Abdul Bari v. Rash Behari Pal* (1899) 6 Cal. L.R. 113 (uncle has no right).



H purporting to act as the guardian of K, his minor brother, sold the SECTION 257. property of K. "The Governor's agent at Surat and the representative *Illustration* of the ruling authority in the management of the estate, was consulted as to the sale, and approved of it," and the Government sanctioned it. *Held* that "the sanction of the ruling power constituted a sufficient authority for the act of the guardian, provided that the transaction was one which a duly constituted guardian might have entered into on behalf of his ward under the rules of Mahomedan law."<sup>1</sup>

See the comment to ss. 258 and 272, the latter of which contains a summary of a very important decision<sup>2</sup> of the Privy-Council which was reported after these pages were in print.

**258.** According to Shiah law:—

(1) The father and after him the grandfather is the guardian of a minor's<sup>3</sup> property,<sup>4</sup> and their survivor may appoint a guardian of the property.<sup>4</sup>

(Shiah law)  
Father and  
grandfather  
guardians  
of property,  
then their  
executors.

(2) Where the grandfather is living, and the father purports to appoint a guardian for his minor children's property,<sup>4</sup> the Shiah authorities are divided as to the effect of such appointment. The better opinion seems to be that such appointment is of no effect, though some jurists hold that the appointment is valid with reference to one-third of the property.<sup>4</sup>

It will be noticed that the guardianship of property does not, like the guardianship of the person, devolve upon all blood-relations in succession.<sup>5</sup> The father is naturally the guardian of the property of his minor children, and this right is generally taken for granted by the Muslim jurists,<sup>6</sup> though express reference to it is not absent; and it is laid down that the father is to take charge of the earnings of his minor children, but that if he is a spendthrift, the judge should take the property out of his hands, and place it with a trustee to keep it for the minor, until the boy arrives at the age of puberty and then deliver it over to him.<sup>7</sup>

Father's right  
to be guardian  
of property.

The Guardians and Wards Act, s. 6, saves the right to appoint a testamentary guardian from being affected by anything in the Act; and,—

Father's right  
to appoint  
guardian

<sup>1</sup> See p. 294, n. 8.

<sup>2</sup> *Imambandi v. Mutsaddi* (1918) 45 I. A. 73.

<sup>3</sup> Cf. s. 234, above.

<sup>4</sup> Bail. II., 230, 251. The opinion of the minority which is stated in s. 258 (2), seems to indicate that guardians of property are alone referred to, and not of the person. Where a testamentary guardian is appointed, it is not easy to decide whether (a) the mother loses her right to the guardianship either of the person [or of the property (if any)]—as to which see s. 259) of the

child; or (b) whether the mother's right is subject to the right of the testamentary guardian, but has priority over the claims of all other persons,—the latter seems more probable; see comment to s. 259, below.

<sup>5</sup> See s. 259 and *Abdul Bari v. Rash Behari Pal* (1880) 6 Cal. L. R. 413.

<sup>6</sup> Similarly in English law, cf. *Thomasset v. Thomasset* [1893] P. 205.

<sup>7</sup> Bail. I. 458; cf. ss. 290-292, below.

## SECTION 258

- (a) Of person.  
(b) Of property.

'(Sayad) Shahu v. Hapija Begam'<sup>1</sup> seems to be decided on the assumption that the Muhammadan law recognises an absolute power of appointing testamentary guardians both of the person and of property,<sup>2</sup> and that if the power is exercised, no one else can be appointed guardian by the Court under s. 7 (1) of the Act, until the will is proved to be invalid. There are, however, reasons to doubt<sup>3</sup> whether Muhammadan law permits the appointment of guardians of the person, so as to oust the rights of those mentioned in this chapter as entitled by law to have the custody of children. As to Shiah law, the power of appointing testamentary guardians is more clearly defined; only there is some room for doubt, whether the power of appointment refers only to guardians of the property (which seems most probable) or also to guardians of the person.

It must, however, be borne in mind that an application may be made to the Court for the appointment of a guardian, and if the father or grandfather has purported by will to appoint as guardian a person other than the one who has legally a preferential claim to act as such, then the Court in making its order would consider the father's or grandfather's wishes and weigh the reasons on which the testamentary appointment was made. See the last paragraph of the comment to s. 259, below.

The fact that the testator leaves the whole of his property to his four grandsons (one of them a minor) in equal shares, without expressly appointing any executor, does not make the grandsons his executors, much are less the major grandsons thereby made the guardians of the minor.<sup>3</sup>

In England, the Statute, 12 Car. II., c. 24, s. 3 entitles the father, by deed or will, to appoint a guardian for any of his children until they attain 21 years. "The right of the father himself as guardian is taken for granted although not expressly declared in the Statute."<sup>4</sup>

**259.** Neither the minor's mother<sup>5</sup> nor uncle,<sup>6</sup> nor brother,<sup>7</sup> nor sister<sup>8</sup> is entitled to act as the guardian of the minor's property, except on being appointed by the father, or paternal grandfather of the minor or by the

Executors or  
guardians by  
implication

Testamentary  
guardians in  
English law

Mother not  
entitled to be  
guardian of  
her children's  
property

<sup>1</sup> (1892) 17 Bom. 560. (*per* Daylev, A. C. J., and Candy, J.).

<sup>2</sup> See ss. 235, 214 above.

<sup>3</sup> *Maludin v. Sheikh Ahmad* (1912) 31 All. 213, 39 I. A. 49; 14 Bom. L. R. 192, 202 (*per*).

<sup>4</sup> *Thomasset v. Thomasset*, [1893] P. 205, 208.

<sup>5</sup> *Bail* 11, 232; *Imambandi v. Mutanadi* (1913) 45, I. A. 73, 830 *Sita Ram v. Amir Begam* (1886) 8 All. 324, 329, 330-340 (Mahmood, J.), followed in *Babu v. Shrinappa* (1895) 20 Bom.

199, *Mogna Bibi v. Banku Behari Biswas* (1902) 29 Cal. 473; cf. *Ayderman Kutty v. Syed Ali* (1912) 37 Mad. 514, 519, *Hurba v. Hiraji Buramji Shany* (1896) 20 Bom. 116.

<sup>6</sup> *Abdul Bari v. Rash Behari Pal* (1880), 6 Cal. L. R. 113.

<sup>7</sup> *Maludin v. Sheikh Ahmad* (1912) 31 All. 213 (*per*).

<sup>8</sup> (*Musamat*) *Burchar v. (Musamat) Maldan Kauri* (1869) 3 Beng. L. R. (App. Civ.) 423.

Court<sup>1</sup>; none of them has the power to appoint by will a guardian for the minor.<sup>2</sup> SECTION 259.

Consequently the Indian Limitation Act, art. 44, does not apply to the acts<sup>3</sup> of such persons when they have not been appointed guardians: see ss. 284A, and 284B, below. The Privy Council said in 'Matadin's' case: "In the absence of duly appointed testamentary guardians, the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would rest in the ruling power and its administration; (Macnaghten's 'Principles of Mahomedan Law,' 5th Ed., page 304): The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court."<sup>4</sup>

not uncle  
nor brother

The authorities cited in the footnotes to ss. 258 and 259 seem to refer directly only to the appointment of guardians of the property, but there is no reason to think that the law is different regarding the appointment of guardians of the person, except as adverted to in s. 258 (comment).

Guardians of  
person and  
property

The line is not very strictly drawn by Muhammadan lawyers between "executors" (of the father and grandfather) and guardians (of their minor children and grandchildren), though there are important distinctions as to the persons entitled to be guardians of property and of the person respectively.<sup>5</sup>

Executors and  
guardians.

It will be observed from the summary given in the comment to s. 244, above, that only the father and grandfather, and after them their executor, are recognised as being entitled to be the guardians of property. Accordingly, it has been held that an elder brother cannot sell the property of his minor brothers<sup>1</sup> or sisters,<sup>2</sup> nor an uncle mortgage his niece's property,<sup>3</sup> nor can he claim to be appointed guardian of property in preference to the mother<sup>4</sup>; and a mortgage was held not to bind the interests of two minor children of a deceased Mussulman though the mother, and the elder brother and sister of the said minors had executed the conveyance, there being no urgent necessity for the mortgage.<sup>5</sup>

Dealings with  
property of  
minor by  
brother or  
uncle.

<sup>1</sup> Bail II. 232 is misleading. The mother may surely be appointed guardian by the father or grandfather. It seems, therefore, that the words "of the property" must be read into the text: the rule must refer to the guardianship of property. The mother is entitled to be guardian of her children in their infancy.

<sup>2</sup> Macnaghten, "Mohummudan Law," 304. The Hindu law is to the same effect. *Venkayya-garu v. Venkata* (1897) 21 Mad. 401. But see s. 238, below, and comment thereto; and *Lyons v. Blenkins* (1882) Jac. 245; cf. s. 234, above.

<sup>3</sup> See p. 296, nn. 7, & 8.

<sup>4</sup> *Matadin v. Sheikh Ahmed* (1912) 34 All. 213.

*Inambandi v. Muteaddi* (1913) 45 I. A. 73, 83.

<sup>5</sup> See p. 296, n. 8.

<sup>6</sup> *Nizamuddin Shah v. Anandi Prasad* (1896) 18 All. 373; *Abdul Bari v. Rash Behari Pal* (1880) 6 Cal. L. R. 413.

<sup>7</sup> *Aliim-Ullah Khan v. Abadi Begam* (1906) 20 All. 10, cf. *Matadin v. Sheikh Ahmed* (1912) 34 All. 213; 39 I. A. 49.

<sup>8</sup> *Blutnath Dey v. Ahmed Hosain* (1885) 11 Cal. 417, see also *Fakruddin v. Abdul Husain* (1910) 13 Bom. L. R. 326. Cf. Bail. I. 530-531. The person having custody of a minor may take possession of a gift on his behalf.

## SECTION 259

Position of  
testamentary  
guardian pur-  
ported to be  
appointed by  
the mother or  
other persons  
not authorised  
to do so.

The leading case of *Lyons v. Blenkin*<sup>1</sup> suggests a point of view that may have important bearing on certain circumstances. Adoption is not recognised by the law of England any more than by Muhammadan law;<sup>2</sup> and yet a person may, on the father waiving his right over the child, by the force of circumstances, acquire or, as Lord Eldon puts it, "purchase the power" of educating the children. "in the way and under the control and guardianship" which such person has "pointed out," and to which the "parent has consented." So that in the case referred to, Lord Eldon, in effect, upheld the appointment of guardians for the infant made by the will of their grandmother, who had maintained and brought them up, notwithstanding that the strict law of England<sup>3</sup> permits the father alone to appoint a guardian by will. When, therefore, comparatively distant relations, and even strangers, who have been "in loco parentis," acquire a right, little (if at all) short, of the power to appoint testamentary guardians, it is evident that where the mother recommends a guardian in her will, the weight to be attached to the recommendation as "the wishes of a deceased parent,"<sup>4</sup> must bring it almost on the same footing as an absolute right to appoint. This, of course, can only apply where the father has not already made an appointment, and subject to the remarks cited in the comment to s. 284A, below. The case cited as illustration (4) to s. 569, below, furnishes another example of the present principle. There the *estate* of one Naurez was purported to be represented by one of his children (this point does not fall under the present chapter), and it was contended that that child was himself represented by his uncle as his guardian: but their Lordships rejected both these contentions.

260: See s. 284A, below.

### § 5.—Guardians Appointed by the Court.

Appointment  
of guardian by  
Court.

261. The District and High<sup>5</sup> Courts of British India are empowered to appoint a guardian:<sup>6</sup> or to declare a

<sup>1</sup> (1821) Jac. 345, 268-264.

<sup>2</sup> See s. 225, above, and comment to it.

<sup>3</sup> See the English law, referred to at the end of the comment to s. 225, above.

<sup>4</sup> G. & W. Act s. 17 (2). In *Lyons v. Blenkin* (1821) Jac. 245, 261, it is a grandmother who "attempts to do that which she could not lawfully do, viz., the father of her grandchildren being living, she appoints a guardian during their minority."

<sup>5</sup> Not the other Courts: G. & W. Act s. 4.

<sup>6</sup> See G. & W. Act, s. 7, which is set out in

the comment. The High Courts have inherent jurisdiction to appoint guardians of a *minor*, or his estate, irrespective of the G. & W. Act: *Re Pristion of Jaram Luzmon* (1882) 16 Bom. 634 (Farran, J., *dubitante*, accepting Mr Inverarity's argument that though under the G. & W. Act a guardian cannot be appointed of a Hindu minor member of a joint family [*Shau-Kuar v. Mohanunaul Sahay* (1892) 19 Cal. 301], the High Court may nevertheless do it); *In re Mansel Harcourt* (1900) 25. Bom. 353: (Jenkins, G. J., Tyabji, and Russell, JJ.)

person to be the guardian of the person or property of a SECTION 261.  
minor,<sup>1</sup> or of both his person and property.<sup>2</sup>

The powers of the Courts in British India to appoint guardians are derived from the Guardians and Wards Act, s. 7, which is as follows :—

Guardians and  
Wards Act s. 7.

“(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian,<sup>3</sup>

the Court may make an order accordingly.

“(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

“(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased<sup>4</sup> under the provision of this Act.”

By s. 19 of the Act, the Court is not authorised “to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards,”

Court of Wards  
Act

The chief Acts relating to Courts of Wards are :—

- (a) (i) Act XXVI. of 1854, applying originally to the Presidency of Fort William, it has been repealed,—in Bengal, by Act IV. of 1870, s. 86; in the North-West Provinces (except as to the scheduled districts), by Act XIX. of 1873; in Assam by Act V. of 1897; and in Burma by Act XIII. of 1898, s. 18; (a) Bengal
- (ii) Bengal Act IX. of 1879 (Bengal Courts of Wards Act) amended 1881, and 1892;
- (iii) Bengal Act III. of 1881.
- (b) The N.-W. P. Land Revenue Act, XIX. 1873 (ch. VI.), amended by Act VIII. of 1879; and see Bengal Regulation V. of 1799, s. 8. (b) N. W. P.
- (c) Oudh Revenue Act XVII. 1876 (ch. VIII.) amended by Act XX. of 1890, ss. 3, 12, 28, and 31. (c) Oudh
- (d) Central Provinces Courts of Wards Act, XXIV. of 1899. (d) Central Provinces

<sup>1</sup> I.e., a minor as defined in the Indian Majority Act, IX. of 1875, s. 3, *viz.*, a person under 18 years of age: *Mahomed Ibrahim Nakh v. Mahomed Ibrahim Nakh* (1915) 30 Mad. L. J. 21.

<sup>2</sup> G. & W. Act, s. 7.

<sup>3</sup> In the arguments in *Annie Besant v. Narayansah*, a full report of which is printed as a supplement to the Madras Law Journal, Vol.

XXVII., it was suggested that a father could never be declared or appointed guardian under the G. & W. Act. But it was later on pointed out that if the father finds it necessary to have his right of guardianship declared, he is not prevented from petitioning to be declared guardian, see pp. 26, 27-30 of the report.

<sup>4</sup> See G. & W. Act, ss. 38-41, corresponding to ss. 270, 282-284, below.

SECTION 261. (e) **Panjab Laws Act, IV. of 1872 (ss. 34-38) amended by Act XII. of 1878; Act XXVI. of 1854 is still printed in the Panjab and Lower Burma Codes.**

(f) **Madras. (f) Madras Regulation V. of 1804, Regulation X. of 1831; Act XXI. of 1855; Act XV. of 1874.**

(g) **Bombay. (g) Bombay Act I. of 1905 (the Bombay Court of Wards Act).**

(h) **Ajnere. (h) See also Act XXXIV. of 1858, s. 24; and Act XXXV. of 1858, s. 9, for lunatics' estates; and Regulation I. of 1888 (for Ajmere) where Bengal Act, IX. of 1879, also extends.**

Procedure  
under the  
Guardians and  
Wards Act.

The procedure for the appointment of guardian under the Guardians and Wards Act may be shortly stated: s. 8 requires that the application should be made by a person who is desirous of being, or claims to be, the guardian or a relative or friend, or by the Collector; s. 10 refers to the form of the application and the particulars to be contained therein, for the purpose of identifying the minor, and his or her circumstances relating to position in life, religion, property, and relatives and residence; the cause for the application has also to be mentioned; s. 11 refers to the procedure to be followed on such an application being made, i.e., for fixing a day for hearing by the Court and for serving notices upon the various persons concerned (parents, 'de facto' guardian, etc.); s. 12 refers to interlocutory orders for production of the minor and interim protection of person and property; after which the Court hears the evidence that may be adduced<sup>1</sup> (s. 13), and appoints a guardian (ss. 15-18); ss. 14 and 16 deal with matters where there are proceedings in more Courts than one regarding the person or property of the same minor.

Considerations  
affecting  
appointment  
or declaration  
of guardian  
by Act

1. Provisions  
of the law  
to which  
the minor  
is subject

**262.** In appointing or declaring the guardian of a Mussulman, the British Courts are guided by the provisions of the law<sup>2</sup> to which the minor is subject,<sup>3</sup> and consistently with that law, by what appears, in the circumstances, to be for the welfare of the minor;<sup>4</sup> provided first that if the minor is old enough to form an intelligent preference, the Court may consider that preference,<sup>5</sup> and secondly, that the Court has no power to appoint or declare any person to be a guardian against his will.<sup>6</sup>

<sup>1</sup> The Court cannot refuse to do so. (*Sayad Shaha v. Hajira Begum* (1892) 17 Bom. 560.

<sup>2</sup> G. & W. Act s. 17 (1), see comment.

<sup>3</sup> The law, of course, is not pure Muhammadan law, e.g. the Caste Disabilities Removal Act XXI., of 1850 and some of the provisions of the

G. & W. Act alter the Muhammadan law.

<sup>4</sup> G. & W. Act. s. 17 (3); see comment.

<sup>5</sup> G. & W. Act s. 17 (5); see comment. The Civil Procedure Code, O. XXXII, r. 4 (3) is to the same effect.

*Explanation.*—In considering what will be for the welfare of the minor, the Court must have regard to—  
 the age, sex, and religion of the minor;<sup>1</sup>  
 the character and capacity of the proposed guardian,<sup>2</sup>  
 and his nearness of kin<sup>3</sup> to the minor;<sup>1</sup>  
 the wishes, if any, of deceased parents;<sup>1</sup> and  
 any existing or previous relations of the proposed guardian with the minor or his property.<sup>1</sup>

SECTION 262.  
 2. Welfare of minor.  
 3. Preference of minor.  
 4. Willingness of guardian to act

#### 1. IMPORTANCE OF VARIOUS CONSIDERATIONS IN APPOINTING GUARDIAN

This section is based entirely on the Guardians and Wards Act, s. 17, omitting subs. (4), which refers only to European British subjects. Guardians and Wards Act, s. 17.

Subs. (1) of the said section is as follows :—

“ In appointing or declaring the guardian of a minor the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor ”

Guardians and Wards Act, s. 17.  
 Matters to be considered by the Court in appointing guardian.

It will be observed, that for the selection of a guardian all considerations are made subject, in the first instance, to the provisions of s. 17 itself. Now out of the four other sub-sections of that section, subs. (3) and (5) are apparently the only provisions to which the Courts can attend in the first instance. For subs. (4) does not apply to Muslims at all, and subs. (2) is merely in explanation of what shall be considered for the welfare of the minor; and that consideration is by the section itself expressly subordinated to the law to which the minor is subject, inasmuch as the welfare of the minor has only to be attended to “ consistently with ” that law. After referring as above stated to the provisions contained in s. 17, the first sub-section proceeds to say, in the second place, that the Courts are to be guided by what “ appears to be for the welfare of the minor ”. But in considering this they have, as already stated, to act consistently with the law to which the minor is subject.

Welfare of minor.

The reasons stated above justify, it is submitted, the form in which s. 262 of this work is framed. The subject is considered in greater detail on general principles under the next two heads of the comment to this section.

#### 2. LAW TO WHICH THE MINOR IS SUBJECT

It is intended that this chapter should state the provisions of Muhammadan law with the alterations therein introduced by the

Provisions of the law to which the minor is subject.

<sup>1</sup> 4 A. W. Act s. 17 (2).

<sup>2</sup> Cf. *Sohna v. Khulak Singh* (1880) 13

All. 78 (mere propinquity not the only consideration).

SECTION 262. British legislature. It is submitted that s. 17 of the Guardians and Wards Act is so framed that on its true construction the provisions of Muhammadan law (if any) on the points contained in the two provisos to s. 262, above, are repealed.<sup>1</sup>

Conflict between the law by which the minor is governed and the Court's opinion as to what is for minor's welfare.

There are some cases in which the Courts have said broadly that the welfare of the minor shall be the paramount consideration in appointing (or declaring) guardians;<sup>2</sup> and this may afford an explanation of the different views taken on the point whether the Courts should consider the welfare of the minor in the first instance, or subordinate that consideration to the law by which he is governed.<sup>3</sup> Sir R. K. Wilson has referred to the terms of the Act, to its history, and to the decisions of the Courts, in support of the view that the law governing the minor is the paramount consideration. To his arguments must be added that the judges are themselves required to follow the law,<sup>4</sup> not to give decisions in accordance with their own views of expedience, and that it would therefore be almost a contradiction in terms to say that the paramount consideration should be not the law, but any other matter. *e.g.*, the opinion of the Court as to the welfare of the minor. Moreover, the law is professedly based on a regard for the welfare of the minor, assuming that it fails in its purpose it is not the function of the judicial tribunals to set right the shortcomings of legislators. The following words of an eminent judge refer directly only to one of the component parts making up the welfare of the minor, *viz.*, freedom from restraint, but they may be taken (with the necessary alterations) to be of general application: "Where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists, and where the child is in the hands of a third person that presumption is in favour of the father." "We must refer to legal principles to see who is entitled to the custody, because the law places the right to custody where it deems that it will be

The law itself best safeguards minor.

<sup>1</sup> See the earlier paragraphs of the comment to s. 262.

<sup>2</sup> *Re Gulbali & Lillias* (1907) 32 Bom. 50, *per* Bava J., following *Hindu v. Sham Lal* (1906) 29 All. 210 (Knox & Richards, JJ). It is submitted that the dicta in these cases are not quite accurate. Thus Garth, C.J., and Macpherson, J., are bound to declare the grandmother guardian, though they thought the uncle far preferable. *Bharola v. Elchi Beg* (1895) 11 Cal. 574. *Banda v. Shaw Lal* (1906) 29 All. 210 was discredited from its *Audiuppa v. Nallendran* (1915) 39 Mad. 471; see also *Mohideen Ibrahim Natchi v. Ibrahim Sahib de Sals*.

<sup>3</sup> Some judges seem to have occasionally

proceeded on Milford's dictum that "Men of most renowned virtue, have sometimes, by transgressing, most truly kept the law."

<sup>4</sup> Note that this expression does not, in this connection, refer to pure Muhammadan law, but to that law as applicable in British India, with the alterations and limitations imposed on it by the Legislature.

<sup>5</sup> Coleridge, J., in *R. v. Greenhill* (1836) 4 A. & E. 624, 643, cited by Lindley, L.J., in *Thommes v. Thommes* (1891) P. 295, 298; and by Bayley, J., in *re Sadhri* (1891) 16 Bom. 307, 312. Cf. *Audiuppa v. Nallendran* (1915) 39 Mad. 473; *Mohideen Ibrahim Natchi v. Ibrahim Sahib* (1915) 39 Mad. 608.



exercised most for the welfare of the minor; and it is not for the Court SECTION 262. to say that it is against the minor's welfare that custody should be taken away from the person (if any such there be) who is by law entitled to the custody, as of right.

The dicta of the judges, therefore, to the effect that the minor's <sup>Minor's</sup> welfare is the paramount consideration must be understood (it is <sup>welfare to be</sup> considered in <sup>submitted</sup> matters left to <sup>the discretion</sup> of the judge) to give inaccurate expression to what they perhaps intend saying, *viz.*, that the principle on which the legislature proceeds, is that the welfare of the minor shall be the paramount consideration, and that this fact may be borne in mind in interpreting the words of the enactments. The dicta must be read with the reservation that judges cannot set their own views above those of the legislator, and if the law laid down that a certain person is entitled to the custody of a child without any reservation (which, it may be stated, it does not) <sup>1</sup> the Courts would be bound to give the custody to him: for the Courts cannot put their own ideas of what is to be deemed to be the welfare of the minor, above the behests of the Legislature. Where the law leaves a discretion to the judge, that discretion will of course be exercised primarily with the object of promoting the welfare of the minor: but in doing so the judge will be acting in accordance with the law by which the minor is governed, and which requires the judge to exercise his discretion. <sup>2</sup>

As already stated, the law never gives an absolute right to custody: even the father may lose that right. But the point of importance is that the law recognises a *prima facie* claim, and that *prima facie* claim must be borne in mind, before turning to the considerations about the welfare of the child: for by giving a *prima facie* right to custody, it is indicated that the welfare of the minor will *prima facie* be best safeguarded if he is in the guardianship of that person. The law lays down in regard to some relations what classes of disqualifications would displace the right of the particular person to have custody: cf., e. g., s. 253.

Here reference might be made to the remark of so ancient an authority as the 'Da'ayam-ul-Islam,' whose author says that in the case of two equal guardians of the same class, that one has the right to the custody of the child who can educate him better; and in case of equality in this respect, the more advanced in age.

<sup>1</sup> In the G. & W. Act s. 4 (1), clauses (d) & (e), it appears to be assumed that none except the father and husband have an absolute right. Cf. *Ithikno Koer v. Chameela Koer* (1896) 2 C. W. N. 191; *Kruto Kishor Neoghy v. Kadermaye Dasari* (1878) 2 C. L. R. 383; *Audiappa v. Nalladurai*

(1915) 39 Mad. 473; *Ibrahim Sahib v. Ibrahim Sahib ibn.*, 608; and, of course, there is also the power of removal: G. & W. Act, s. 39.

<sup>2</sup> Cf. *Ithikno Koer v. Chameela Koer* (1896) 2 C. W. N. 191.

## SECTION 262.

## 3 WELFARE OF THE MINOR HOW CONSIDERED

Welfare of the  
minor  
considerations  
of age, sex,  
and religion

Religion.

English law.

Father when  
disqualified  
by his religious  
views.

In considering what is for the welfare of the minor, his or her age, sex, and religion are required to be borne in mind. Muhammadan law pays special regard to each of these considerations, and, it is presumed, that where no person is pointed out by that law as the one entitled to be the guardian, the Courts will go on the analogy of the same principles of preference, with the possible exception of the consideration of religion as to which there may be some difficulty. Muhammadan law naturally favours the religion on which it is based,<sup>1</sup> but the preference cannot hold in British India.<sup>2</sup> The rule of English law is that the father is entitled to bring up his children in his own religion, and he cannot contract himself out of it by agreement, whether in consideration of marriage or otherwise,<sup>3</sup> and after the death of the father the child is to be brought up in the religion of its father, or according to his directions, unless he has waived or abandoned his rights,<sup>4</sup> or, for some other reason, it is for the benefit of the child to do so.<sup>5</sup>

A learned author has said with reference to English law: "Though there is no case in which the father has been deprived of the custody of his children purely on the ground of his religious principles, yet, if the father's principles manifest themselves in conduct which the law looks upon as vicious and immoral, and he is likely to bring up his children in the same principles, the Court will interfere."<sup>6</sup> Lord Eldon's decision in the case cited has often been the theme of invective. It may be observed, however, that the decision might be justified on other grounds. Shelley had deserted his wife and children and left them for three years to be maintained by her relations, it might therefore well have been held that he had waived his rights by acquiescence.<sup>7</sup> Lord Eldon distinctly disclaims acting on the ground of the father's speculative opinions, his decision was based on the fact that Shelley's principles led him to uphold and practise conduct which the law condemned as vicious, *e.g.*, to uphold the theory that marriage was not a binding institution, to act upon it by deserting his wife and children and living with another woman, and to declare that he would bring up his children in similar

<sup>1</sup> *Ball*, I. 185, II. 265, see § 51, above, and comment thereto.

<sup>2</sup> *Mooland Lal Singh v. Nobodai Chaudai Singh* (1898) 25 Cal. 881, see n. to s. v. above.

<sup>3</sup> *Re Barendse, R. v. Smith* (1853) 22 L. J. (n.s.) 116; *Andrews v. Salt* (1873) 8 Ch. App. 622; *Re Kerin* (1891) 2 Ch. 299 (C.A.).

<sup>4</sup> *Re Sedgwick* (1891) 16 Bon. 307; and see s. 253, above, as to father's loss of right.

<sup>5</sup> Halbury "Laws of England" XVII. 82.

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<sup>6</sup> *Simpson on Infants* (3rd Ed., 1909), 133-134.

<sup>7</sup> *Shelley v. Westlake* (1817) Jac. 266. See *Re Beant* (1879) 11 Ch. D. 508, where the mother (Mrs. Annie Beant) was not allowed to enforce an agreement by which she was to be given custody of the child, because she promulgated atheistical opinions and had published and circulated an obscene book.

views. It is difficult to see how any judge could, consistently with SECTION 262, recognised principles, have acted otherwise."<sup>1</sup>

The question is complicated in India by the fact that there is no established State religion here. The fundamental principles of religion and morality underlying all creeds have, of course, to be accepted.<sup>2</sup>

#### 1. PREFERENCE OF THE MINOR.

The Courts do not, as a rule, consider a male child to have attained the age of discretion so as "to form an intelligent preference," before he is 14 years old; nor a female before 16 years.<sup>3</sup> The Guardians and Wards Act does not fix the age of discretion.

The following is translated from the 'Sharh-i-Viqaya' (a Hanafi authority):<sup>4</sup> "The minor cannot be given an option except according to Imam Shafi'i [who considers that the child has the option of remaining with either parent, and his view is based on the tradition that the Prophet (on whom and whose descendants be peace) gave the child the choice between its mother and father, and said, 'go to either as you desire,' and said, 'Oh God, direct him (the child) rightly,' and the child chose its mother]."<sup>5</sup>

#### 5. WILLINGNESS OF THE PROPOSED GUARDIAN TO ACT.

The Muhammadan lawyers, in considering the question of the custody of minors, say that a father may be compelled to take charge of his minor children even against his own wish.<sup>6</sup> The rule of Muhammadan law is, of course, repealed in so far as it comes into conflict with the second proviso to the present section, but it must be remarked that that proviso refers merely to appointment by the Court,<sup>7</sup> and merely to guardianship,—which may be considered as a species of right,—as distinguished from the duty to maintain.

As to guardianship of property, Muhammadan law considers it part of the duty of executors, and it may be a question whether by consenting

<sup>1</sup> See s. 253, above. Cf. *Thomas v. Roberts* (1850) 3 De G. & S. 758; *Re Curtis* (1858) 28 L. J. (Ch.) 158; *Re Meades* (1871) 1 R. 5 Eq. 98; *Re Grimes* (1877) 1 R. 11 Eq. 465.

<sup>2</sup> Cf. *Jamshedji v. Nanabhai* (1907). 33 Bom. 122, 204, *supra*; 10 Bom. L. R. 117, 480, *supra*, as to the applicability in India of the attitude adopted by Courts in Ireland on questions of religion; there being no established Church in Ireland.

<sup>3</sup> In *re Sathes* (1891) 6 Bom. 307, where Bayley, J., refers in detail to a great number of English decisions; see also *Thomas v. Thomas* (1894) P. 295, 298 (Lindley, L. J.); *Ex parte Hopkins* (1732) 3 P. Wms. 152; *R. v.*

*Humes* (1800) 3 E. & L. 332, 336, 337 (Cockburn, C. J.); *Re Agar Ellis, Agar Ellis v. Lancelles*, (1883). 24 Ch. D. 331, 335, 337 (C.A.); *Re Macguth Infants* [1893] 1 Ch. 113, 150 (C.A.).

<sup>4</sup> Book on *Talaq*, ch. on *Hanout*, II. 169 (Lucknow, 1313 A.H.).

<sup>5</sup> Cf. Hed. 139, where the tradition is "distinguished" on the ground that the Prophet's prayer must have directed the right choice of a child.

<sup>6</sup> See s. 267, below.

<sup>7</sup> On the father's peculiar position and his liability to maintain, see s. 253, above, and ss. 267 and 310-319, below. See also s. 269, below.

Preference on the part of minor.

Hanafi and Shafi'i law on the point:

s. 262, sub-s. (2) Guardian against his will.

Consent to act as executor; effect of this as to guardianship of property.

**SECTION 262.** in the lifetime of the testator to act as his executor, one is debarred from declining the trust on the death of the testator, either relating to the entire duties of an executor, or in so far as they refer to guardianship<sup>1</sup> The Courts would hardly force upon an unwilling person such a charge; but a person who has once accepted a trust, cannot at his own option decline to discharge the duties thereafter.<sup>2</sup>

Court may  
appoint joint  
guardians.

**263.** *Semble*, the Court may, if it thinks fit, appoint two or more joint guardians of the person or property (or both) of a Mussulman minor;<sup>3</sup> and where they are so appointed, on the death of one or more of the joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.<sup>4</sup>

Death of  
one of several  
joint guardians.

Under the Guardians and Wards Act, s. 38, on the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court. In England, however, the death of one terminates the right of all, though, of course, the Court might re-appoint the survivors.<sup>5</sup>

"Where there are more guardians than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the matter in difference as it thinks fit"<sup>6</sup> It would seem that they must act jointly, and one of them cannot act independently of the other.

## § 6.—Powers, Duties and Obligations of Guardians.

### (1) Guardian of the Person.

Guardian of  
the person  
charged with  
custody, sup-  
port, health  
and education.

**264.** A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, and education and such other matters as the law to which the ward is subject requires.<sup>7</sup> *Quære*, whether a

<sup>1</sup> *C. H. Med.* 697, *Ind. T.* 666-667, 11, 250.

<sup>2</sup> *G. & W. Act*, s. 10, *Indian Trusts Act*, s. 16.

<sup>3</sup> *G. & W. Act*, s. 15 (1), *cf.* s. 234, above.

<sup>4</sup> *Ibid.*, s. 38. In England the death of one joint guardian terminates the guardianship of all. Halsbury, "Laws of England," XVII, s. 295. See s. 233, above.

<sup>5</sup> Halsbury, "Laws of England," XVII, s. 295.

<sup>6</sup> *G. & W. Act*, s. 13 (2). It will be noticed that joint guardians have, on a difference of opinion, the power to apply to the Court, though they have not been appointed or declared by the Court, whereas only those who have been so appointed or declared, come under *G. & W. Act*, s. 33 (1).

<sup>7</sup> *G. & W. Act*, s. 21, *verbatim*, *cf.* s. 234, above.

ward of Court can marry without the consent of the Court.<sup>1</sup>

Marriage

The Guardians and Wards Act, s. 25, empowers the Court to have a ward arrested in order to prevent his leaving the custody of his legal guardian. S. 26 requires leave of Court to be obtained before a guardian appointed by the Court (unless he is the Collector, or a guardian appointed by will or other instrument) is authorized to remove the minor beyond the jurisdiction of the Court.

"The natural duty of a parent to protect an infant child, justifies acts of personal violence in defence of the child, and upholding and maintaining of the child in a law suit"<sup>2</sup>

Use of force to defend minor.

As to instituting suits and taking legal proceedings, see Civil Procedure Code, Order 32, generally. Rule 4 (2) of that Order provides that, 'Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor; or be appointed his guardian for the suit; unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act, or be appointed as the case may be.'

**265.** A guardian of the person has the right to restrain and control the acts and conduct of the ward;<sup>3</sup> and the father<sup>4</sup> has the right to inflict correction<sup>5</sup> on the child, for disobedience to his orders, by personal and other chastisement, to a reasonable extent.<sup>6</sup>

Right to restrain and chastise.

**266.** The rights mentioned in s. 265, above, may be delegated by the guardian or father respectively to a tutor, or schoolmaster, or other person.<sup>7</sup>

Delegation of right to restrain and chastise.

<sup>1</sup> See ss. 59-68, above, under "Guardians for Marriage," cf. (*Bai*) *Durai v. Moli Karun*, (1896) 22 Bom. 509, a Hindu case, where the Court felt doubtful whether getting the ward married falls within the duties of the guardian of the person and property. In *Moujan Bibi v. District Judge of Bubbhun* (1914) 42 Cal. 351, 20 Cal. L. J. 91, the Court was not prepared to accept the extreme view that the marriage of an infant who is a ward of Court may be allowed to take place without the sanction, or even the knowledge, of the District Judge.

<sup>2</sup> Halsbury, "Laws of England," XVII s. 265, citing Blackstone, Comment I. 450, etc.

<sup>3</sup> *Fleming v. Pratt*, (1823) 1 L. J. (K.B.), 191. A young lady of 18 visited a relation whom the

guardians had forbidden her to visit. In a suit for trespass against the guardians who sent officers to fetch her back, *held*, there would have been justification for guardians if the facts had been pleaded and proved.

<sup>4</sup> *R. v. Hopley*, (1860) 2 F. & F. 202, 206-207 (Cockburn, C.J.), *Hallwell v. Council* (1878), 3 L. J. 176.

<sup>5</sup> These powers of correction are probably slightly less in the case of the mother, and still less in the case of other guardians.

<sup>6</sup> Ss. 265 and 266 are taken from Halsbury's "Laws of England," XVII, s. 252, p. 107.

<sup>7</sup> *Ex parte McClellan* (1831), 1 Dowd. 81; *R. v. Hopley*, (1860) 2 F. & F. 202, 206; *Fitzgerald v. Northcote*, (1867) 4 F. & F. 676, 686 (Cockburn, C.J.). See s. 2, above.

## SECTION 267.

Obligation on father to take charge.

**267.** Subject to s. 262, above, the father may be compelled to take charge of his child, after it has attained the age when he becomes entitled to its custody.<sup>1</sup>

The effect of the Guardians and Wards Act may be somewhat doubtful, inasmuch as the duty of the father is allied to his duty to maintain (on which see ss. 316, 319, below). He may, of course, be ordered to maintain the child while it is placed in the custody of another person. On the other hand, it is said that where a father is in straitened circumstances and the child's mother refuses to take charge of it without hire, while its paternal aunt is willing to do so, the aunt is to be preferred.<sup>2</sup>

Father's moral duty in England to maintain child.

In England "except under the operation of the poor laws there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation."<sup>3</sup> But there is a moral obligation on the father to maintain the child,<sup>4</sup> the obligation on the mother being less strong;<sup>5</sup> and this moral duty is recognised in so far that the Court will not make an allowance to the father for the purpose of maintaining his infant child out of the child's property.<sup>6</sup> Ss. 316-319, below, supply a curious contrast.

Obligation of mother to take care of child, how limited.

**268.** The mother cannot be compelled to take charge of her child so long as there is any other relative within the prohibited degrees to take charge of it.<sup>6</sup> *Quære*, whether she can be compelled in any circumstances.<sup>7</sup>

### (2) Guardian of Property.

#### (a) Guardian not to Benefit by the Charge.

Fiduciary relation between guardian and ward.

**269.** (1) A guardian stands in a fiduciary relation<sup>8</sup> to his ward, and, save as provided by the will or other instrument (if any) by which he was appointed, or by the Guardians and Wards Act, he must not make any profit out of his office.<sup>9</sup>

<sup>1</sup> Bail. I. 431.

<sup>2</sup> Bail. I. 435. Cf. c. 253 at comment to s. 262 (heads 3 and 4), above.

<sup>3</sup> *Per* Cockburn, C. J., *Baszley v. Furdor*, L. R. 3 Q. B. at p. 565; *Simpson*, "Infants" (3rd Ed.) 152.

<sup>4</sup> Halsbury, "Laws of England," XVII., s. 266.

<sup>5</sup> *Ibid.*, and *Simpson*, "Infants," 240.

<sup>6</sup> Bail. I. 431; cf. s. 234, above.

<sup>7</sup> See s. 267, and comment thereto, and s. 262 proviso (2), above.

<sup>8</sup> Cf. *Re Casanmally Javazbhai Pirodhai* (1906), 30 Bom. 591; 8 Bom. L. R. 883 (Scott, J.).

<sup>9</sup> So the guardian must not make a profit by selling his property to the minor, or buying the minor's property. Bail. I. 681; *Hed.* 638.

(2) The fiduciary relation of a guardian to his ward extends to, and affects purchases by, the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.<sup>1</sup>

SECTION 269.

The following short Sura of the Quran deserves attention—

'In Quran'  
on orphans and  
widows

*In the name of God, the Merciful, the Compassionate*

By the splendour (of the morning) !  
And by the still of night !  
Thy Lord hath not forsaken thee, nor hated thee.  
Verily the life to come shall be better than this present life .  
And Thy Lord shall give thee a reward wherewith thou shalt be well pleased.  
Did He not find thee an orphan, and sheltered thee ?  
And found thee erring and guided thee ?  
And found thee poor, and enriched thee ?  
Then, as for the orphan, oppress him not,  
And as for him who asketh of thee, chide him not away.  
And as for the bounty of thy Lord, tell of it. -- Quran, XCIII.

With the above may be compared the following, where legislative injunctions take the place of devotional gratitude: -

They will ask thee concerning orphans: Answer, to deal righteously with them is best, and if ye intermeddle with (the management of what belongs to) them (do them no wrong), --they are your brethren. God knoweth the corrupt dealer from the righteous, if God please, he will surely distress you; for God is mighty and wise.—Quran II v. 220.

Under the Muhammadan law a guardian of the property is entitled to take "the ordinary hire or recompense for his trouble"<sup>2</sup> See Quran, IV. 5, quoted under s. 230, and compare the comment to s. 344, below.

Muhammadan law gives to the father some privileges<sup>3</sup> over his minor children's property, such as a preference over other creditors, if the father chooses to pawn or sell the minor's property; in so far as such privileges are in contravention of the rules contained in the present section, they must be taken to be abrogated by the Act, the father being a

<sup>1</sup> G & W Act, s. 20, *verbatim*.

<sup>2</sup> Bail, II. 252, G & W Act, s. 22, empowers the Court to give an allowance to the guardian

for his care and pains.

<sup>3</sup> Cf. Hed. 639.

**SECTION 269.** 'guardian' by the definition whether appointed or declared as such or not. But where the father uses or disposes of the property of his children for their maintenance, he is entitled to do so under Muhammadan law (see ss. 290-292, below) and there is apparently no breach of trust (see s. 2, above and 21 Geo. III. c. 70, s. 18, reproduced in the table preceding Chapter I).

(b) *Care in Dealing with Ward's Property.*

Dealings by  
guardian with  
property of  
ward.

**270.** A guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would deal with it<sup>1</sup> if it were his own;<sup>2</sup> and, subject to the provisions of Chapter III. of the Guardians and Wards Act, he may do all acts which are reasonable<sup>3</sup> and proper or the realization, protection or benefit<sup>4</sup> of the property.<sup>5</sup>

Restrictions on  
the guardian's  
power imposed  
by the person  
appointing him  
or by the Court.

The Guardians and Wards Act, s. 28, recognises the validity of restrictions on the powers of guardians, imposed on them by the instrument appointing them: and the Court has power (ss. 28 and 32) either to impose or to remove restrictions; s. 29 refers to a general restriction against the guardian mortgaging, charging, selling, making gift, etc., of immovable property. If ss. 28 and 29 are disregarded, the disposition is voidable (s. 30); s. 31 lays down the general practice with respect to permitting transfers under s. 29, viz., that they shall be permitted only if necessary or evidently advantageous;<sup>6</sup> the necessity or advantage must be recorded. The Court may, besides, impose conditions requiring its own sanction for the completion of the transfer, or that it shall be at a public auction; or as to terms of the lease, payment of proceeds into Court, etc.

(c) *Guardian's Dealings with Minor's Property.*

Pre-emption.

**271.** The guardian of the property of a minor may either exercise<sup>7</sup> or refuse to exercise<sup>8</sup> the right of pre-emption on behalf of the ward.

<sup>1</sup> (*Syud*) *Loof Hossain v. Dursun Zail Sahoo* (1875), 23 W. R. 424.

<sup>2</sup> Cf. *Leatroyd v. Whiteley* (1887), 12 App. Cas 727, 733. See also *Lal Bahadur Singh* (1881), 3 All. 37; *Umrao Singh v. Dalip Singh* (1901), 23 All. 129.

<sup>3</sup> *Both Mull v. Gource Sunkur* (1886), 6 W. R. 16; *Roushan Jahan v. Enaet Hossain* (1866), W. R. 5.

<sup>4</sup> Scott, C. J., (then Scott, J.), has held that the duty of guardians primarily is to preserve, and not to add to, the property of a minor. *Re Casanally Javrajibhai Purbhai* (1906), 30 Bom 591, 8 Bom. L. R. 833.

<sup>5</sup> Sect. 270 is G. & W. Act, s. 27, *mutatis mutandis*.

<sup>6</sup> Cf. Ball. I. 676, *seq.*, where distinctions are laid down between the cases where there are, and where there are not, debts and legacies, and between movable and immovable property, and the consent or want of consent on the part of the heirs who are not minors.

<sup>7</sup> *Lal Bahadur Singh v. Durga Singh* (1881), 3 All. 437; Ball. II. 180 (par. 2, 4.)

<sup>8</sup> *Umrao Singh v. Dalip Singh* (1901), 23 All. 129. The plaintiff's mother and guardian was held to have acquiesced in a sale, and this was taken as sufficient refusal.



**272.** (1) A guardian cannot validly contract in the name of a ward, so as to impose on him a personal liability.<sup>1</sup>

(2) It is not within the competence of a manager of a minor's estate, or of a guardian of a minor to bind the minor, or the minor's estate, by a contract for the purchase of immovable property.<sup>2</sup>

(3) A guardian's powers with respect to the property of his ward, are restricted so that he cannot alienate it unless there is absolute necessity for the alienation, or it is greatly for the benefit of the ward.<sup>3</sup>

The following paragraph from Macnaghten's "Moohummadan Law"<sup>4</sup> was referred to by the Privy Council,<sup>5</sup> apparently as stating the correct law on the point:—

"A guardian is not at liberty to sell the immovable property of his ward except under seven circumstances, viz., first, when he can obtain double its value; secondly, when the minor has no other property and the sale is absolutely necessary to his maintenance; thirdly, when the late incumbent died in debt which cannot be liquidated but by the sale of such property; fourthly, where there are some general provisions in the will which cannot be carried into effect without such sale; fifthly, when the produce of the property is not sufficient to defray the expenses of keeping it; sixthly, where the property may be in danger of being destroyed; seventhly, when it has been usurped and the guardian has reason to fear that there is no chance of a fair restitution."<sup>6</sup>

The law has been considered in the light of the authorities and their result laid down by the Privy Council<sup>5</sup> in a recent decision in which the following propositions were enunciated:—

- (1) No one except the persons in whom the legal guardianship of a minor is vested (viz., (a) the father, (b) his executor, (c) the grandfather, (d) his executor, (e) the guardian appointed by

<sup>1</sup> *Waghela Rajanji v. (Shah) Masludin* (1887) 11 Bom. 551; 14 I. A. 89.

<sup>2</sup> S. 272 (2) is taken verbatim from *Mir Sarwarjan v. Fakhrudin Mohamed Chowdhury* (1911), 39 Cal. 232; 14 Bom. L. R. (P.C.), 8 C. (decision of High Court) (1900) 34 Cal. 163.

<sup>3</sup> *Inamabandi v. Mutsaddi* (1918) 45 I. A. 73, 84, 88, 91, *Hurban v. Hiraji Buramji Shrinji* (1895) 20 Bom. 116, 121; (*Musamut*) *Bukshan v. (Musamut) Doolhun* (1869) 12 W. R. 337; (*Musamut*) *Syedun v. (Musamut) Syed Velangi* (1872) 17 W. R. 239; (*Musamut*) *Bukshan v. (Musamut) Maldai Koeri* (1869) 3 Beng. L. R. (A. C.) 453; *Bhutsath Dey v. Ahmed Hossain* (1885) 11 Cal. 417;

429 (H. 1-2), 421 (H. 4-7); (*Thottoli Kodian*) *Aliyamma v. Kunhammed* (1910), 34 Mad. 527, 532, *Ayderman Kuttiv. Syed Ali* (1912) 37 Mad. 514, 517 (where *Abdur Rahim, J.*, has collected and reviewed the cases), is overruled by *Inamabandi v. Mutsaddi* (1918) 45 I. A. 73; *Abid Ali v. Imam Ali* (1916) 38 All. 92.

<sup>4</sup> Macnaghten, ch. VIII, cl. 14. Macnaghten's statement is also referred to with approval in *Hurban v. Hiraji* (1895) 20 Bom. 116, 121.

<sup>5</sup> *Inamabandi v. Mutsaddi* (1918) 45 I. A. 73, (on appeal from the Calcutta High Court) disapproving *Ayderman Kuttiv. Syed Ali*, (1912) 37 Mad. 511,

SECTION 272  
Contract imposing personal liability or for purchase of immovable property

or for sale of immovable property.

Conditions on which sale of immovable property is allowed :  
(i) double price,  
(ii) for maintenance,  
(iii) payment of debts of late incumbent,  
(iv) will,  
(v) to defray expenses,  
(vi) property in danger,  
(vii) property usurped,

## SECTION 272.

de jure  
guardians their  
powers are limited

the Court : see ss. 257, 258, above) has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined (p. 84).<sup>1</sup>

- (2) The powers even of 'de jure' guardians are confined within legal limits, being subject to the conditions of necessity for, or benefit to, the infant (pp. 84, 88).<sup>1</sup>

- (3) As to the executor-guardian ('wasi,')—

Executor  
guardian's  
powers.

(a) he may sell or purchase movables on account of the orphan under his charge, either for an equivalent or at such a rate as to occasion an inconsiderable loss (p. 84) ;

(b) it is unlawful for him to sell immovable property, unless it be evident that it will otherwise perish or be lost, in which case the sale is allowed (p. 85) ; it is allowed in three (other) cases :

(i) where there is a purchaser willing to give double its value ; or

(ii) the sale is necessary to meet the minor's emergencies ; or

(iii) there are debts of the deceased and no other means of paying them (p. 91).<sup>2</sup>

- (c) The rule in clause (b), above, applies to all forms of property which like 'aqar' combines both security and permanency. But it does not exclude the discretion of the Judge to sanction any alteration of investments in the interests of the infant (p. 91).<sup>1</sup>

- (4) As to the executor of a mother, or a brother, *i.e.*, when a mother or brother has died leaving a minor son or brother and having appointed an executor,—

(a) he may lawfully sell anything but 'aqar' <sup>2</sup> belonging to the estate of the deceased ;

(b) he may not sell 'aqar,' <sup>3</sup> except as stated below ;

(c) he may not lawfully buy anything for the minor but food and clothing which are necessary for his preservation ;

(d) he may not sell anything that the minor has inherited from his father, whether movable or immovable, and whether the property be involved in debt or free from it ;

(e) if the estate is involved in debt or legacies, he may sell so much of it as is necessary to defray the debt, the sale of 'aqar' <sup>3</sup> coming within his power, for this purpose.<sup>1</sup>

- (5) The following acts of an unauthorized person who happens to

<sup>1</sup> *Imamuddin v. Mutsuddi* (1918) 45 L. A. 73.

<sup>2</sup> See the extract from Macnaghten's "Moolhimmadan Law" cited above.

<sup>3</sup> *Aqar* is immovable property, and includes houses, groves, orchards &c.

have charge of a child (a 'de facto' guardian) are binding on SECTION 272. the infant's property : acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. But there is no reference here to the pledge (mortgage) or sale of immovable property, as the power of dealing with that class of property is confined to the 'de jure' guardian.

- (6) A person who has charge of the person or property of a minor without being his legal guardian (a 'de facto' guardian) has no power to convey to another any right or interest in immovable property which the transferee can enforce against the minor; nor can such transferee if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the minor as a trespasser.<sup>1</sup>

It may in conclusion be pointed out that a person who considers it necessary or convenient to act on behalf of a minor, may in British India get himself appointed a guardian, and obtain the sanction of the Court to his act.

In a case where there were disputes about the minor's title to the property, and, "by the sale, the disputes were put an end to," the Privy Council held that "looking at the whole of the transaction, it was within the power of the guardian to make the sale."<sup>2</sup>

(d) *Acknowledgment of Debt.*

**273.** A guardian has authority to acknowledge a debt on behalf of his ward, so as to give the creditor a fresh start for the period of limitation.<sup>3</sup>

Acknowledgment under Limitation Act

(J) *Ward's Remedies against the Guardian*

**274.** The ward has all the remedies against the

Liability of guardian as trustee.

<sup>1</sup> *Imambhai v. Mutanji* (1918) 45 I. A. 72.

<sup>2</sup> *Kali Dutt Jha v. Abdul Ali* (1888), 16 Cal. 627, 634, 635.

<sup>3</sup> Indian Limitation Act, s. 21 (1) giving effect to *Sobhanadas Appa Rao v. Seeramulu* (1893), 17 Mad. 221, and *Krishna Padachi v. Ponnulannu Achi*, (1891) 18 Mad. 456; and overruling the decisions to the contrary: *Chato Ram v. Bisto Ali* (1908), 26 Cal. 51, *Wanban v. Kadir Bakh*

(1886), 13 Cal. 292; *Azuddin Hossain v. Lloyd* (1883), 13 C. L. R. 112; (*Naharain Shri Ram-mahsingh v. Vaddal Vakhatabad* (1894), 20 Bom. 61, 71, 75. *Muttusami Ayyar, J.*, points out that it may be for the benefit of the minor to have the debt acknowledged as he may thereby get time to pay off the debt. Cf. the Guardians and Wards Act, s. 27, to which s. 270, above, corresponds, see also s. 185, above.

**SECTION 274.** guardian which any other beneficiary has against his trustee; and in particular <sup>1</sup> a guardian may be used for an account of what he has received in respect of the property of the ward, and be ordered to pay such amount as may be found to be payable by him.<sup>2</sup>

(4) *Guardian Appointed or Declared by Court.*

Power to take opinion of Court where guardian is appointed or declared by Court.

**275.** A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him, for its opinion, advice or direction, on any present question respecting the management or administration of the property of his ward.<sup>3</sup>

Procedure for doing so.

The Guardians and Wards Act, s. 33 (2) and (3), provide respectively for service of a copy of the petition, and for protection of the guardian if he acts on the opinion, advice or direction given to him on the facts stated by him in good faith.

Right of such guardian not affected by marriage of female ward.

The powers of a guardian of the person of a female appointed or declared by the Courts cease on her marriage if the Court is of opinion that her husband is not unfit to be the guardian of her person: s. 41 (1) (d) of the Act, corresponding to s. 256. above.

Duties imposed on such guardian.

The above-mentioned privileges are counterbalanced by the liability of having to face an application under s. 43 of the Act (under which the Court may make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court); by the restrictions imposed by s. 26 against the guardian, without the permission of the Court, removing the ward out of the jurisdiction of the Court, disregard of which may subject him to a fine of Rs. 1,000 or imprisonment for six months (s. 44); and by the liability to give a bond (s. 34) which may be forfeited (s. 35) to file accounts, and to make payments into Court, in default of which he is liable to be fined (s. 45).

How guardian may enforce his rights.

**276.** A person who is entitled to be the guardian of a minor<sup>1</sup> may enforce his right by instituting a suit for the purpose; or may apply to the Court for a declaration of his right under the Guardians and Wards Act, s. 7;

<sup>1</sup> G. & W. Act, s. 37.

<sup>2</sup> *Id.* s. 46, s. 35 provides for a suit on the bond into which the guardian may be asked to enter; ss. 36 and 37 explicitly refer to the fact that, on the death of the ward or guardian, their

respective representatives may respectively sue and be sued.

<sup>3</sup> G. & W. Act, s. 33 (1), *verbatim*. Cf. s. 254, above.

or for delivery to him of the custody of the child under SECTION 277. the Criminal Procedure Code, s. 491.

The last-mentioned procedure is the simplest, and is based on the 'habeas corpus' proceedings.

### § 7.—Termination of Guardianship.

#### (1) Attainment of Majority or Marriage.

**277.** The right to the custody of a male child<sup>1</sup> ceases to exist in any person after the child has attained majority.<sup>2</sup> Emancipation of male child.

Under strict Muhammadan law "puberty [and discretion]" would be substituted for the word "majority," see s. 5A, above.

As to the Sunni law, it is said that, after a child has attained puberty, "if he is of ripe discretion, and may be trusted to take care of himself, he is to be set free, and allowed to go where he pleases, but if he cannot be trusted to take care of himself, the father should join him to himself or keep him by him, and be his guardian."<sup>3</sup> The Shiah law is similar: "When a child has attained to puberty and discretion, the power of the parents is at an end, and he is free to join himself to whomsoever he pleases."<sup>4</sup>

**278.** (1) The right to the custody of a virgin<sup>5</sup> ceases to exist in any person after she has attained the age of discretion.<sup>6</sup> Emancipation of females

(2) The powers of the guardian of the person of a female ward cease by her marriage to a husband who is not unfit to be the guardian of her person; provided that where a guardian of her person has been appointed or declared by the Court, his powers do not cease, unless the Court is of opinion that the husband is not unfit.<sup>6</sup> Husband's right.

#### (2) Removal of Guardian by Court.

**279.** A guardian appointed or declared by the Court, or appointed by will or other instrument, may be removed by the Court<sup>7</sup> under the Guardians and Wards Act, s. 39. Removal of guardian by Court. Guardians and Wards Act, s. 39.

<sup>1</sup> See s. 234, above.

<sup>2</sup> G. & W. Act, s. 41 (1) (c); see s. 229, above.

<sup>3</sup> Bail. I. 434 (par. 3).

<sup>4</sup> Bail. II. 96 (second).

<sup>5</sup> Bail. I. 434. If she is not a virgin, but "she cannot be safely left to herself, the father ought to keep her with himself." If "she may be trusted to take care of herself, the father has no right to retain her." *Quære*, whether in a question

to be decided by the High Courts any effect s. 39.

could be given to this provision of the law as coming under "the rights and authorities of fathers of families" (21 Geo. III. c. 70. s. 18); see table preceding Chapter II, and s. 2, above. The right to have custody as guardian, must be distinguished from the duty to maintain.

<sup>6</sup> G. & W. Act, s. 41 (1), (d) and see s. 256, above.

<sup>7</sup> Cf. *Hed.* 698; *Bail. I.* 669.

## SECTION 279.

The section referred to is as follows :—

“The Court may on the application of any persons interested, or of its own motion, remove a guardian appointed or declared by the Court ; or a guardian appointed by will or other instrument, for any of the following causes, namely : —

Guardians that may be removed  
Causes for removal.  
Abuse of trust, non-performance of duties, incapacity, ill-treatment, contravention of Act conviction

adverse interest, residence beyond jurisdiction, insolvency, law to which minor is subject, guardian appointed by will or other instrument, adverse interest, person appointing must have been ignorant of it, residence beyond jurisdiction, at impracticable distance.

- (a) for abuse of his trust ;
- (b) for continual failure to perform the duties of his trust ;
- (c) for incapacity to perform the duties of his trust ;
- (d) for ill-treatment or neglect to take proper care of his ward ,
- (e) for contumacious disregard of any provision of this Act, or any order of the Court ;
- (f) for conviction of an offence implying, in the opinion of the court, a defect of character which unfits him to be the guardian of his ward ;
- (g) for having an interest adverse to the faithful performance of his duties ;
- (h) for ceasing to reside within the local limits of the jurisdiction of the Court ;
- (i) in the case of a guardian of the property, for bankruptcy or insolvency,
- (j) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject :  
Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed,—
- (a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him : or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest ; or
- (b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence, as in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.”

Inherent right in High Court to set aside claim of unfit person to be guardian.

**280.** *Semble*, the High Court has inherent jurisdiction to declare or appoint a person other than the person who is entitled by law to be guardian, where in the opinion of the said Court the person entitled is unfit.

See comment to ss. 281 and 261, with the footnotes thereto.

**281.** *Semble*, where the person who is entitled by law to be the guardian of a minor has not been appointed or declared by the Court, nor appointed by will or other instrument, and a District Court (other than a High Court) is of opinion that the said person is unfit to be such guardian by reason of any of the causes referred to in s. 279, above, the said Court may declare the said person to be guardian, and may then remove him; after which it may appoint or declare another person to be such guardian.

*Procedure in District Court for setting aside unfit guardian who has not been appointed or declared.*

It would seem that it is necessary for the District Court first to declare the person entitled by law to be the guardian, before it can remove him, inasmuch as the Guardians and Wards Act, s. 39, empowers the said Courts to remove only such guardians as have been appointed or declared by the Court, or by a will or other instrument. Consequently the District Court can remove (or pass over) a guardian only for the causes mentioned in the said section, (which is set out in the comment to s. 279, above).

*Sec. 39 of Guardians and Wards Act applies only when guardian appointed or declared by Court by an instrument.*

It is submitted, that under the Guardians and Wards Act, s. 42, and the general policy underlying the Act, the Court does not, on the person entitled to be guardian being declared unfit, get plenary powers to appoint any other person guardian, but it must declare the person next entitled, who is not so unfit to be the guardian by law.

*Court must declare person next entitled.*

The powers referred to in this, and the last, section, may appear to give the Court discretion to choose the guardian for itself, irrespective of the person that is entitled by law. But in practice there is a great deal of difference between absolute discretion, and a power that can be exercised effectively, only after the claims of a number of persons have first to be set aside, by categorically holding that they are unfit.

It may, therefore, be doubted whether the decision in *Bindo v. Sham Lal*<sup>1</sup> can be justified on the grounds mentioned in the judgment; for the Judges there state: "It is true there is nothing against the father; then they say that he has married again, and so it will be more for the welfare of the minor to live with her maternal grandmother, than with the stepmother." These grounds are not sufficient, it is submitted, to deprive the father of the custody of the child. The same decision might, however, have been arrived at on the ground that the father had abandoned his right over the child, inasmuch as he had allowed the girl

*Bindo v. Sham Lal.*

<sup>1</sup> As to High Court, see s. 280, above. The High Court is ordinarily included in the term District Court in the G. & W. Act, s. (4).

<sup>2</sup> (1907) 29 All. 210. The case was dissented

from in *Andiappa v. Nallendransi* (1915) 93 Mad. 473, see also *Ibrahim Nachi v. Ibrahim Sahib*, ib. 608.

**SECTION 281.** to be maintained by the grandmother for five years, ever since the death of the mother, without apparently contributing to the expense.<sup>1</sup>

**282.** (1) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.

Resignation of  
guardian

(2) If the Court finds that there is sufficient reason for the application, it will discharge him; and if the guardian making the application is the Collector, and the Local Government approves of his applying to be discharged, the Court will, in any case, discharge him.<sup>2</sup>

**283.** (1) The powers of a guardian of the person cease—

Cessation of  
authority of  
guardian of  
1. the person,

- (a) by his death, removal or discharge;
- (b) by the Court of Wards assuming superintendence of the person of the ward;
- (c) by the ward ceasing to be a minor;
- (d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person; or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or,
- (e) in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so; or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.

(2) The powers of a guardian of the property cease—

2. of property.

- (a) by his death, removal or discharge;
- (b) by the Court of Wards assuming superintendence of the property of the ward; or
- (c) by the ward ceasing to be a minor.

(3) When for any cause the powers of a guardian cease, the Court may require him, or, if he is dead, his representative, to

Order to  
deliver  
property or  
accounts.

<sup>1</sup> See s. 253, above.

<sup>2</sup> G. & W. Act, s. 40, *verbatim*.



deliver, as it directs, any property in his possession or control, belonging to the ward, or any accounts in his possession, or control, relating to any past or present property of the ward. SECTION 283.

(4) When he has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities, save as regards any fraud which may subsequently be discovered.<sup>1</sup>

The author of the ‘Da’ayam-ul-Islam’ cautions guardians against giving over possession of the ward’s property to him before he acquires one of two qualifications, the age of marriage and discretion, or intelligence and capacity to take care of his property. In view of the great regard that guardians evince for their wards in our advanced days, and the anxiety that they show not to part prematurely with possession of their ward’s property, the foregoing caution seems unnecessary. The holy author adds, however, with shrewdness, as well as with seeming foresight of the days to come, that if, after the ward has acquired the said qualifications, the guardian does not hand over possession of the property to the ward, the Court may compel him to do so.

284. When a guardian appointed or declared by the Court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the Court, of its own motion or on application under Chapter II. of the Guardians and Wards Act, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.<sup>2</sup>

### § 8.—Unauthorised Persons Acting as Guardians.

284A. Where<sup>3</sup> any person other than the legal guardian of a Mussulman minor<sup>1</sup> purports to deal with his property, the transaction may be avoided by the minor notwithstanding that the said property was so dealt with in order to pay the minor’s debts, and was beneficial to him or necessary for his interest.<sup>1</sup>

<sup>1</sup> G. & W. Act, s. 41, *verbatim*.

<sup>2</sup> G. & W. Act, s. 42, *verbatim*.

<sup>3</sup> The present s. 284A was numbered s. 280 in the first edition. See s. 259, above.

<sup>4</sup> Cf. s. 231, above.

<sup>5</sup> *Maludin v. Sheikh Ahmad* (1912) 34 All 213; 39 I. A. 49. 11 Bom. L. R. 192. *Imambanda v. (Matsudda)* (1913) 15 I. A. 73, 83.

## SECTION 284A.

Distinction  
between  
manager and  
guardian.

The Privy Council have said: "Without some authority, their Lordships are unable to accept the view that there is no difference between the position and powers of a manager, and those of a guardian."<sup>1</sup> This remark was called forth by the following statement of Rampini, J., in a reference to a full bench: "The acts of a guardian in this country bind the minor. There is no difference between his position and powers, and those of a manager."<sup>2</sup>

In a later case their Lordships of the Privy Council say: "It is urged on behalf of the appellant that the elder brothers were 'de facto' guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was, therefore, necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a 'de facto' guardian. He may, by his 'de facto' guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."<sup>3</sup> It has been held, however, in India that when the transaction is for the benefit of the minor<sup>4</sup> or lunatic, it may be upheld;<sup>5</sup> though not otherwise.<sup>6</sup>

\* De facto \*  
guardian.

It is a question that may require consideration, whether, when a person who is appointed or declared a guardian by the Court, becomes disentitled to act as guardian by operation of any of the ss. 246-229. above, he gives place to the person next entitled, without any necessity of his removal by the Court, or whether, if the latter desires to act as guardian, he must apply to the Court to be declared as such, or take proceedings under s. 276, above.

84: see the statement of the propositions laid down in this case in the comment to s. 272, above; in particular the propositions numbered (5) and (6), *Sayad Ali v. Muhammad Zuhkar Ali Khan* (1916) 51 Punj. Rec. 252 (No. 83), *Musannnat Mehr Bibi v. Chaudan Din* (1917) 52 Punj. Rec., 209 (No. 50).

<sup>1</sup> *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1911) 39 Cal. 233; 14 Bom. L. R. (P. G.).

<sup>2</sup> *Mir Sarwarjan v. Fakhruddin* (1906) 34 Cal. 163, 166.

<sup>3</sup> *Matinda v. Sheikh Ahmed* (1912) 34 All. 213, 222; 39 I. A. 49; 14 Bom. L. R. 192.

<sup>4</sup> *C. I. Batl. I. 676.*

<sup>5</sup> *Ummi Begum v. Kenko Das* (1908) 30 All. 462 (per Stanley, C. J., & Banerji, J.) the wife and mother of a lunatic may validly sell his property to pay his debts; the following cases are referred to: *Mafuzul Hosain v. Basid Sheikh* (1906) 34 Cal. 36; *Ram Charan Saigal v. Anukul Chandra Acharya*, ib. 66; *Majidun v. Ram Narain* (1903) 29 All. 22. See also *Husan Ali*

*v. Mehdi Hussain* (1877) 1 All. 533 (which is adversely commented upon in *Pathamabai v. Vid Ummachabi* (1902) 26 Mad. 734, 739,—itself over-ruled by *Abdul Majeeth v. Krishnamachariar* (1916) 40 Mad. 213 (t. B.). On the other hand, Rampini and Pratt, J.J., have held that the mother is not the natural, nor the *de facto*, guardian of her minor children (so far as property is concerned) *Moyna Bibi v. Barker Behari Biswas* (1902) 29 Cal. 473.

<sup>6</sup> A conveyance by a mother on behalf of her minor son was set aside where the sale was shown to be neither necessary nor for the benefit of the minor: *Hirbai v. Haraj Banaji Nanja* (1895) 20 Bom. 116; *Fakhrudina v. Abdul Hussain* (1910) 13 Bom. L. R. 326. and see cases cited in comment to s. 259; and also *Moyna v. Barker* (1902) 29 Cal. 973; *Durgaji Rao v. Fakker Sahib* (1906) 30 Mad. 197; *Ram Charan Saigal v. Anukul Chandra Acharya* (1906) 34 Cal. 36; *Mafuzul Hosain v. Basid Sheikh* (1906) 34 Cal. 66.

## CHAPTER VIII.

### MAINTENANCE.

#### § 1.—*Preliminary.*

##### (1) *Explanation of Terms*

285. In this chapter, unless there is anything repugnant in the subject or context,—

(1) “maintenance” includes food, raiment, and lodging; <sup>Maintenance.</sup> <sup>1</sup>

(2) a Musulman is said to have “means to provide maintenance,” or to have “the means to maintain,” when he or she is possessed of sufficient means to be prevented, according to the precepts of Islam, from accepting alms; <sup>Means.</sup> <sup>2</sup> by “means” is meant “means to provide maintenance;”

(3) a Mussulman is said to be “indigent,” or “in indigent circumstances,” when he is not possessed of sufficient means to be prevented, according to the precepts of Islam, from accepting alms; <sup>Indigence.</sup> <sup>3</sup>

(4) “ability to earn a livelihood” or “ability to earn” implies that the person is able to work for wages in point of health and strength and in accordance with what is usual among persons of the same rank; females are not considered to have the ability to earn in any circumstances; <sup>Ability to earn.</sup> <sup>4</sup>

(5) a person is said to be “necessitous,” when he is both indigent and unable to earn his livelihood; <sup>Necessitous person.</sup>

(6) “ability to maintain” implies the present possession of means to maintain; but where the law imposes on one person the obligation to earn (if necessary) the means <sup>Ability to maintain.</sup> <sup>5</sup> When a person can earn the means.

<sup>1</sup> Bail. I. 137, 122; II. 101 (part 2)

<sup>2</sup> Hed. 118, Bail. I. 161 (citing *Hobart*, and *Kilgour*, II. 333-394). Means, which make it unlawful to beg, are “a surplus of 200 *dinars*

over one's necessities.” But see comment to this section; and cf. Civil Procedure Code, O. XXXIII, r. 5.

<sup>3</sup> Bail. I. 158.

SECTION 285. for maintaining another,<sup>1</sup> then the person so obliged, is said to have the ability to maintain that other, if he is able to earn the means for providing the maintenance of the said other person; and notwithstanding that he may have no present means to pay the expenses of the said maintenance;

**Minor.** (7) a "minor" is a person who has not attained majority under the Indian Majority Act; and a "major" is a person who has attained it;

**Infant.** (8) a child is said to be an "infant" if, being a male, he is not more than two years old, or if, being a female, she is not more than seven years old;

**Young person.** (9) a person is said to be "young," so long as he or she has not attained puberty;

**Adult person.** (10) a person is said to be "adult," after he or she has attained the age of puberty;

**Presumptive heirs.** (11) "presumptive heirs" mean those relations of a living Mussalman, who would inherit his estate if he were immediately to die;<sup>2</sup> "presumptive rights to inherit" refer to the rights of succession which "presumptive heirs" would have if the person in question were immediately to die;

**Presumptive rights to inherit.**  
**Prohibited degrees of relationship.** (12) two persons are said to be "within the prohibited degrees" where, being of different sexes, the relation between them is such that they cannot lawfully intermarry, or where, being of the same sex, the relation between them is such that they could not have intermarried if they had been of different sexes.

**Rules regarding maintenance undefined on many points, frequently of only moral obligation.**

The law of maintenance suffers in point of definiteness on many questions, owing to the fact that the exponents of Muhammadan law had no object in keeping legal rights distinct from obligations of a moral nature. The powers of a 'Qazi' are so different from those of Courts of law in British India, that rules which were quite sufficient to guide the Muslim courts, are sometimes hardly capable of being stated in a concrete form, without doing violence to some necessary, but perhaps merely

<sup>1</sup> *E.g.*, the father is bound to work and earn, if he can do so, in order to provide for young children, see s. 320, below.

<sup>2</sup> *Nemo est heres cuius* applies in Muhammadan law as much as in any other system, cf. *Bail. I.* 463, 574 (par. 3); II, 9-10.

implied, reservation or qualification. The whole of the law cannot, SECTION 285 however, be said to be of merely imperfect obligation;<sup>1</sup> and the present chapter is based on what is deemed legally enforceable.

In some respects there can be no complaint that the Muslim authorities have left the law too undefined: but the details about the quantum of maintenance, the rules for determining which persons are to be considered necessitous, and for fixing the standard of means, the possession of which imposes the obligation to provide maintenance, are hardly applicable to our times and conditions.

The following precepts of the Prophet about begging are relevant as those alone are considered entitled to maintenance for whom it is proper to beg: "Verily it is better for one of you to take your staff, and bring a bundle of wood upon your back and sell it, in which case God guards his honour, than to beg of people, whether they give him or not." "Acts of begging are scratches and wounds by which a man wounds his own face." "It was said, 'O Prophet, what makes him in no need of asking,—in having which, it is forbidden to beg?' He said, 'Fifty dirhems of silver, or the value of that in gold.'" "The Prophet said, 'That property with the possession of which it is not right to beg, is that quantity of things which supports the night and the morning, that is, whoever has food for a day and night, it is prohibited him to beg.'" "That person who has forty dirhems or equal to it in value, then verily he begs in a forbidden way." "Verily it is not for the rich to ask, nor for a strong robust person."<sup>2</sup>

With reference to the terms relating to the different periods of human life, it may be observed that the saving clause of the Indian Majority Act, does not except from its operation the rules relating to maintenance, as it does in regard to marriage, dower, divorce, adoption and religion. Hence it is implied that the Indian Majority Act "shall affect the capacity of any person to act" in regard to maintenance. Nevertheless, it does not follow (as has been suggested) that wherever in this branch of the law a minor is referred to, a minor as defined in the Indian Majority Act is to be understood. For s. 3 of the Indian Majority Act, it is submitted, in the main contains a definition of terms, and cannot by itself affect the substantive law. The absence of any enactment of the Legislature of British India, laying down, as a principle of universal application, the effect of a person being deemed in law a minor, such as

<sup>1</sup> *Mahomed Jume v. Hajj Adam* (1911) 37 Bom. 71, 73. Cf. s. 267 (comment), above, for an example of how moral duties may affect legal

obligations.

<sup>2</sup> *Mishent-ul-Masabih*, VI. v., 1, 2. Cf. Grote, *History of Greece*, III., 180.

## SECTION 285.

The definition of majority in the said Act cannot affect the divisions of human life known to Muhammadan law.

there is in regard to contracts,<sup>1</sup> has already been adverted to.<sup>2</sup> A mere definition of English words (like majority and minority) however authoritative the definition might be, cannot, by itself, affect a system of law (like the Muhammadan law) the expositions of which are contained in a language other than English. The only effect that such definitions can have, must be in the nature of a warning to translators, who ought, in future, to be careful not to use the words so defined, unless in the originals, which they are translating, the same notions are referred to as are annexed to the terms by the said definitions. Thus, in regard to the law of maintenance, for instance the Muslim texts lay down, that until the age when a child is weaned, its rights are of one description, and after it, until the attainment of seven years, different sets of considerations prevail; finally, between seven years and puberty its rights are of another description. Can the definition of majority in the Indian Majority Act extend the last-mentioned class of rights up to the age when a person is said to have attained majority under the Act any more than the said definition can extend the rights given to an infant in some up to the age of 18 or 21 years? It is true that when the Muslim authors wish to refer to the attainment of puberty they occasionally do so by means of Arabic words, the effect of which might be reproduced in English by the words "reaching the full age" or "attainment of majority"; but, on the other hand, when the British Legislature has adopted a definition of majority which is not determinable with reference to puberty, this cannot have the effect of introducing any change into the original purport of the Arabic words.

It might, no doubt, be urged that by the definition in question the legislature must be supposed to have intended to abrogate the substantive law, relating to the matters referred to. As to this argument, in the first place, it may be pointed out that there is nothing to indicate that the legislature intended by the Indian Majority Act to enact that the only division of human life in regard to any law recognised in the British Courts shall be that of minority and majority; and that rights or duties which are annexed by Muhammadan law to any period of life anterior to the age which is defined in the Act as the age of majority, shall in future be continued to the person in question until he attains the said age. If it were so, it might be argued with equal force that, when a testator gives an annuity to a child to be continued until the child attains puberty, then by reason of the Indian Majority Act the annuity must be continued till the child attains majority under that Act.

—Nor alter the rights annexed to specific periods of life.

<sup>1</sup> Indian Contract Act, s. 11.

<sup>2</sup> See § 5A, above.

It may be recalled that both the English and Roman law divide the period of human life anterior to the attainment of majority into various divisions, annexing distinct rights and obligations to each.

It may be of interest to note that the first law of Solon at Athens (594 B. C.) is said to have related to the ensuring of maintenance to wives and orphans.<sup>1</sup>

(2) *Rights and Obligations of Maintenance.*

(a) *Relation as Affecting Maintenance.*

**286.** (1) Under the circumstances and subject to the conditions and priorities hereinafter mentioned,—

(a) a Mussulman is bound to provide, and entitled to receive, maintenance to or from his ascendants and descendants;<sup>2</sup>

(b) according to Hanafi law reciprocal rights and obligations relating to maintenance arise also between collateral relations by blood who are within the prohibited degrees of relationship; under Shiah law no such rights and obligations arise;<sup>3</sup>

(c) the wife is entitled as of right to receive maintenance from her husband; but as a rule no other relation by affinity is obliged to provide maintenance, or entitled to receive it, in his or her own right.<sup>4</sup>

(2) Under the Criminal Procedure Code<sup>5</sup> if any person having sufficient means,<sup>6</sup> neglects or refuses to maintain his wife<sup>7</sup> or his legitimate or illegitimate child, unable to maintain itself, the District Magistrate, Presidency Magistrate, Sub-divisional Magistrate or Magistrate of the first class may, upon proof of such neglect or refusal, order such

Persons entitled to be maintained under—  
(1) Mahomedan law—  
(a) ascendants and descendants,  
(b) collaterals,

(c) wife.

(2) Criminal Procedure Code—  
(a) wife and children, legitimate or illegitimate.

<sup>1</sup> Plutarch, Solon, 24, cf. Grote's History of Greece, III., 179, n. 2.

<sup>2</sup> Ball. I. 463; II. 103-104.

<sup>3</sup> Ball. II. 102 (par. 4), ss. 384, et seq., below.

<sup>4</sup> See ss. 294, et seq., below.

<sup>5</sup> Act I. of 1898, s. 488, corresponding to Act X. of 1872, s. 536.

<sup>6</sup> The definition of "means" given in s. 285 (2), above, does not, of course, apply here.

<sup>7</sup> Does this statutory right inhere in a *mulla* wife? In *Luddan Sahiba v. (Mirza) Kamar Kudar* (1882), 8 Cal. 736, 11. O. L. R. 237, it was held that it does. Cf. s. 25 (14), and comment to s. 215 (3rd head), above.

**SECTION 286.** person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Whether  
due from  
mother to  
children  
Maintenance  
from wife to  
husband in  
England.

In interpreting the Acts of British India, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females,<sup>1</sup> and consequently a mother may, apparently, be proceeded against under s. 488 of the Criminal Procedure Code.<sup>2</sup> There does not, however, seem to be any reported case mentioning such proceedings. In England both parents are liable to maintain their illegitimate children, and a woman may, under certain circumstances, be required to maintain her husband,<sup>3</sup> a contingency that does not seem to be contemplated under Muhammadan law.

Illegitimate  
children

Muhammadan law appears to impose no burden upon an illegitimate father;<sup>4</sup> and though the Hanafi law recognises the relation of the mother to a child, begotten out of wedlock, there does not seem to be any recognition of such a relation in Shiah Ithna 'Ashari law. It would, therefore, seem that an illegitimate child is not entitled to maintenance from either parent under the latter law, and only from its mother under Hanafi law.<sup>5</sup>

(b) *Possession of Means and Ability to Earn.*

Absolute right  
of -

**287.** (1) Save as provided in this section, no person who is not necessitous is entitled to receive maintenance from another;<sup>6</sup> and no indigent person is obliged to maintain another.<sup>6</sup>

1. wife

(2) The wife is entitled to maintenance from her husband though she may have the means to maintain herself, and though her husband may be without means.<sup>6</sup>

2. necessitous  
parents

(3) Parents and grandparents<sup>7</sup> who are in indigent

<sup>1</sup> General Clauses Act, X. of 1897, s. 13 (1).

<sup>2</sup> This is pointed out by Sir R. Wilson, "Anglo-Muhammadan Law," 201, s. 148, and see above.

<sup>3</sup> Cf. s. 311, below, also Civil Code of France art. 205-207.

<sup>4</sup> See comment to s. 215 (3rd head), above.

<sup>5</sup> See s. 285 (5), and s. 328. Hed. 147, 118, Bail. I. 455, 157, 458, 461, 463, II. 104.

<sup>6</sup> See s. 285 (3), above; and Bail. II. 105 (par. 1.), et. c. "A poor man shall not be compelled to maintain other than four (classes of persons),

(i) his minor children, (ii) his daughters who have attained puberty, whether virgin (i.e., unmarried) or *specta* (married), (iii) his wife, (iv) his slaves," - Mahomed Yusuf, "Muhammadan Law of Marriage," etc., II. 329 (translation from the *Fatawa Qazi Khan*), and see Mayne's "Hindu Law," § 605 (on possession of property), *ibid.* 610 (on personal obligation to maintain wife, in dependency of possession of property).

<sup>7</sup> Bail. I. 462 (par. 4).



circumstances are entitled, under Hanafi law, even though they are able to earn their livelihood,<sup>1</sup> to receive maintenance from their children, provided that the children have the means to maintain.<sup>2</sup> *Quære*, whether under the Shiah law the parents and grand-parents are so entitled.<sup>3</sup>

(4) Young <sup>1. young children</sup> children are entitled (subject to ss. 291 and 292, below) to maintenance from their parents though the latter may be in indigent circumstances.<sup>5</sup>

(3) *Priority in Obligation to Maintain.*

**288.** (1) The obligation to maintain a necessitous Mussulman rests— Priority of obligation to maintain

(a) according to Hanafi law, in the first instance on the children,<sup>6</sup> then on the father, then on the mother, then jointly on the grandparents and grandchildren, and then on the collaterals;<sup>7</sup> Ascendants, descendants, then collaterals.

(b) according to Shiah law, on the nearest descendants jointly with the nearest ascendants: <sup>8</sup> proximity amongst ascendants being reckoned on the following basis: the father is considered nearest, then the nearest paternal grandfather (how remote soever), then the mother, and then the nearest maternal grandfather (how remote soever).<sup>9</sup> Ascendants and descendants.

*Explanation.*—According to Shiah law no person is legally obliged to maintain any of his collateral relations.<sup>10</sup>

(2) When the person on whom the obligation to maintain another is imposed in the first instance, is absent, or is unable to provide maintenance, the person on whom the obligation is imposed in the next instance, may be required to do so; but the expenses of the maintenance

When person primarily liable unable, person on whom liability rests in the next instance to provide: with right to recover.

<sup>1</sup> Hed. 117-148; cf. Bail I. 462 (par. 2)

<sup>2</sup> Bail. I. 401; II. 103.

<sup>3</sup> Bail II. 103 (par. 2); and see s. 320, below and footnotes thereto.

<sup>4</sup> See s. 285 (9), above.

<sup>5</sup> See s. 285 (3), above, and s. 307, below: Hed. 147-148.

<sup>6</sup> Bail I. 103 (last line).

<sup>7</sup> Bail. I. 457-458; where, however, paternal uncle alone is referred to

<sup>8</sup> Bail. II. 102 (par. 4); 101 (par. 3)

<sup>9</sup> Bail. II. 103-104.

<sup>10</sup> Bail II 102 (par. 4), adding "though it is becoming and proper for a person to maintain them, also particularly when he is one who would inherit from them."

SECTION 288. so provided may be recovered from the person whose obligation to maintain is prior, if and when the person so obliged in priority is no more absent, or unable to maintain.<sup>1</sup>

Priority between obligation on the mother and paternal grandfather.

Reason of conflict between Shiah and Sunni law.

View that the mother and grandfather should jointly bear expense, Abu Hanifa's opinion; grandfather alone to provide maintenance though mother living<sup>2</sup>

It will be observed that the Hanafis and Shiahs differ from each other as to the relative obligations of the mother and the paternal grandfather. The Hanafis consider the mother to be liable in the first instance, and then the grandfathers, both paternal and maternal, and the Shiahs put the liability on the paternal ancestors in the first instance, and then on the mother and maternal ancestors. It is easy to surmise that the difference of opinion arises from the conflict between the Pre-Islamic customary rules of succession which entirely excluded the mother (as a female),<sup>3</sup> and the Islamic injunction by which the mother gets in any event a share in the estate. The difficulty is increased in the Hanafi law by the fact that the relative positions of the mother and grandfather vary greatly in that system; for, while, under some circumstances the mother gets a third of the estate, and the grandfather two-thirds of the estate, in other circumstances, the mother gets her share in the estate, but the grandfather is excluded by the father.<sup>4</sup> It is, therefore, suggested in the 'Zahir Riwayat'<sup>5</sup> that where the mother and grandfather of a minor co-exist (the father, of course, being dead) the maintenance is to be paid in proportion to their rights in the inheritance, *i.e.*, the mother pays a third<sup>6</sup> and the grandfather two-thirds.<sup>6</sup> Abu Hanifa, however, is reported by "Hussun son of Ziyad" not to have adopted this view, but to have held that the grandfather alone is responsible for the maintenance. Abu Hanifa's view seems to be based on a precedent set by Abu Bakr.<sup>6</sup>

<sup>1</sup> For instances see ss. 309, 321, 322, 333, 311, below.

<sup>2</sup> See s. 602, below, and Chapter XIV *passim*.

<sup>3</sup> Bail. I. 461. Mahomed Yusoff's "Mahomedan Law of Marriage, Divorce, etc." II. 338, s. 1765.

<sup>4</sup> Sir R. Wilson ("Anglo-Muhammadan Law," 210), suggests that the mother's share of the maintenance would be reduced to one-sixth when her rights of inheritance are similarly reduced: The reduction in her share of inheritance takes place (1) where there are two or more brothers or sisters, (2) where the propositus (*i.e.*, the person entitled to maintenance) has children—an eventuality that cannot occur, as we are speaking of persons who have not attained puberty; and if we assume that the propositus has children, then the first duty is on the children and not the mother or grandfather of the propositus to maintain him. See s. 288 (1), above.

<sup>5</sup> See s. 323, below, dealing with the position of mother and grandfather.

<sup>6</sup> There is another precedent mentioned by Khan Bahadur Mahomed Yusoff, "Mahomedan Law of Marriage, Divorce, etc." II., 338, s. 1766, which shows Abu Hanifa's view to be that where there is a mother, a brother and a grandfather the last alone is to provide the maintenance. The author then adds: "and this is the view taken by (the first Khalifa) Abu Bakr Siddiq, on whom be peace." This instance, however, does not, as Sir R. K. Wilson seems to think, ("Anglo-Muhammadan Law," 210), enunciate any new principle. It is merely the same opinion that is stated above to be attributed to Abu Hanifa. No difference is made, it is evident, by the presence of the brother, for the grandfather in any case is bound to maintain in priority to the brother, who is a collateral. Apparently in the particular instance, which was taken for adjudication before Abu Bakr, the first Khalif, there were a mother, brother, and grandfather co-existing, and from the decision reported to be given by the Khalif in that instance, Abu Hanifa draws the general conclusion above referred to.

(4) *Property Liable for Maintenance.*

(a) *Property of Absent Persons.*

**289.** (1) Where a person is absent leaving available property, the Court may order maintenance to be recovered out of it for the benefit of the following persons, if they are indigent,<sup>1</sup> but of no others, namely, (a) his parents,<sup>2</sup> (b) his young or adult sons who are unable to earn their living, (c) his daughters whether young or adult, and (d) his wife.<sup>3</sup>

Maintenance out of property belonging to absent persons. Maintenance of parents, children and wife.

(2) The Court may also direct the said persons to apply the property in their hands, belonging to such absent son, father, or husband, as the case may be, to their own maintenance.

Application of property by the Court's order.

(3) The said persons may lawfully apply such property for their maintenance without any order from the Court;<sup>1</sup> provided that it consists of such articles as they are entitled to receive for their maintenance.

Without Court's order.

(4) Movable property of an absent son in the possession of the father, may, without an order from the Court, be sold by the father, and the sale proceeds applied to the maintenance of the father and of the son's wife and child; but the son's immovable property may not be so sold, unless the son is young or insane.<sup>4</sup>

Father's rights as to movables.

This is one of the few points on which the Muhammadan law differentiates between movable and immovable property; cf. s. 641, below.

"The father may sell the movable property of his adult son who is absent, but not if he is present. His mother and the Qazi and his other relations have no authority to sell. The Imam (Abu Hanifa) and his disciples are agreed that the father may sell; because the father has, but no one else has, the authority to expend thereout. But the father may not sell immovable property, as, for instance, lands and gardens. So in as much as he is prevented from selling the immovable property only of adults, it is evident that he may sell the immovable property of his young and insane children. And there is unanimity on this point."<sup>5</sup>

'Durr-ul-Mukhtar': Father may sell movable property of adult children and both movable and immovable of minors and insane persons.

<sup>1</sup> Bail, I. 459.

<sup>2</sup> Hed. 149; Bail, I. 459.

<sup>3</sup> See as to wife's right, s. 294, below.

<sup>4</sup> Bail, I. 459. Cf. s. 2, above; and 21 Geo.

III. c. 70 s. 18 (see table preceding p. 29 Ch. 11 above). See also the comment to the present section.

<sup>5</sup> *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *faul*, vi.

**SECTION 289.** The father must, however, be careful in dealing with the son's immovable property in India: see the chapter on Guardianship.

Except the father no other person may apply another's property for the maintenance of a third person.

**290.** Where property belonging to the absent son of an indigent person is in the possession, not of the father, but of a third person, then such third person cannot, without an order of the Court, apply the said property towards providing maintenance for the father; and if he does so he is liable to account for it to the son.<sup>1</sup>

*Semble*, the same rule applies where maintenance is due to any other person mentioned in s. 289, above.

(b) *Property of Young Children.*

Minor's property may be applied for his own maintenance

**291.** The expenses of the maintenance of a young Muslim may be taken out of any property he<sup>2</sup> may have, which may be sold for the purpose of maintaining him,<sup>3</sup> notwithstanding that his father may have means or may be able to earn. But where the father has already supplied maintenance to his young children, he cannot sell their property to reimburse himself for the expenses of their maintenance, unless he has reserved his right to have recourse to their property.<sup>3</sup>

But not for past maintenance.

(c) *Earnings of Young Sons.*

Earnings of young children may be applied for their maintenance.

**292.** Where the young sons of a person are able to work and earn their living, the father is entitled to apply their earnings for their maintenance, but is bound to hold the surplus in trust for them.<sup>4</sup> *Semble*, this section is

<sup>1</sup> Hcd 119.

<sup>2</sup> "Though the word in the original (*abov*) is masculine, I think it includes female children also who have property". Bail. I. 457 n. 1, with a cross reference to Bail. I. 455.

<sup>3</sup> Bail. I. 457 (par. 3). In England the obligation of the father to maintain his children arises under the Poor Laws, the Court refuse to order maintenance out of the children's property where the father is in a position to maintain his infant children: Halsbury, "Laws of England," XIII 114; and see s. 293, below, relating to arrears. Under the French Civil Code, art 384, parents have "the enjoyment of the property of their children, until the latter reach the full age of 18 years or emancipation."

<sup>4</sup> Bail. I. 458. "Though one is actually able to work, yet if work is not suitable or proper for him he is held to be weak and unable," so it is explained that "the sons of the better orders . . . are to be treated as weak," i.e., they are not required to earn their living; "so also students of learning when unable to earn anything; and their right to maintenance from their fathers does not abate while engaged in legal studies." The father is ordinarily the guardian of their property (see ss. 257, 258, above) though "if he be a spendthrift . . . the judge should take it out of his hands, and place it with a trustee to keep for the boy until he arrives at puberty and then deliver it over to him." Bail. I. 458 (par. 1). Legal studies are favoured, as law means religion.

subject to the same reservation as is contained in the SECTION 202 second sentence of the last section.

(5) *Arrears of Maintenance.*

**293.** Where the Court has ordered maintenance <sup>1</sup> for a relative other than a wife <sup>2</sup> [and young child],<sup>3</sup> and a month or more elapses without maintenance being recovered, no maintenance can be recovered in respect of the time that has so elapsed.<sup>4</sup>

Maintenance cannot be recovered for time that is past except by wife and minor child.

"For this reason that he must have received sustenance during the period that has elapsed: and the maintenance of relatives is due in order to supply them with the necessities for sustaining life, hence when the time has elapsed, and their sustenance has actually been supplied, then no maintenance can remain due. And Zail'i has included a young child also with the wife in the exception."

Reason for the rule.

Whether minor children also excepted.

§ 2. *Maintenance of Wife.*

(1) *Nature and Extent of Wife's Right.*

**294.** (1) The wife <sup>5</sup> who is regularly married,<sup>6</sup> and who has attained an age at which she can render to the husband his conjugal rights,<sup>7</sup> is entitled (while the marriage subsists)<sup>8</sup> to receive from him maintenance, according to her health and position in life and his means;<sup>9</sup> provided that she places, or offers to place, herself in his power,<sup>10</sup> so as to allow him free access to herself at all lawful <sup>11</sup> times;

Conditions on which the wife becomes entitled to receive maintenance—

1. puberty.
2. accessability to husband.

<sup>1</sup> *Semble*, where the Court has not ordered it *a fortiori* so.

<sup>2</sup> Similarly in the *Du'ayam-ul-Islam (Notes)*, it is provided that the wife can claim maintenance (if fixed by the court) though she has spent out of her own means.

<sup>3</sup> See comment, and s. 307, below.

<sup>4</sup> *Durr-ul-Mukhtar*, ch. on *Nafaga faul*. vi. Cf. Mayne, "Hindu Law," 610: "Arrears of maintenance used to be refused by the Madras High Court. But this view has now been overruled."

<sup>5</sup> Whether she be a *Moodim* or *Zimnee*, poor or rich, enjoyed or unenjoyed, young or old, it not too young for matrimonial intercourse": *Bail* I. 437; see *Bail*. II. 99; and comment to s. 24 and the present section.

<sup>6</sup> Not a *mu'ta* wife: see ss. 16, 26 (14), above, nor "one engaged under a semblance of legality": *Bail*. I. 440; nor, of course, a woman who

purported to marry a man who is already the husband of four wives, and consequently cannot marry a fifth one: *Abdul Hamid Khan v. Mussumat Mohi Jan* (1912) 48 Punj. Rec. 192 (No. 49).

<sup>7</sup> Under Hindu law the husband is bound to pay for maintenance of his immature wife, though she stays with her parents. Mayne, 610.

<sup>8</sup> *Shah Abu Ilyas v. Ulfat Bibi* (1896), 19 All. 50. *Abdool Fattah Moulvie v. Zabunessa* (1881), 6 Cal. 631. No an order for maintenance by the Magistrate drops on a divorce: see s. 301, below. See also the illustrations to this section.

<sup>9</sup> See s. 295, below.

<sup>10</sup> Such placing herself in the power of the husband is called *tamkin* in Arabic. The wife must reside in the husband's place of residence: *Bail*. I. 438, II. 97.

<sup>11</sup> See s. 297, below.

**SECTION 394.** and obeys all his lawful commands.<sup>1</sup> Where the marriage is irregular merely because of the absence of witnesses,<sup>2</sup> she is entitled to maintenance in the same manner and subject to the same conditions as if her marriage had been regular.

Wife's  
absolute right.

*Explanation.*—The inability of the husband to provide due maintenance for his wife does not affect her right to receive it.<sup>3</sup>

Maintenance  
under Cri-  
minal Proce-  
dure Code

(2) *Quære*, whether an order for maintenance may be made under the Criminal Procedure Code<sup>4</sup> against a Muslim husband, though the wife has not attained puberty.<sup>5</sup>

After 'mut'a.'

(3) It has been held that an order may be made under the said Code in favour of a woman who has contracted 'mut'a' with the man.<sup>6</sup>

*Illustrations.*

(1) H is absent from his wife, W. W appears before the judge offering to place herself within the power of H. This does not make H liable for maintenance, till H is apprised of the offer, nor till after the lapse of sufficient time for H's coming to W, or sending an agent, together with the actual surrender of W to H or H's agent.<sup>7</sup>

(2) W, the wife of H, is disobedient, but afterwards returns to obedience; W is not entitled to maintenance till H is informed of her submission, and the lapse of sufficient time to allow his coming to her or sending an agent.<sup>7</sup>

(Effect of 'mut'a'  
on maintenance.)

(3) A Shiah Ithna 'Ashari woman, W, made an application for maintenance under the Criminal Procedure Code, against H, with whom W had contracted 'mut'a.' Held, that the fact that under the Shiah law W did not have a right to maintenance capable of being enforced by a suit in a Civil Court, did not interfere with W's statutory right to maintenance under the Criminal Procedure Code, but that the question to be determined was whether the period of 'mut'a' had already expired, or the relation between W and H was subsisting.<sup>8</sup>

<sup>1</sup> Bail. I. 250, 437-438, II. 97, 101 (par. 3), cf.

<sup>2</sup> 2), and in particular s. 24 (2), above.

<sup>3</sup> Bail. I. 466 (last line).

<sup>4</sup> Bail. I. 439 (par. 2). Though this means may be taken in account to fix the amount. See comment to s. 235, below and Bail. I. 447, L. 15-18.

<sup>5</sup> See s. 286 (2), above.

<sup>6</sup> *Kotahnu Bibee v. (Shauk) Dular Bux* (1875) 24 W. R. (Cr.) 44; Jackson, J., did not in

this case decide the point, as the wife was only ten years old; and no one was examined on her behalf except herself.

<sup>7</sup> See illustrations (3) and (4) to this section.

<sup>8</sup> Bail. II. 101.

<sup>9</sup> *In the matter of the Petition of Luddun Sahib, Luddun v. (Mirza) Kamar Kadar* (1882) 8 Cal. 780; 11 C.L. B. 237; H was the second son of the ex-King of Oudh, and W the niece of one of his wives: 14 Cal. 277.

(4) A Shiah Mussulman sued for a declaration that he had dissolved the 'mut'a' connection which had existed between himself and W, by making a gift of the unexpired portion of the 'mut'a,' and that, consequently, he could not be ordered, under the Criminal Procedure Code, to maintain W; *declared accordingly*; and *held*, that W was under the 'mut'a,' in the position of debtor to H, and the gift of the unexpired portion of the term of the 'mut'a' operated as a release to which the consent of W was not necessary, *1. See 49 Cal. 2.*

In connection with the point whether maintenance is due even to a wife who has not attained puberty, *Shah* is cited (in the 'Hidayat') to be of the opinion that she is. This statement conflicts with the statement contained in the 'Fatawa Razvi,' where the *Shah* is stated to be the same as the Hanafi and Shafi laws. This contradiction is explained by the fact that *Shah* holds the opinion attributed to him in the 'Hidayat' previous to his adoption of *Bayan-i-Khatib*, but afterwards altered it so as to make it conform with the rule prevailing in the other schools. *2*

The following is a translation of an extract from the 'Durr-ul-Mulh' *Maintenance* (a text of authority on the subject) — "Maintenance is due only to a wife who has been regularly married, so that if the marriage is found to be irregular, as for instance if she is found to be a free 'Hind' (at the time of the marriage contract) for another husband, or if the marriage is void on the ground that the woman married turns out to be the foster sister of the man, then the man may demand back the allowance of maintenance; as is stated in the 'Bayan-i-Raiq.' In an irregular marriage maintenance can be demanded back, provided that it had not become obligatory by reason of the order of the Qazi; and if it is paid by such a husband who is not the Qazi, then it cannot be demanded back. The same is stated in the 'Mumtaz' from the 'Hashiat-ul-Mulh.' *3* Where it has been ordered to be paid by the judge, it is presumed to be voluntarily given, and ranks as a gift. *4*

295. For the purpose of determining at what rate maintenance is payable by the husband to the wife, in accordance with Muslim law, the legal position of both the

*1* *Mohamed Ali Khan v. Khan, 11 Cal. 270* (1886).

*2* In this decision it is stated that the woman's relation to the man under a *mut'a* contract is entirely analogous to that of a debtor's relation to his creditor, and that therefore the man is entitled to annul the contract by "releasing" the woman, even without her assent. See, however, *3*, 25, above, which indicates

that the relation created is in favour of the woman also.

*3* See Wilson, "Anglo-Muhammadan Law" (Oxford ed.) 107, referring to p. 531 of the *Fatawa Razvi*, and Vol. II, p. 83 of the *Mukhtaf*.

*4* *Mukhtaf-ul-Fatawa*, II, 85.

*5* Cf. *3*, 265, above.

*6* *Durr-ul-Mulh*, Ch. on *Nafaka*, *faskh*, I.

When maintenance is paid to a regularly married woman who can be demanded back.

scale of maintenance. in Muslim law.

SECTION 295  
Shafi'i law.

Shiah law

Particulars of  
maintenance  
due.Medical  
attendanceInapplica-  
bility of  
these detailed  
rules.Maintenance  
and the  
social condi-  
tions and  
means of the  
husband or  
wife, or both.1. 'Fatawa  
'Alumgiri.'2. The 'Zahir-  
Riwayat.'3. The  
'Hidaya.'

husband and wife are equally considered.<sup>1</sup> In accordance with Shafi'i law the position of the husband is alone considered.<sup>2</sup> The Shiah law is that the maintenance should be determined by the wife's requirements in respect of condiments, food, clothing, residence, service, and implements of anointing; a due regard being also had to the custom of her equals,<sup>3</sup> among her own people in the same city.<sup>4</sup>

Many details are given in the texts about the class of maintenance that is due, especially from the husband to the wife, *e.g.*, as to whether one or more servants should be maintained for her, and even as to the quality and quantity of food that she is entitled to receive. It is, for instance, laid down that she is not entitled to perfumes, nor medical attendance at the expense of the husband.<sup>5</sup> These details are, in their nature, of little use under the changed circumstances of our times; and we find in the 'Fatawa 'Alumgiri' itself an indication that modern rules may differ on these points from the "older opinions."<sup>6</sup>

The remarks made above do not apply directly to the question whether the condition of the husband alone, or of the wife alone, or of both should be the basis of maintenance. Still, the following passage from the same digest must be considered as liable to modification, especially as the Muslim jurists themselves are not unanimous.<sup>7</sup> "When monthly maintenance is decreed and the husband is rich, eating white bread and roast meat, while the woman is poor, or the reverse is the case, the condition of both should be taken into consideration according to one set of opinions. But in the 'Zahir Riwayat' it is said that regard should be had only to the condition of the man, and there are also many opinions in favour of this view; the *futea*, however, is said to be in accordance with the other." The 'Hidaya' lays down that "in adjusting maintenance, regard should be paid to the rank and condition of both her and her husband," and though Shafi'i is stated to be of the opinion that the Quran requires only the husband's position to be considered, the author of the 'Hidaya' interprets the Quran in a different way, and supports his own view by the authority of a tradition.<sup>8</sup> The view adopted in the 'Hidaya' is also accepted by the 'Sharh-i-Viqaya,'

<sup>1</sup> Bail. I. 411-412, II. ed. '10.<sup>2</sup> II. ed. 110.<sup>3</sup> Cf. the *mahr-ul-mithl* s. 97, above.<sup>4</sup> Bail. II. 99.<sup>5</sup> Bail. I. 411-412. As to dress: I. 148, residence, I. 418-149; II. 99. See also Mahomed Yousuf's "Mahomedan Law of Marriage.Dissave, *etc.*" Vol. II. 264, *et seq.*<sup>6</sup> Bail. I. 139 (II. 1-3).<sup>7</sup> See s. 114, above.<sup>8</sup> II. ed. 140-141. The tradition is given in the quotation which follows, below, from the *Sharh-i-Viqaya*, and is also to be found in the *Mohent-ul-Masabih* Cf. Mayne, "Hindu Law," 617.



where it is stated as follows: "In fixing upon the amount of maintenance the condition of both parties must be regarded. And this is our (i.e., the Hanafi) view, but according to Imam Shafi'i only the condition of the husband is to be considered. The authority in support of our view is that the Prophet said to Hinda, the wife of Abu Sufian, 'take from his property what is required for thy needs, and the needs of thy child,' which tradition is reported by Bukhari and Muslim, and refers the quantum of maintenance to the needs of the wife. It will be found explained at length in the 'Fath-ul-Qadir.'<sup>1</sup> The view supported by the 'Hidaya' and 'Viqaya' would no doubt find favour with the British Courts in India, especially as the 'Alamgiri' states that the 'fatwa' is in accordance with that view.

4. The 'Sharh  
-i-Viqaya.'

A recent decision in England has a bearing on a point involved in s 295, the wife's right to be supplied with apparel by the husband; and it is worth being noted as an example of how, what seem to be the most antiquated rules of law, are brought into intimate contact with the most modern conditions of life. The question arose whether the necessary wearing apparel may be given by a husband to his wife as a loan, or whether he must give it away to her as a gift. Bailhache, J., is reported to have remarked, that, if it were the law that the husband was bound to make a gift to the wife of her necessary wearing apparel, then an agreement between the husband and wife that the husband would only lend her such apparel would not be enforceable against the execution creditors: it would be an agreement made without consideration, and would not be valid against the creditor. But the learned Judge was satisfied that the law (in England) was not that the husband was bound to make a gift to the wife of her necessary apparel. He was bound to provide her with necessary apparel suitable to her station in life as fixed by that of her husband, but he was not bound to make her a gift of it.<sup>2</sup>

Wearing  
apparel.  
English law

Under the Divorce Act IV. of 1869 (which does not apply to Mussul-  
mans), alimony, pending a suit, is not to exceed one-fifth of the husband's  
net income, for the three preceding years.

Analogy of  
alimony.

**296.** Each wife is entitled to have a separate apart-  
ment for herself, free from the intrusion of any person  
other than her husband.<sup>3</sup>

Each wife is  
entitled to a  
separate  
apartment.

<sup>1</sup> *Sharh-i-Viqaya*, *Talaq*, Ch. on *Nafqat* (ad init.).

pp. 666, 667.

<sup>2</sup> *Rondeau, Le Grand & Co. v Marks*, decided 23 July 1917, noted *Sol. Journ.* for 4 Aug. 1917.

<sup>3</sup> *Ibid.* 143, *Bail. I.* 149; *II.* 99-100. Each wife may also exclude from her own apartment another wife of her husband.

## SECTION 297.

(2) *Duration of Wife's Right to Maintenance.*(a) *During Marriage.*

Right  
not lost by  
wife lawfully  
refusing  
access

**297.** The wife does not lose her right to receive maintenance under s. 294, above, if she refuses access to her husband on some lawful ground.<sup>1</sup>

Nor by  
husband's  
minority nor  
her own ill-  
ness nor  
malformation,  
nor absence  
with permission.

**298.** The wife does not lose her right to receive maintenance by the fact that the marriage cannot be consummated owing (1) to the husband's not having attained puberty,<sup>2</sup> or (2) to the wife's absence from him with his permission,<sup>3</sup> or (3) her illness,<sup>4</sup> or (4) malformation.<sup>5</sup>

If the wife has never come into the house of her husband, it need hardly be said that she is not entitled to maintenance.

(b) *During Widowhood.*

Widow has no  
right to  
maintenance

**299.** The wife's right to maintenance ceases on the death of her husband.<sup>6</sup>

According to what the editor of the 'Sawiyat-ul-Uloom' considers the most common or generally received Shari'ah opinion, the widow is not entitled to any maintenance during widowhood.<sup>7</sup> From the statement that, according to some Shari'ah authorities the widow has the right, even on the death of her husband, she is pregnant to be married and until she is delivered, out of the share in the estate of her husband which the child borne by her is entitled to inherit.<sup>8</sup>

It may be remarked that the mother would be entitled to maintenance from her child (see s. 328, below); and that her claim would (subject to s. 293, above, and comment thereto), be absolutely enforceable against the property of her child. On the other hand, where there is property which the unborn child would be entitled to inherit from its

<sup>1</sup> *E.g.*, if she does so for obtaining payment of her dower; *Hid.* III, *Had.* I, 338. It is also stated that the husband, not saying his wife is not a lawful ground, is committed to her; above. She is entitled to refuse to accompany him in his journey; *Had.* I, 429.

<sup>2</sup> *Had.* I, 129-130, II, 97-8 (where, a dissenting opinion is also related to).

<sup>3</sup> *Had.* II, 97-98.

<sup>4</sup> *Khan Bahadur Mahomed Yusof* in his learned book gives some details on this point which may occasionally be of use: "Mahomedan Law of Marriage, Divorce, etc.," II, 268-266

ss. 157-158, 5.

<sup>5</sup> "Or it is a belief in the 'Dawane-ul-Fitrat' that, if, on any other circumstances, the wife's permission prevails the husband having no choice but to marry; *Dawane-ul-Fitrat*.

<sup>6</sup> *Had.* I, 11, *Had.* I, 12-159, II, 98-99; *Agha Ali Khan's July 18, 1881, v. Koodum Beeba* (1879) 10 Cal. 9, 241, V 196.

<sup>7</sup> *Had.* II, 98-9, 102, 171, *Ch. Had.* I, 453 (at 3 line): "She would have no right to maintenance out of his estate; but if she has a child her maintenance will be in the share of his child."

father, the mother would equally be entitled to inherit a portion there- SECTION 299.  
of ; and thus s. 287 (1) would probably prevent the mother from having  
any claim to be maintained, inasmuch as she would not be necessitous  
(as defined in s. 285 (5) ). Hence it seems that for all practical purposes  
the law is sufficiently and accurately stated in s. 299 as it stands.

In Pre-Islamic times the Arabs excluded widows entirely from inheritance. To remedy this, an early verse of the Quran<sup>1</sup> provided that widows should be given maintenance for a year by way of inheritance. This provision was revoked by a later verse<sup>2</sup> which gives to widows more extensive rights than mere maintenance for a year,<sup>3</sup> and share in the estates of their deceased husband. That the latter verse revokes the former is a point on which all commentators on the Quran are agreed, but, in a case<sup>4</sup> that the Privy Council had to decide, this fact was not pointed out to them, and they consequently were unable to understand how it was that the 'Hidaya' and 'Sharaya'-ul-Islam' laid down that no maintenance was due to the widow, in direct contradiction to the verse of the Quran. They held, however, that they would not speculate as to the causes of the apparent contradiction, but would consider the law to be correctly laid down in commentaries of such antiquity and authority. See ss 611 and 641, below, and the comment thereto.

(c) Maintenance after Divorce.

(i) During 'Iddat.'

300. (1) According to Hanafi law a wife who is divorced is entitled to maintenance during her 'iddat,'<sup>5</sup> whether the divorce is revocable or irrevocable (or triple), and whether or not she is pregnant, unless the marriage has been dissolved for some cause of a criminal nature,<sup>6</sup> originating from the woman.

(2) According to Shiah and Shafi'i law,—(a) a wife who is revocably divorced is entitled to maintenance during her 'iddat';<sup>7</sup> (b) but not a wife who is irrevocably divorced;<sup>8</sup> provided that (c) if, at the time when an

<sup>1</sup> Sura II. 240.

<sup>2</sup> Sura II. 234.

<sup>3</sup> The French Civil Code, art. 205 (amended by the law of 9th March, 1891) gives the same period for support to widows and widowers.

<sup>4</sup> *Aga Mohamed Jaffer Bhandare v. Koolson Bicebe*, (1897) 25 Cal. 9, 24 L. A. 196

<sup>5</sup> But not beyond, see the *n* to s. 701.

<sup>6</sup> Bail. I. 450-451; Hed. 115.

<sup>7</sup> *E.g.*, apostasy on the part of the wife, or her misbehaviour so as to establish supervenient prohibition. See s. 302, below. Bail. I. 451, Hed. 145.

<sup>8</sup> Bail. II. 98 102 (II. 4-5), 169.

Abrogated verse of the Quran requiring widows to be maintained for a year.

Right to maintenance after divorce during 'iddat,' Hanafi law.

(Shiah and Shafi'i law.)  
1. during 'iddat' when divorced  
2. during pregnancy when irrevocable

SECTION 300. irrevocable divorce is pronounced, the wife is pregnant, she is entitled to maintenance during her pregnancy.<sup>1</sup>

*Illustrations.*

(1) H's wife, *W*, dissolves the marriage by exercising her option of puberty or of inequality; *W* is entitled, under Hanafi law, to maintenance during the 'iddat.'<sup>2</sup>

(2) H absents himself from his wife, *W*, and she marries another husband, *HA*, and the marriage of *W* with *HA* is consummated. Then H returns, and *HA* and *W* are separated, and *W* has to observe 'iddat,' but she is not entitled to maintenance, either from H or *HA*,<sup>3</sup> because she was disobedient to H, and her marriage with *HA* was void.<sup>4</sup>

(3) H pronounces three divorces against his wife, *W*. Before the expiration of her 'iddat,' *W* marries *HA*, and their marriage is consummated, and then *W* and *HA* are separated judicially, on which maintenance is due from H to *W* according to Abu Hanifa,<sup>5</sup> because *W* was not disobedient to H (though her marriage to *HA* was invalid).<sup>6</sup>

(ii) After "Iddat."

Right to maintenance drops after expiration of "iddat."

301. On the expiration of the 'iddat' after divorce, the wife's right to maintenance drops, whether based on the Muhammadan law, or on an order under the Criminal Procedure Code.<sup>7</sup>

(d) Effect of Apostasy on Right to Maintenance.

Apostasy of wife. Is maintenance forfeited?

302. According to Muhammadan law, if the wife is converted from Islam to another religion, the marriage is dissolved, and she loses her right to maintenance.<sup>8</sup> *Quære*, whether this rule has any, and if so, what, effect in British India, subsequent to Act XXI of 1850.<sup>9</sup>

(3) Revival of Right to Maintenance after Loss.

Revival of right lost by disobedience.

303. (1) Where a wife loses her right to maintenance

<sup>1</sup> Hed. 145; Bail. II. 98, 170.

<sup>2</sup> Hed. 146 (col. i. par. 2); for though the marriage was dissolved for a cause originating from the wife, yet it was not of a criminal nature.

<sup>3</sup> Bail. I. 452-453.

<sup>4</sup> Mahomed Yusoff, on Marriage, Divorce, etc.

<sup>5</sup> 272-273, s. 1594.

<sup>6</sup> Bail. I. 453.

<sup>7</sup> Mahomed Yusoff on Marriage, Divorce, etc. II. 272-273, s. 1595; as to the powers of the Court of Divorce in England to make orders for

maintenance, see the Divorce and Matrimonial Causes Act, 1853, 732.

<sup>8</sup> So an order for maintenance by the magistrate drops by divorce: *In re Abdulali Ismatijh*, (1883) 7 Bom. 180; *In re Kasam Pirbhat*, (1871) 8 Bom. H. C. R. (C.L.) 95; *Re Petition of Din Mahomed*, (1886) 5 All. 220; *Syed Saib v. Meeran* (1910) 20 M. L. J. 22; and see s. to the word "subsists" in s. 294, above; and the illustrations to s. 294.

<sup>9</sup> See also ss. 303, 304, below.

owing to her disobedience to her husband, or some such SECTION 303. other cause which does not dissolve the marriage, her right to maintenance revives under Hanafi law by her ceasing to be disobedient, or by the removal of the said other cause, though she should in the meanwhile have been irrevocably divorced; provided that the period of her 'iddat' has not expired.<sup>1</sup>

(2) Where a wife is revocably divorced, and she apostatizes, her right to maintenance is, under Hanafi law, lost, and does not revive by her subsequent return to Islam.<sup>1</sup>

(3) Under Shiah law the right to maintenance is lost by apostasy from Islam, but it revives on re-conversion.<sup>2</sup>

(4) *Quære*, whether the rules contained in this section are in British India, repealed to any, and if so, to what, extent by Act XXI. of 1850.

It is stated that, under the Hanafi law, if the divorce is irrevocable and the woman apostatizes, her right to maintenance (during 'iddat') is not lost, except ('ex necessitate rei') while she is in prison for apostasy. In British India she would not be imprisoned for apostasy, and so, on the principle 'cessante ratione cessat ipsa lex,' she would not lose her right to maintenance, even according to strict Hanafi law. The Hanafi rule is, however, different where the divorce is revocable, and in the case of such a divorce being pronounced, and the wife then apostatizing, she loses the right to maintenance. This seems to be just the reverse of what one would expect. But perhaps the reason is that the law disapproves of irrevocable divorces, some of which are characterised even as sinful;<sup>3</sup> and, therefore, the husband is mulcted in maintenance under all circumstances after such divorces.

The Shiah law on the other hand allows the divorced wife maintenance if the divorce is revocable, but not if it is irrevocable,<sup>4</sup> and the reason seems to be that the disapproved kinds of divorces are not permitted under Shiah law, and a considerable part of the 'iddat' expires before any pronouncement of divorce can become irrevocable in accordance with Shiah law. Hence divorces, whether revocable or irrevocable, stand on the same footing as far as the approval of the Shiah

<sup>1</sup> Ball. I. 451, 452 (par. 2), 453 (par. 3).

<sup>2</sup> Ball. II. 1.

<sup>3</sup> See ss. 135 & 142, above.

<sup>4</sup> See s. 294, above.

SECTION 303. law is concerned; and, consequently, it is provided, as might be expected, that a wife should be more favoured during the period when the divorce is still revocable, than after it has become irrevocable.

No revival  
when loss  
of right by an  
Act which has  
dissolved  
marriage.

304. Where a wife loses her right to maintenance by [apostasy or] some [other] cause proceeding from herself which dissolves her marriage, her right to maintenance does not revive by her return to Islam, or by the removal of the said other cause.<sup>1</sup> *Quære*, whether in British India a wife retains her right to maintenance, after apostasy.<sup>2</sup>

The reason underlying s. 304 is obvious. The wife deprives herself of the right to maintenance by her own act, and by an act that has the result of severing the marital tie. Two questions, however, may arise, (1) whether in British India Act XXI. of 1850 would save the wife's rights, and (2) whether even in cases in which the status of wife is lost and subsequently regained by her, she becomes entitled to maintenance.

(4) *Some Incidents of the Wife's Right of Maintenance.*

(a) *As to Payment of Arrears and Transfer.*

Maintenance  
due monthly,

305. Maintenance becomes due and is payable to the wife according to Shiah law day by day;<sup>3</sup> the Hanafi texts contemplate payment by monthly instalments, unless otherwise decreed by the Court.<sup>4</sup>

No valid  
release or  
transfer of  
right to  
future  
maintenance,

306. The wife cannot validly release [or transfer<sup>5</sup>] her right to receive maintenance, except after it has become due; and (according to Hanafi law) for one month in anticipation.<sup>6</sup>

It would seem that, according to Shiah law, since maintenance becomes due day by day, it cannot be anticipated for more than a day.<sup>7</sup> And this surmise is somewhat strengthened by the fact that, in case of divorce, maintenance for the day on which the divorce is pronounced is expressly stated to be due.<sup>8</sup>

<sup>1</sup> Bail I. 451.

<sup>2</sup> See ss. 302. & 303, above.

<sup>3</sup> Bail, II. 100, 102 (first line, and "f/th")

<sup>4</sup> Bail, I. 449; see s. 306, below.

<sup>5</sup> The texts speak of "releasing" alone. It would seem, therefore, that a transfer is a *fathori* invalid. Cf. also the Transfer of Property Act, s. 6; and *Shamsuddin Gulam Husain v. Abdul*

*Hussain Kalamuddin*, (1906) 31 Bom. 165; 8 Bom. L.R. 781, where the effect of s. 6 (a) of the Transfer of Property Act is considered, and transfers and releases are compared.

<sup>6</sup> Bail I. 446.

<sup>7</sup> See s. 200, above.

<sup>8</sup> Bail, II. 100 (last line).

Similarly in England the right to maintenance is not capable of SECTION 306. being assigned or charged whether it consist of alimony <sup>1</sup> or permanent English law. maintenance after divorce<sup>2</sup> or allowance made in lunacy to the committee of a lunatic.<sup>3</sup>

307. (1) According <sup>4</sup> to Shiah and Shafi'i law the wife Wife's right to arrears of maintenance. is entitled to maintenance notwithstanding that she has allowed it to get into arrears without having had the amount fixed by the Court, or by agreement with the husband.<sup>5</sup>

(2) According <sup>6</sup> to Hanafi law arrears of maintenance are not recoverable unless fixed by the Court, or by agreement between the husband and wife; nor even after they have been so fixed, in case their marriage is dissolved by divorce or by the death of either party; provided that they may be recovered if the judge has decreed maintenance, but not fixed its amount.<sup>6</sup>

(3) *Quære*, whether the rules of Muhammadan law contained in this section refer to adjective law, and are superseded by the law of British India.

308. (1) According to Shiah and Shafi'i law, where a Refund of maintenance. husband has already received maintenance, and it does not lawfully become due to her, the husband may claim back from her, the whole, or such portion thereof, as did not become lawfully due to her.<sup>7</sup>

(2) According to Hanafi law, where the husband has, (Hanafi law.) Where maintenance paid in advance under order of Court, it may be recovered, but not if voluntarily paid. under an order of the Court, paid to the wife maintenance allowance in advance, in respect of a specified future period of time, and the husband dies, or the marriage is otherwise dissolved before the expiration of the said period, a part of the said maintenance allowance (proportionate to the unexpired part of the said period of time) may be reclaimed

<sup>1</sup> *Re Robinson* (1884) 27 Ch. D. 160; 53 L. J. (CH.) 986; 3 W. R. 17 (C.A.).

<sup>2</sup> *Watkins v. Watkins*, [1896] P. 222; 65 T. J. P. 74-75; L. T. 630; 44 W. R. 677 (C.A.).

<sup>3</sup> *Re Weld* (1882) 20 Ch. D. 451; 51 L. J. (CH.) 913; 46 L. T. 397; 30 W. R. 385.

<sup>4</sup> See s. 307 (3).

<sup>5</sup> *Bail*, II. 100; *Med*. 142-143; *Slc. Ct.* s.293, above; and see comment to s. 308, below.

<sup>6</sup> *Bail*, I. 143-144, 452 (par. 4); *Abdool Futteh Moulvie v. Zabunnessa Khatoon*, (1881) 6 Cal. 631.

<sup>7</sup> See comment.

SECTION 308. from the wife, or from the widow, as the case may be, by the husband or by the other heirs of the husband respectively. According to Abu Hanifa and Abu Yusuf such proportionate part of the maintenance cannot be reclaimed if the allowance has been voluntarily paid by the husband. Imam Muhammad holds that the said part may be recovered even if voluntarily paid, where it exceeds the allowance due for maintenance for one month.<sup>1</sup>

*Illustrations.*

(1) H gives his wife, W, an allowance for maintenance in advance, and then he divorces her irrevocably; or W (after an irrevocable divorce) claims, and is paid, maintenance, falsely stating that she is pregnant. W must refund the maintenance for the period after the divorce.<sup>2</sup>

(2) H says to his wife, W, "If maintenance does not reach you in ten days you may divorce yourself from me;" and W is rebellious<sup>3</sup> by going to her father's house without his permission within the period. A dissolution of marriage does not take effect, though H should fail to send maintenance to W;<sup>4</sup> because she was not entitled to maintenance and the option to divorce was based upon it.<sup>5</sup> In other words, the option to divorce must be interpreted as being subject to a failure on the husband's part to give due maintenance; and not an absolute undertaking to provide maintenance, whether or not the wife became entitled to it.

(3) H divorces W, his wife, three times, but intends remarrying her; and with that object gives her maintenance during her 'iddat,<sup>6</sup> "and afterwards goes back from his intention; he may in all cases, according to the most authentic reports, reclaim it, whatever may have been the conditions under which the money was paid, because in such circumstances it is a bribe."<sup>7</sup>

Recoverability of arrears of maintenance: Shiah and Hanafi law differ.

The following occurs in the 'Sharaya'-ul-Islam' a Shiah text:—  
 "A wife when she has placed herself in the power of her husband is entitled to her maintenance day by day, and if he refuses to give it, and the day passes, her right is confirmed; and so on for other days in succession, though the judge should never have fixed the amount nor made any order in her favour."<sup>7</sup> In a footnote to this, Baillie says: "According to the Hanafites arrears of maintenance cannot be recovered

<sup>1</sup> Bail. I. 413-444, 452 (par. 4); *Abdool Fattah Meulree v Zubunnissa Khatun*, (1881) 6 Cal. 631.

<sup>2</sup> Bail. II. 440, 454; Hed. 148.

<sup>3</sup> *Nashiz*, in Arabic; Bail. I. 250.

<sup>4</sup> Bail. II. 110. 102.

<sup>5</sup> Bail. I. 250; cf. s. 125, above.

<sup>6</sup> See ss. 128, et seq, above; cf. s. 442, *ill.* (5) below.

<sup>7</sup> Bail. II. 100.



unless it has been fixed by agreement or a judicial decree," and cites as authority, Bail. I. 443. The reason assigned for this rule of Hanafi law is as follows: "Because it is due only so far as may suffice according to the necessity (whence it is not so to those who are opulent) and they being able to suffer a considerable portion of time to pass without demanding or receiving it, it is evident that they have a sufficiency, and are under no necessity of seeking a maintenance from others; contrary to where the Kazee decrees a maintenance to a wife and a space of time elapses without her receiving any; for her right to maintenance does not cease on account of her independence, because it is her due whether she is rich or poor. What has been observed on this occasion applies to cases only in which the Kazee has not authorized the parties to provide themselves a maintenance upon the absentee's credit; but where he has so authorized them, their right to maintenance does not cease in consequence of a length of time passing without their receiving any, because the authority of the Kazee is universal, and hence his order to provide a maintenance upon credit is equal to that of the absentee himself, wherefore the proportion of maintenance for the time so elapsed is a debt upon the absentee and does not cease from that circumstance.<sup>1</sup> The time here meant is any term beyond a month, and if the time elapsed be short of that term, maintenance does not cease."<sup>2</sup>

SECTION 308.  
Reason why not recoverable in Hanafi law.

**309.** The wife's right to maintenance is a debt<sup>3</sup> as against the husband, and it has priority over the rights of all other persons to receive maintenance.<sup>4</sup>

Priority of wife's right to maintenance.

But see s. 307 (2), above.

According to the author of the 'Durr-ul-Mukhtar,' "the reason why the maintenance is due to the wife in priority to the child is this, that the wife is the source ('asl') and the child is a branch."<sup>5</sup>

Reason.

The rule is different in the case of all persons other than the wife, and in their case the sum expended on maintenance can in no case be claimed back by the person who has provided it, from the person maintained; "for maintenance is limited to necessities, and does not constitute a debt against the maintainer even if the judge should have actually fixed its amount. True, if the judge should have authorized the person entitled to maintenance to borrow on the credit of the

Person maintaining cannot reclaim expenses of maintenance. Maintenance not claimable as a debt (except by wife).

<sup>1</sup> *Da'ayam-ul-Islam* is to the same effect. *Da'ayam* (Notes).

<sup>2</sup> Hed. 149 (col. II. par. 2.); cf. Bail. II. 100 (second), 102 (fourth, fifth); Hed. 143.

<sup>3</sup> Bail. I. 444.

<sup>4</sup> Bail. II. 103 (first); 103, (par. 2); cf. Bail. I. 402 (II. 28-31); see also ss. 108, et seq., on *wahr*.

<sup>5</sup> *Durr-ul-Mukhtar*, book on *Talaq*, ch. on *Nafaga*, *faul* I.

SECTION 309. maintainer, the amount so borrowed is a debt as against the latter which is obligatory on him to discharge."<sup>1</sup>

Married women  
may receive  
maintenance  
from other  
than husband,  
e. g., brother.

The following is an illustration of the effect of s. 288 (2) upon the rights of a wife to maintenance : " It is stated in the ' Siraj ' that if an indigent person has a wife and she has a brother with means, then the brother will be forced to provide the wife with maintenance, and when the husband obtains means the brother can recover it back from him."<sup>2</sup> It will be remembered that a brother is not legally obliged under Shiah law to maintain a sister.<sup>3</sup>

(b) *Application of Property of Husband to Wife's Maintenance.*

Self-help by  
wife.

**310.** The wife may apply to her own use such articles belonging to her husband as are in her possession, and as she is entitled to claim for her maintenance,<sup>4</sup> but she has no right to sell other property of her husband in order to maintain herself out of the sale proceeds.<sup>5</sup>

" In all cases in which the judge may decree maintenance to a wife out of the property of her husband, she may lawfully take it herself <sup>4</sup> out of the property, without his order, to such an extent as may be justified by common usage. But when the property left by a husband in his own house, or in deposit, is of a different nature from that which a woman is entitled for maintenance, it can neither be sold by herself, nor by the judge on account of her maintenance ; and upon this point all are agreed."<sup>6</sup>

Traditions as  
to self-help by  
wife.

The wife's right to self-help probably originates from the following tradition : " Aayeshah said, ' verily Hind-bint Utbah said, " O Messenger of God, verily Abu Sufian is a miser, and does not give me and my children sufficient to live upon, except what I take without telling him." His Highness said, " take what will suffice you and your children. " ' "<sup>7</sup>

The following traditions apply less directly to the present section : " Jaber-bin Samurah said, ' the apostle of God said, " When God gives to any one of you great riches, he must first take care of himself, and give to his family and relations what is more than necessary to supply his own wants. " ' "<sup>8</sup> " Abudhar-Ghaffari said, ' the Apostlo of God said, " God has ordained that your brothers should be your slaves, therefore,

<sup>1</sup> Ball II. 703, (par. 4). Baillie's marginal note to this passage is " arrears of maintenance not recoverable." (J. Mayne, " Hindu Law," 625.

<sup>2</sup> *Durr-ul-Muhitar*, ch. on *Nafaka*, *faid vi.*

<sup>3</sup> Section 288, Explanation II, above ; and ss 337, et seq., below.

apparel ; Ball. I. 443 ; cf. s. 285 (1), above.

<sup>5</sup> Ball. I. 443-444 ; and she cannot give it to another without his permission : Ball. I. 450 (par. 3).

him whom God hath ordained to be the slave of his brother, his brother must give him of the food of which he eats himself, and of the clothes with which he clothes himself, and not order him to do anything beyond his power, but if he doth order such a work, he must assist him himself in doing it." " " 1

**311.** The wife may pledge the credit of her husband for providing herself with maintenance.<sup>2</sup>

Pledge of husband's credit by wife:

Similarly in England the husband's credit may, under certain circumstances, be validly pledged by the wife for necessities.<sup>3</sup> A wife may in England be made chargeable with the maintenance of the husband, if she has separate property, and if he becomes chargeable to any union or parish: Muhammadan law does not contemplate a wife maintaining her husband.<sup>4</sup>

### § 3.—Maintenance of Ascendants and Descendants.

#### (1)—Priorities.

**312.** As between parents and children, children have the preferential right to receive the maintenance that their father has the means to provide.<sup>5</sup>

Priority to receive maintenance · Children prior to parents.

**313.** (1) According to Hanafi law, as between parents, the mother has the preferential right to be maintained by her children.<sup>5</sup>

Mother prior to father.

(2) According to Shiah law the rights of both parents are equal and the maintenance allowance must, if necessary, be divided between the father and mother equally.<sup>6</sup>

F is infirm, and his son, S, earns something, but is not able to provide maintenance for F. If there is no surplus food with S, a judicial order cannot be passed against him, but as a matter of conscience, S may be required to maintain F. This is when S is alone. If S has a wife, and young children, all that he can be compelled to do is to bring F into his family and maintain him like one of them; and he is not obliged to provide him with separate maintenance.<sup>7</sup>

Illustration.

<sup>1</sup> See p. 344, n. 6.

<sup>2</sup> Ball. I. 443. Cf. a. 294, above. Cf. Mayne, "Hindu Law," 614: "A wife who is unlawfully excluded from her own home, or refused proper maintenance in it, has the same right to pledge her husband's credit as a wife in England."

<sup>3</sup> *Wilson v. Glossop* (1888) 20 Q. B. D. 354.

<sup>4</sup> Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) s. 20; see Hal-bury's "Laws of England," XVI. 318.

<sup>5</sup> Ball. I. 462.

<sup>6</sup> Ball. II. 101 (par. 2).

<sup>7</sup> Ball. I. 462 (par. 3).

**SECTION 314.**

Sole liability of children to maintain.

**314.** Where a necessitous person has a son or daughter he or she is alone bound to provide maintenance for the parents, and the obligation is not shared by anyone else.<sup>1</sup>

So that if a necessitous person has a son and a father, the son alone is bound to maintain.<sup>1</sup>

Maintenance and rights of inheritance. Amongst descendants rights of inheritance do not control liability.

The author of the 'Durr-ul-Mukhtar' says: "When the cause of the obligation to maintain is descent and participation (of blood), then if there are two having such participation, of whom one is nearer than the other,—in such a case maintenance is due only from the nearer, and not from the remoter, irrespective of their rights of inheritance. Thus, if a person has a daughter with the son of a son, or the daughter of a daughter with a brother, then the maintenance is in the first illustration due from the daughter, and not the son's son; and in the second illustration from the daughter's daughter and not from the brother: for this reason that rights of inheritance are not the guiding principle here. But, no doubt, rights of inheritance are the index where both are alike as regards proximity.<sup>2</sup> As, for instance, between the father's father and the son's son; namely, if a necessitous person has a paternal grandfather, and a son's son, then the maintenance is due from both in proportion to their rights of inheritance: that is, the grandfather has to provide a sixth, and the grandson the rest. For this reason, that the relation of both is of the same nature, so that preference cannot be given to one over the other, except on the ground of rights of inheritance; and when in point of proximity two persons are equal, then the preference of one over the other must be controlled by their rights of inheritance. Here indeed a critic has pointed out that even where proximity is in equal degree the rights of inheritance are a weak index; and he refers to the case of a necessitous person having a father and a son, both with means, in which circumstances the maintenance has to be provided by the son alone: whereas if rights of inheritance had been the index, the father would have had to provide one-sixth of the expenses."<sup>3</sup> The author then refers to a tradition tracing the son's sole liability to other reasons; but it is unnecessary to follow the subject further here.

Exclusive duty of children to maintain parents.

**315.** The duty of grandchildren to maintain a Hanafi Mussulman is postponed to the duty of the father of the said person to maintain him.<sup>4</sup>

<sup>1</sup> Bail. I. 463 (last line); Hed. 147.

<sup>2</sup> Proximity for purposes of maintenance is reckoned on the basis that those who participate in blood, (the ascendants and descendants) are

nearer than all others.

<sup>3</sup> *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fusi* v.

<sup>4</sup> Bail. I. 463 (par. 4); Hed. 147.

(1) N has a son's son, Ss, and his father, F, is alive: F is bound to SECTION 315. maintain N, and the liability of Ss is postponed to F.<sup>1</sup> *Illustrations.*

(2) N has a daughter, D, and a son's son, Ss: D alone is bound to maintain N.

(2) *Obligation to Maintain Descendants.*

(a) *Father's Obligation to Maintain.*

(1) *Maintenance of Young Children.*

316. (1) The father is solely obliged to maintain his children until they become adult.<sup>2</sup> *Sole liability of father.*

(2) The father is obliged to provide the whole of the expense of the maintenance<sup>3</sup> of his infant children during the period that the mother or other person is entitled to their custody. *Maintenance of infants child.*

It has been stated that a bare maintenance should be allowed to a minor child who is in the custody of a divorced wife.<sup>4</sup> As stated by Macleod, J., in a subsequent case<sup>5</sup> ideas as to what may be a bare maintenance may differ. It is submitted, moreover, that there is no authority for the assumption made in the case first referred to.

"The expenses of a nurse for infant children, and of the maintenance of the mothers, are due from the father to the mother; and if the mother is absent the infant will be kept in the custody of the person entitled thereto (at the expense of the father)."<sup>6</sup> *Expense of nurse.*

317. (1) The mother may be compelled by the father to nurse her infant child if no other suitable nurse can be obtained; or if neither the father nor the infant has any property; otherwise the mother cannot be compelled to nurse her infant child.<sup>7</sup> *Nursing of infant's mother not compellable thereto.*

(2) According to Hanafi law the mother is not entitled under any circumstances to receive any hire for nursing

<sup>1</sup> Ball, I. 463 (par. 4); Hed. 147.

<sup>2</sup> Ball, I. 455. See s. 285, above.

<sup>3</sup> *Mahomed Jusub Haji Adam Nurani v. Haji Adam Haji Usman Nurani* (1911) 37 Bom. 71. Hed. 148; Ball, I. 455-456; "If confidence cannot be placed in her, i. e. the mother, the maintenance is to be committed to some other person to be laid out for the child's benefit." See ss. 235, 236, 240 above.

<sup>4</sup> *Mahomed Jusub Haji Adam Nurani v. Haji Adam Haji Usman Nurani* (1911) 37 Bom. 71.

<sup>5</sup> *Enubai v. Haji Tar Muhammad Haji Adam*, Bombay H. Ct., O. O. C. J. Suit 232 of 1913, Cor. Macleod, J., 21-5 & 22nd July 1913, in which case Rs. 35 a month were allowed.

<sup>6</sup> *Dur ul-Mukhtar*, ch. on *Nafaga*, fasl 5.

<sup>7</sup> Ball, I. 455-456.

SECTION 317. her own infant ;<sup>1</sup> but according to Shiah Ithna 'Ashari law she is entitled to do so.<sup>2</sup>

Mother's duties  
in nature of  
moral obliga-  
tions, not legal.

"If mothers nurse their children for two full years, then it is like any other household duty, like cooking or sweeping, which is an obligation of only a moral nature and not of a legal nature: that is, if they refuse to perform any of these duties they cannot be compelled thereto."<sup>3</sup>

Some details are given about the hiring of nurses for a child, including the provision that if a nurse has been hired for a month, and after its expiration the child will not take the milk of another woman, she may be compelled to renew the contract.

Daughters

318. Daughters are entitled to maintenance until they are married, unless they have property of their own.<sup>4</sup>

Necessitous  
adult sons

319. Necessitous sons are entitled to maintenance, though they are adult.<sup>5</sup>

Cf. "The obligation to maintain an adult son, who is unable to earn, as for instance if he is lame of leg, is similar to the absolute obligation to maintain a daughter (whether adult or not) so long as she is not married."<sup>6</sup>

Father must  
earn if neces-  
sary.

320. The father's obligation to maintain his children is not affected by his indigence, so long as he has the ability to earn.<sup>7</sup> *Quere*, whether this rule applies in Shiah law.<sup>8</sup>

Maintenance  
from necessitous  
father.  
He must earn.

321. Where the father of necessitous children<sup>9</sup> is himself necessitous,<sup>9</sup> the Court may fix a sum to become periodically due from him as maintenance to his children, which may be recovered from him if and when he is able to repay it.<sup>10</sup>

<sup>1</sup> Hed. 146.

<sup>2</sup> Bail. II. 91.

<sup>3</sup> *Durr-ul-Mukhtar*, ch. on *Nafaga*, *fasl* 5.

<sup>4</sup> Bail. I. 458; see ss. 322-323, below Cf. Mayne's "Hindu Law," 602.

<sup>5</sup> Hed. 147; Bail. I. 458. Cf. Mayne's "Hindu Law," 609.

<sup>6</sup> *Durr-ul-Mukhtar*, ch. on *Nafaga*, *fasl* iv.

<sup>7</sup> Bail. I. 456; Hed. 340. Cf. comment to s.

322, below. As to Shiah law see Bail. II. 103.

<sup>8</sup> It is stated in Bail. II. 103 (par. 2) in general terms that "ability on the part of the *moonik* or maintainer is a condition of the liability to maintenance," and there does not seem to be any exception to this in the case of the father. See s. to s. 323 (4), below.

<sup>9</sup> See s. 285 (5), above.

<sup>10</sup> Bail. I. 456; Hed. 148.

" If the father and his young child are both without means, then SECTION 321. the father must earn it, and if he is unable to work for his living, then he must get it by asking for alms, so that he may provide for the child; and if his earnings are insufficient, then the paternal or maternal uncle must provide them with maintenance, and recover the expense thereof from the father, if and when, the latter is in possession of means." <sup>1</sup>

There is no claim against the uncles where the parties are governed by Shiah law, which does not recognise right of maintenance as against collaterals.

(b) *Mother's Obligation to Maintain her Children.*

(1) *Mother when Liable to Maintain her Children.*

**322.** Subject to s. 291, above, if the father has no property out of which his minor children may be maintained, but their mother has such property then she may be ordered to maintain her children, with liberty (unless the father is infirm, and unable to earn the means to provide maintenance for his children) to recover the expenses of maintenance from the father. <sup>2</sup>

" Where the father is without means, and the mother has means, then she may be ordered to provide maintenance, which will be a debt as against the father and may be recovered back when he has means." <sup>3</sup>

(2) *Mother when Liable Jointly with Father.*

**323.** The father's obligation to maintain his young children is not shared by any other person; but where the children are adult, and they are entitled to maintenance under s. 318, or 319, above, according to the 'Hidaya' the maintenance of such adult children has to be borne by the father and mother jointly in the proportion of two-thirds and one-third respectively. <sup>4</sup>

" No one shares with the father (even though the father is indigent) the duty to maintain the following persons: namely, young children, and disabled adult children, and (unmarried) daughters. Thus also the maintenance of necessitous parents is on their children alone; and this

<sup>1</sup> *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fast* iv; see s. 288 (2) above.

<sup>2</sup> *Rail*, I. 457. The father may reimburse himself out of the child's property, but not *ex hypothesi*.

the child has none.

<sup>3</sup> *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fast* iv.

<sup>4</sup> *Hed*, 148.

Mother when liable to maintain children.

Mother's duties when father indigent.

Maintenance of children:

1. during minority, on the father alone;

2. later, on the father and mother jointly.

Father's sole liability to maintain.

SECTION 323. duty is not shared by the uncle or grandfather ; and the wife's maintenance is entirely on the husband, and on no one else ; and the ' fatwa ' is to the same effect, namely, that the maintenance of the children, etc., is entirely and solely on the father, unless and until he is in great want. When he is in want he is included amongst the deceased, and in that case the maintenance of the young children will be an obligation on those relatives from whom it would have been due if the father had not been living, provided that the expense of the maintenance may be recovered back from the father. But a mother having means, ought to maintain the children ; then, when the father has means, she may recover it back from him. This is from the ' Bahr-ur-Raiq. ' ' 1

(III) *Mother when Liable Jointly with the Grandfather.*

Mother and  
grandparents.

324. The authorities are divided on the point whether where the mother of a necessitous Hanafi Mussalman has means, any remoter relation <sup>2</sup> is bound to provide any share of the maintenance.

See s. 288, above, and comment thereto, and ss. 325, 326, below.

Quære :  
Mother  
bound to pro-  
vide main-  
tenance alone  
when she  
co-exists with  
father's  
father.

325. Where a necessitous person has both a grandfather and a mother, the maintenance is, according to some Hanafi authorities, including the ' Fatawa ' Alamgiri, ' to be provided by both jointly in the proportion of one-third by the mother and two-thirds by the grandfather. <sup>3</sup> According to other Hanafi authorities including the ' Durr-ul-Mukhtar, ' the mother alone is obliged to provide the maintenance. <sup>4</sup> *Seemle*, the balance of authority is in favour of the view that they are jointly liable.

(IV) *Mother when Liable Jointly with Collaterals.*

Two Hanafi  
views :

1. Mother and  
collateral  
obliged jointly.

326. Where a necessitous person has a mother and an agnatic collateral, according to some Hanafi authorities <sup>5</sup> including the ' Fatawa ' Alamgiri, ' the maintenance has to be provided as to one-third by the mother and as to two-

<sup>1</sup> *Durr-ul-Mukhtar*, ch. on *Nafaga*, fasl iv.

<sup>2</sup> I.e., whether a grandparent or a collateral.

<sup>3</sup> *Dall.* I. 464.

<sup>4</sup> " As between the mother and the father's

father, if both have means, the obligation to provide maintenance is on the mother alone " :  
*Durr-ul-Mukhtar*, ch. on *Nafaga*, fasl iv.

<sup>5</sup> As to Shiah law see s. 288 (1) (b) above.



thirds by the collateral.<sup>1</sup> According to other Hanafi authorities, including the 'Durr-ul-Mukhtar,' the mother alone is obliged to provide the maintenance.<sup>2</sup> *Semle*, the balance of authority is in favour of the view that they are jointly liable.<sup>3</sup>

SECTION 326  
2. Mother alone obliged.

"The author of the 'Bahr-ur-Raiq' considers it a point of difficulty that the lawyers should have laid down that when the mother and paternal uncle of a necessitous person co-exist, the maintenance is due from the mother and uncle in the proportion of their presumptive rights to inherit, i.e., one-third on the mother and two-thirds on the uncle. The point is said to be difficult inasmuch as by participation (of blood),<sup>4</sup> the mother is nearer than the uncle, and therefore the rights of inheritance ought to have no bearing on the obligation to maintain; and the said author raises the question whether, when the mother, maternal grandfather, and the paternal uncle co-exist, then the maintenance will be on the mother alone, or in accordance with the rights of inheritance."<sup>5</sup>

Durr-ul-Mukhtar on doubt whether the mother can be jointly liable with a grandfather or with a collateral.

(c) *Obligation of Grandparents to Maintain Grandchildren.*

**327.** Where neither the father nor mother of a Muslim has means to maintain him,<sup>6</sup> his grandparents, whether paternal or maternal, who have means, are obliged to maintain him; provided that, where the person so maintained possesses any property out of which he may be maintained, or where he is able to earn his livelihood, the said grandparents may recover, from the father of the person so maintained, the expense of providing the said maintenance, and the father may reimburse himself by having recourse against the property or earnings above referred to.<sup>7</sup>

Grandparents' obligation to maintain grandchildren.

<sup>1</sup> Bail. I. 404. Cf. ss. 324, 325, above, and 337 (2), below.

<sup>2</sup> See comment.

<sup>3</sup> See comment to s. 328, below.

<sup>4</sup> See comment to s. 314, above.

<sup>5</sup> *Durr-ul-Mukhtar*, *ibid.* Moulvi Khurram

<sup>6</sup> Ali, a commentator on that treatise, remarks on this passage that there really is no difficulty, inasmuch as, in each case, the mother alone is liable, i.e., both as against the maternal grandfather and the uncle, citing the *Hashiat-ul-Madina* and tracing the difficulty of the author of *Bahr-ur-Raiq* to the author of the *Qunn*, who is stated

to have been misled by a discredited tradition. The present author has not been able to verify the reference to the *Hashiat-ul-Madina*, but while it may be conceded that the view taken by the author of the *Durr-ul-Mukhtar* is more in accordance with principle, it would appear that in India the books adopting the other view would be considered as more authoritative.

<sup>6</sup> The masculine includes the feminine in s. 327.

<sup>7</sup> Bail. I. 457. The father alone can apply the property of minor children to their maintenance; the grandfather cannot do it directly: see s. 289 (4), above.

SECTION 328. (3) *Obligation on Descendants to Maintain the Ascendants.*(a) *Obligation of Children to Maintain their Father and Mother.*

Liability of  
each child to  
maintain  
severally,  
with right to  
contribution.

**328.** (1) The liability to maintain necessitous parents rests in equal shares upon children of both sexes, provided that they have means; but if some only of them have means, then the whole expense of the parents' maintenance is to be borne by such children as have means, the others being liable to pay to the said children their proportionate shares of such expenses.<sup>1</sup>

Liability  
proportionate  
to means.

(2) It is suggested in the 'Zakhira' <sup>2</sup> that where there are several children of necessitous parents, the children should be ordered by the Court to share the expenses of maintaining the parents, not in equal shares but proportionately to the means of each.<sup>3</sup>

When father  
able to earn.  
(Sunni law)

(3) Amongst the Hanafi authorities there is difference of opinion on the point whether children are obliged to provide maintenance for the father where the latter is able to earn for himself; the better opinion seems to be that they are so obliged.<sup>3</sup>

(Shiah law.)

(4) Amongst the Shiah authorities also there is a difference of opinion on the point above referred to; but the better opinion seems to be that no person is obliged to maintain anyone who is able to earn.<sup>4</sup>

*Illustrations.*

(1) F is necessitous, and he has a son, S, and a daughter, D, both having means. S and D are both liable to maintain F, and must bear the expenses of F's maintenance in equal shares.<sup>5</sup>

(2) F is necessitous, and has a son, S, who is without means to maintain F and a daughter, D, with means. D is liable to provide F's entire maintenance, but she has a right to contribution from S as to half of it.<sup>5</sup>

<sup>1</sup> Bail I, 161.

<sup>2</sup> Cited in the *Fatawa 'Alamgiri*, translated in the comment to s. 328.

<sup>3</sup> According to the *Fatawa 'Alamgiri* opinions differ on this point; Bail, I, 462 (par. 3). In l. 148 (col. 1.) it is stated (without reference to any difference of view) that maintenance is due from the child to the parents even though the latter are able to subsist by their own

industry. In the case of the mother there can be no question of her earning for herself; Bail, I, 462. See next foot-note.

<sup>4</sup> Bail, II, 103: "Is inability to earn anything by one's own exertions also a condition? It is more agreeable to traditional authority to answer this question in the affirmative." There is no specific reference to the parents.

<sup>5</sup> Bail I 161

The 'Fatawa 'Alamgiri' leaves the question somewhat in doubt **SECTION 328.**  
whether the son and daughter, though their liability to provide maintenance for their parents is alike, (i.e., joint), are to provide the maintenance in equal shares. But the extracts translated below leave no doubt that their liability is equal.

Son and daughter jointly liable; are they to bear expenses in equal proportion ?

The author of the 'Durr-ul-Mukhtar' states, that the principle that the presumptive rights of inheritance should determine the proportionate obligation to maintain, does not apply in the case of persons who participate in blood,<sup>1</sup> i.e., ascendants and descendants,—amongst whom the nearer alone is liable, irrespective of his rights of inheritance. But the rule, even when it is stated in this form, and with the qualification referred to, does not by any means govern every case that is mentioned in the texts. There are illustrations given in the 'Durr-ul-Mukhtar' itself<sup>2</sup> which break the rule that its author has laid down. Still, it will be found to be a useful guide, and it should be noted that where this rule is broken, there generally are differences of opinion. Thus, for instance, the points are doubtful whether the mother is solely or jointly liable when she co-exists with a grandparent, or an uncle. It will be remembered that the question cannot arise amongst Shiahs who hold that no collaterals are obliged to provide maintenance.

The following are translations of extracts from Hanafi texts :—

"If<sup>3</sup> a person has sufficient means to necessitate payment by him of the poll-tax, he is under an obligation to provide maintenance for his principal relations, [viz.,<sup>4</sup> the father, mother, grandfather and the like]. A son and a daughter are in the same position; [in<sup>5</sup> this regard] proximity of relationship is to be regarded, and not the right of inheritance. For instance, if a person has a daughter and a son's son, the whole expense is payable by the daughter. In the case of his having the child of a daughter and a brother, the former has to bear the expense [although<sup>6</sup> the inheritance goes (in the first illustration) to the daughter and the grandson half and half; and (in the second illustration) the whole estate is taken by the brother to the exclusion of the issue of the daughter]."<sup>7</sup>

Shares in which children should provide maintenance;

"If a necessitous person has two children, and one is in better circumstances than the other, the second one barely possessing 'nisab,'<sup>8</sup> then maintenance will be obligatory on both children in equal portions; considered.

Whether relative wealth of each to be considered.

<sup>1</sup> As to "participation in blood," cf. comments to ss. 35, 314, above.

<sup>2</sup> Cf. comment to s. 320, above.

<sup>3</sup> *Shark-i-Viqaya*, 183 (Book on *Talay*, ch. on *Nafaga*).

<sup>4</sup> The comment (*Shark*) is enclosed in [ ],

the rest consists of the text of the *Viqaya*.

<sup>5</sup> "The *nisab* in question is that, the possession of which forbids the acceptance of alms, or in other words a surplus of 200 dirhems over one's necessities." Bail, I., 461; cf. s. 285 (3), above.

SECTION 328. and if one of the two is a Mussulman, and the other a 'zimmi,' still the obligation will be the same on both. This is in the 'Fatawa Qazi Khan.' "

"Shams-ul-A'imma has stated that our Shaikhs have said that the obligation on both will be in equal shares only then when the wealth of each varies only in a slight degree, but that if the wealth of the two differs greatly, then it is incumbent that there should be a similar difference in the share of maintenance that each is required to provide. This is in the 'Zakhira.' " <sup>1</sup>

Indigent  
descendants.

"The maintenance of ancestors is an obligation upon such descendants as are bound to give the legal alms," <sup>2</sup> i.e., descendants not having means are not bound to work and earn in order to provide maintenance for their ascendants.

Maintenance  
of parents  
by son and  
daughter.

"The maintenance of parents is due in equal shares, so that if a necessitous father has a daughter and a son, then half the maintenance is due from each of them. This is the true doctrine, and the 'fatwa' is in accordance with it, as stated in the 'Fath-ul Qadir' and the 'Khu-lasa,' and the reason is that the cause of the obligation to maintain, in this instance, is descent, in which both (the son and daughter) are alike. There is a less authenticated opinion in favour of the view that the son should provide two-thirds of the expense and the daughter one-third. This latter is the view adopted by Shafi'i. Shams-ul-A'imma has stated that children must bear the maintenance of their parents in equal shares only if the difference in the means of the children is negligible." <sup>3</sup>

Right of  
father to  
"steal" son's  
property for  
maintenance.

The father's rights are placed on a very high footing in a passage that may be translated as follows: "A necessitous father may steal from the property of his son having means sufficient for his (the father's) maintenance, in cases where the son does not consent to maintain him, and where the Qazi is absent; and such theft is no crime. But if the Qazi is present, the theft is not permissible; he must in that case make an application to the Qazi who will make an order in his favour. It is so stated in the 'Hashiat-ul-Madani.' " <sup>4</sup>

The rule last referred to can have no application in British India, where the "Qazi" is always present: *quaere*, whether apart from this the right of the father to "steal" under the circumstances would be safeguarded under the head of "rights of fathers of families"—cf. s. 2, above. In connection with this the following verse of the Quran may be referred to:

<sup>1</sup> *Fatawa 'Alamgiri*, Vol. 11. 219 (*Talay*, ch. xvii *fasl* x.). This passage has been omitted in his translation by Baillie. Its proper place is at

Bail. I. 461 (par. 2, li. 3 et seq.)

<sup>2</sup> *Durr-ul-Mukhtar*, ch. on *Nafaya*, *fasl* v.

<sup>4</sup> *Durr-ul-Mukhtar*, ch. on *Nafaya*, *fasl* v.

"Ye know not whether your parents or your children be nearer to you in usefulness."—Quran IV. 12.

**329.** Children who are not able to provide separate maintenance<sup>1</sup> for their parents, may be compelled to take the parents to live with themselves.

When children unable to provide maintenance they should take the parents to live with them.

*Explanation.*—A son whose earnings leave a surplus over his own maintenance, is to be considered as able to provide separate maintenance for his parents, unless he has a wife and young children.<sup>2</sup>

An interesting provision from the laws given to the Athenians by Solon may be noted here: "If a father had not taught his son some art or profession, Solon relieved the son from all obligation to maintain him in his old age."<sup>3</sup>

(b) *Obligation on Grandchildren to Maintain their Grandparents.*

**330.** Grandparents, both on the father's<sup>4</sup> and on the mother's<sup>5</sup> side, are entitled to maintenance from their grandchildren on the same conditions as parents.<sup>6</sup>

Rights of grandparents similar to those of parents.

The point is very clearly dealt with in a passage in the 'Durr-ul-Mukhtar,' of which the following is a translation: "A descendant having means is bound to maintain his indigent ascendants, including a maternal grandfather, as stated in the 'Zakhira'; even though such ascendants are able to earn. Amongst the ascendants are included the father and mother and the paternal and maternal grandparents; but the son's son is bound to provide maintenance for his paternal grandfather only when his father is dead, or indigent; and similarly with reference to the maternal grandfather, when the mother is dead or in want; and the obligation to maintain ancestors in want is irrespective of the ancestors' ability to earn."<sup>7</sup>

Indigent ancestors must be maintained though they have the means to earn.

Ancestors both cognates and agnates to be maintained.

**331.** Where a necessitous person has a grandchild and also collateral relations, the former alone is bound to provide maintenance, though the latter may be presumptive heirs.<sup>8</sup>

Grandchildren liable though collaterals are presumptive heirs.

<sup>1</sup> Merely "food" in Ball. I. 462 (f. 24)

<sup>2</sup> Ball. I. 462.

<sup>3</sup> Plutarch, Solon, 22-21. Grote, History of Greece, III. 180.

<sup>4</sup> Ball. I. 462 (par. 4).

<sup>5</sup> No illustration in the *Fatawa Alamgiri* is given mentioning the maternal grandfather; but

the principle is the same, and the rules applying to him must be similar to those applying to the mother; and in the extract from the *Durr-ul-Mukhtar* cited in the comment he is specifically mentioned.

<sup>6</sup> *Durr-ul-Mukhtar*, ch. on *Nafaka*, fasl. v.

<sup>7</sup> Ball I. 463. See ss. 311, 315, above,

SECTION 331. N has a daughter's daughter, *Dd*, a daughter's son, *Ds* and *Illustration.* also a full brother, *Fb*. *Dd* or *Ds* alone is liable to maintain N.

(c) *Joint Obligation on Grandchildren and Grandparents.*

Joint obligation on grandparents and grandchildren.

332. Where grandparents and grandchildren are under a joint obligation to provide maintenance, they have to do so in the proportion of one-sixth by the grandparent, and five-sixths by the grandchildren.<sup>1</sup>

*Illustration*

N is necessitous, and has *Ff*, a grandfather, and *Ss*, a grandson. *Ff* pays one-sixth of the maintenance of N, and *Ss* five-sixths.<sup>1</sup>

Baillie refers only to the case of the grandson and grandfather, but granddaughters must be in the same position. It is unnecessary to consider the case of remoter descendants, and even the illustration that is given postulates the co-existence of persons removed five generations from each other in the direct line: *Ff* is the great-great-grandfather of *Ss*.

§ 4.—*Maintenance of Collaterals under Hanafi Law.*

(1) *Collaterals who are under Obligation to Maintain.*

Hanafi law.)  
Obligation on  
collaterals :  
Postponed  
to that on  
descendants  
and  
ascendants,  
Subject to  
having  
means.  
Subject to  
recourse  
against  
father.

333. Where the lineal descendants<sup>2</sup> and ascendants of a person governed by Hanafi law are unable to maintain him, his collateral relations, who are within the prohibited degrees, and who have means, are, subject to s. 326, above, obliged to maintain him; provided that where the person so maintained possesses any property, or is able to earn his livelihood, the said collateral relations may recover the expenses of providing the said maintenance from the father of the person so maintained, and the father may reimburse himself by having recourse against the property or earnings above referred to.<sup>3</sup>

*Illustration.*

N, a Hanafi Mussulman, is necessitous, and has a maternal aunt *Ma*, also a paternal uncle's son *Pus*: both *Ma* and *Pus* having means; *Ma* is alone obliged to maintain N, as *Pus* is not within the prohibited degrees.<sup>4</sup>

<sup>1</sup> Ball. I. 464.

<sup>2</sup> Ball. I. 458, where only ascendants are

<sup>3</sup> Ball. I. 458; see comment to this section, and to s. 289, above.

Baillie refers only to the paternal uncle as being obliged to maintain, but the following translation makes it clear that all collaterals are obliged :— "Maintenance is due to the sister, paternal and maternal aunts, and to the daughter of paternal and maternal aunts, whether they are young or have reached puberty, whether in health or in illness, provided that they are indigent and unmarried, for if they are married then their maintenance will be on their husbands. So maintenance is also due to a male relative (who is a collateral) though he has attained puberty; provided that he is unable to earn, being permanently disabled as, if he is lame, or blind, or an idiot, or paralytic." <sup>1</sup>

All collaterals are entitled to maintenance under Hanafi law.

**334.** No person who is without means, is obliged to maintain any collateral relation.<sup>2</sup>

The effect of this section is that a person is not obliged to earn in order to maintain a collateral.

**335.** Subject to the Caste Disabilities Removal Act,<sup>3</sup> rights to maintenance, according to Hanafi law, do not arise between collaterals who profess different religions.<sup>4</sup>

Whether collaterals are entitled only when both are Muslims.

The rule is applicable only under Hanafi law. It is restricted in its application to collaterals. The 'Sharaya'-ul-Islam, a Shiah text, makes no mention of it in regard to any relations, though it expressly refers to the fact that the wife's rights to maintenance are irrespective of her being a Muslim.<sup>5</sup> It will be remembered that under Shiah law collaterals are not entitled to maintenance from each other.<sup>6</sup>

15-9.  
No such rule in Shiah law.

Baillie translates the rule as follows: "Maintenance is not due where there is a difference of religion except to a wife, both parents, grandfathers and grandmothers, a child, and the child of a son." <sup>7</sup>

Difference of religion does not affect rights of descendants or ascend.

All descendants are, however, intended to be included in the exception, as is clear from the 'Hidaya,' which refers to children and grandchildren<sup>8</sup> and explains that "between the child and parent exists a common participation of blood, and he who participates of another's blood, is in fact the same as the participator himself, and as a man's infidelity is no objection to his providing his own maintenance out of his own property, it follows that the same circumstance can be no objection with respect to one who is a part of him." <sup>9</sup>

The 'Durr-ul-Mukhtar' also makes it clear that all ascendants and

'Durr-ul-Mukhtar' on the point.

<sup>1</sup> *Durr-ul-Mukhtar*, ch. on *Nafaya*, *fasl* v.

<sup>2</sup> *Bail*, II, 99.

<sup>3</sup> *Bail*, I, 463 (par. 2, last sentence).

<sup>4</sup> *Sec* s. 286 (1) (b), above.

<sup>5</sup> *Set out* in comment to s 1, above.

<sup>6</sup> *Bail*, I, 466.

<sup>7</sup> *Hed*, 148. *Bail*, I, 166

<sup>8</sup> *Hed*, 147

SECTION 335. descendants are to be maintained irrespective of difference of religion :  
 " Maintenance is not due where there is a difference of religion except that to the wife and the ancestors and descendants, maintenance is due whether the ancestors are high like the grandfather or great-grandfather, or the descendants are remote like the grandson and great-grandson."<sup>1</sup>

Caste Disabilities Removal Act does not apply where the loss of right is not penalty for apostasy.

The law of Islam generally penalises apostasy from Islam, and favours those who adopt Islam. But in regard to maintenance the rule is on a different basis.<sup>2</sup> It will be noted that the Hanafi law does not impose a penalty on renunciation of Islam, but it imposes the obligation to maintain and the right to receive maintenance only between persons who profess the same religion. The rule is the same whatever be the cause, and whoever is responsible for the difference between the religions of the parties concerned, and whether it arises from either of them embracing or renouncing Islam. Hence it may require consideration by the courts whether the Caste Disabilities Removal Act is intended to affect the operation of such a rule of law as is above referred to. In its terms the Act can only apply so as to remove the penalty annexed to the renunciation or exclusion from any religion, or to the deprivation of caste. The point is not merely a technical one, concerned with the interpretation to be put on the words of an Act. There is a general principle underlying the rule of Hanafi law : viz., that one person should not be bound to maintain another when the two do not profess the same faith, and hence the way of life followed by one may be quite different from the other's.

Principle of the rules of Hanafi law.

Defendant's law to govern the decision of suits.

Assuming that the Act applies in respect of this rule of Hanafi law, its effect has to be considered in connection with another set of principles, viz., the rules as to the law that has to prevail where the personal law governing the parties before the Court is not the same. In such cases, as will be seen by a reference to s. 8. and the table of enactments, above, the legislature requires either that the law of the defendant should be applied, or that the Courts should act in accordance with justice, equity and good conscience. Thus where a suit is instituted by a Hanafi Muslim claiming maintenance, and the defendant is not a Hanafi, the latter may raise the plea that the rights of the parties in the suit should be determined by reference to the law governing him (the defendant), and that consequently he should not have an obligation imposed on him which his own law does not impose upon him. This is a point that must be determined apart from the Caste Disabilities Removal Act, and appa-

1. Muslim suing non-Muslim for maintenance

<sup>1</sup> *Durr-ul-Mukhtar*, ch. on *Nafaza*, *faul* vi.

<sup>2</sup> Thus, it may be remarked, that the wife who is of a different religion is expressly stated

to be entitled : see s. 204 and footnotes thereto. But she loses the right by apostasy.



rently before giving any consideration to that Act, inasmuch as the question that has to be dealt with in the first instance is concerned with the determination of the law in accordance with which the suit is to be decided. It is only after it has been decided which law governs the suit, that the Court can determine the respective rights and obligations of the parties.

For determining both questions, however, the Court would, no doubt, consider whether, where the defendant is a convert to his non-Muslim religion, his conversion was genuine or a fraud upon the law.<sup>1</sup> And if it comes to the conclusion that the conversion was not genuine, it will not permit him to commit a fraud upon the law.<sup>1</sup>

On the other hand, where the plaintiff, belonging to a religion other than Islam, sues a collateral for maintenance, and the defendant is a Hanafi Mussulman, the Hanafi law, as the defendant's law, would probably be held to govern the case, and then the question would arise whether the Caste Disabilities Removal Act displaces the rule of Hanafi law by which rights of maintenance are restricted to cases where the parties profess the same religion. Now, if the plaintiff was originally a Hanafi Muslim, and he has been converted to another religion, then it is evident, that the Caste Disabilities Removal Act protects his rights of maintenance, unless it is held that the loss of right was not a forfeiture caused by apostasy within the Act.

2. Non-Muslim suing Muslim for maintenance.  
(a) When the plaintiff has renounced Islam.

Where, however, the defendant is a convert to the Hanafi sect of Islam from another religion or sect, then can he be allowed to contend that the Hanafi law should not be applied to him seeing that he has chosen to place himself under that law? And then, if it is held that the Hanafi law is on this point altered by the Caste Disabilities Removal Act, it would seem that he would be obliged to maintain the non-Muslim plaintiff. For in such a case the ruling of the Court would in effect be that in accordance with the Hanafi law (as it has to be enforced in our Courts) the defendant is liable to maintain the plaintiff though the plaintiff does not profess Islam, and the defendant could, it is submitted, not be heard to object to that law being applied to him under which he has chosen to place himself by adopting his new religion, nor would be allowed to say that his law was different from the interpretation that the Court would put upon it even though that interpretation be affected by the Caste Disabilities Removal Act.

(b) When the defendant is a convert to Islam.

It does not seem necessary again to go over the ground just covered, in order to consider cases in which the person claiming maintenance is not a Mussulman.

3. Both plaintiff and defendant being converts.

**SECTION 335.** Similar questions may arise when one of the parties is a Shiah and the other a Hanafi, for the former sect does not recognise the obligation to maintain collaterals.

**336.** No person is liable to maintain any relative who is not related within the prohibited degrees by consanguinity.

*Illustration.*

(1) N has a maternal uncle, Mu, and the son of a paternal uncle, SPU. Mu is alone bound to maintain N, though SPU is the presumptive heir to the exclusion of Mu.<sup>1</sup>

(2) In the last illustration, if, instead of SPU, there were the foster-brother of N, he also would not be obliged to maintain N,<sup>1</sup> though the foster-brother is within the prohibited degrees of relationship,—the reason being that the prohibition is not by consanguinity.

Collaterals not to maintain if any ascendant or descendant able to maintain.

**337.** (1) No person is obliged to maintain a collateral relation so long as the person to be maintained has any descendant or paternal ascendant able to maintain him.

(2) The obligation of collaterals to provide maintenance when they co-exist with the mother (or a maternal ascendant<sup>1</sup>) is subject to the difference of opinion referred to in s. 326, above.

(2) *Liability how Shared amongst Collaterals.*

Proportion of liability.

**338.** Where the maintenance of a Hanafi Mussulman is to be borne by his collateral relations, they have to bear it proportionately to their presumptive rights to inherit.

*Illustration*

N is necessitous, and has a full sister, *Fs*, a consanguine sister, *Cs*, and a uterine sister, *Us*. Then *Fs*, *Cs*, and *Us*, will have to bear jointly the expense of maintaining N, *Fs* paying three-fifths, *Cs* one-fifth and *Us* one-fifth respectively.<sup>2</sup>

Where one presumptive heir unable to provide maintenance, his liability shared by the others.

**339.** Where one of several presumptive heirs<sup>3</sup> of a Mussulman is not able to provide the share of the maintenance due from him under s. 338, above, the said share has to be provided by the other presumptive heirs<sup>3</sup> in proportion to their respective presumptive rights to inherit.<sup>4</sup>

<sup>1</sup> Bail. I 464.

<sup>2</sup> Hed. 148.

<sup>3</sup> See s. 283 (11), above.

<sup>4</sup> Hed. 148; Bail. 464. *See also*, the same rule

would apply if one of the presumptive heirs is "absent" or cannot be found; see comment to s. 311, below.

**340.** Where none of the presumptive heirs of a Mus-  
sulman is able to provide maintenance, under s. 338, above,  
the obligation to maintain devolves upon those collaterals  
who would become presumptive heirs if all the existing  
presumptive heirs were to predecease the person who is  
entitled to be maintained. <sup>1</sup>

**SECTION 340.**

Where all existing presumptive heirs are unable to maintain, the next set of presumptive heirs to maintain—

**341.** The collaterals referred to in s. 340, above, are  
obliged to bear the expenses of the maintenance in the  
proportion in which they would be presumptively entitled  
to inherit, if all the existing presumptive heirs were to  
decease, and then immediately thereafter the person who  
is entitled to be maintained were to decease; <sup>2</sup> provided  
that the said collaterals may recover back the said expenses  
from the existing presumptive heirs if and when they have,  
or any of them has, the means to repay the said expenses. <sup>2</sup>

Sharing proportionately to what their presumptive rights would be.

With right of recourse.

N is a person entitled to maintenance, and has a paternal uncle  
Pu, a paternal aunt, Pa, and a maternal aunt Ma, then Pu alone is  
obliged to maintain N; if Pu has no means, then Pa and Ma are  
both liable. <sup>3</sup>

*Illustration*

The rule is thus stated in the 'Durr-ul-Mukhtar': "It is stated in  
the 'Qunia,' on the authority of the 'Hashiat-ul-Madani,' that when the  
nearest relations within the prohibited degrees, on whom the obligation  
to provide maintenance rests, are absent, then the next in degree who is  
present, may be ordered to provide maintenance, with liberty to recover  
the expenses thereof from the nearer when he returns; so that if a  
necessitous person has a full brother and a consanguine brother, and  
the full brother is absent and cannot be found, then the authorities may  
order the consanguine brother to provide maintenance, and then when  
the full brother returns, the consanguine brother will be able to recover  
back what he had expended." <sup>4</sup>

Where nearest collateral absent then next one may be ordered to provide maintenance with right of recourse.

*Illustration.*

**342.** Where the obligation to maintain a necessitous  
Mussulman is upon his collateral relations, and one <sup>5</sup> of  
the presumptive heirs is (a) not within the prohibited de-  
grees, or (b) the cause of the prohibition is other than of

Devolution of obligation.

<sup>1</sup> Bail. I. 464 (par. 2)

<sup>2</sup> See comment.

<sup>3</sup> Bail I. 464.

<sup>4</sup> Durr-ul-Mukhtar, ch. on *Nafaga*, *faal* vi.

<sup>5</sup> The singular includes the plural.

SECTION 342. blood relationship, such presumptive heir<sup>1</sup> is not obliged to provide maintenance; and his<sup>1</sup> liability devolves upon such persons as would have been liable under s. 339 or 340, above, if the said presumptive heir<sup>1</sup> had been unable to provide maintenance.<sup>2</sup>

*Illustrations*

N<sup>3</sup> is necessitous and has—

(A) a son, S, who is unable to maintain N; or } and N has also,—  
(B) a daughter, D, who is indigent and unmarried;

(1) a full brother FB, a consanguine half-brother Cb, and a uterine half-brother Ub; or

(2) a full sister Fs, a consanguine half-sister Cs, and a uterine half sister Us,—

(A) (1) When N and S co-exist with FB, etc., N must be maintained jointly by FB and Ub; the former providing 5 parts and the latter, 1 part; but the maintenance of S is to be paid by FB alone.

(B) (1) When N and D co-exist with FB, etc., they must be maintained by FB alone.

(A) (2) When N and S co-exist with Fs, etc., N must be maintained jointly by Fs, Cs and Us, providing respectively 3 parts, 1 part and 1 part; but S is to be maintained by Fs alone.

(B) (2) When N and D co-exist with Fs, etc., they are both to be maintained by Fs alone.<sup>3</sup>

§ 5.—*Maintenance of Relations by Affinity.*

Son's wife  
not to be main-  
tained.

**343.** A Mussulman is not bound to maintain his son's wife, unless his son is young and neither has means, nor is able to earn.<sup>4</sup>

See the comment on s. 344, below, in which the principle underlying ss. 343 and 344 is explained. The 'Fatawa 'Alamgiri' is not as definite on the point covered by the present section as it is on that covered by the next. The relevant portion is translated by Baillie as follows: "It is also incumbent on a father to maintain his son's wife when the son is young, poor or infirm. It is stated however in the 'Mubsoot' that a father cannot be compelled to maintain the wife of his son."<sup>5</sup>

Father's wife  
not to be main-  
tained.

**344.** A Mussulman is not obliged to maintain his

<sup>1</sup> The singular includes the plural.

<sup>2</sup> *Bail. I* 464.

<sup>3</sup> *Bail. I*, 464-466; and s. 339, above.

<sup>4</sup> *Bail. I*, 458 (par. 3).

<sup>5</sup> *Bail. I*, 458, (par. 3).

father's wife, who is not his mother, unless his father is SECTION 344.  
weak and infirm, and has not the means to maintain her.<sup>1</sup>

The following is a translation of an extract from the 'Durr-ul-Mukhtar': "It is stated in the 'Mukhtar' and the 'Multaqa' that maintenance is due to the wife of the son from the father of the son, if the latter is a minor and indigent or disabled: and if the husband is absent, his father will be ordered to provide the wife with maintenance.<sup>2</sup> In the same way the mother will be ordered to provide maintenance with liberty to recover it from the father, when he returns: and in the same way the son will be ordered to provide maintenance for his mother with liberty to recover it from her husband, when he returns after his absence, whether he be his own father, or step-father; and similarly a brother will be ordered to maintain the child of his absent brother with liberty to recover it from the absentee when he returns, and in the same way maintenance will be ordered as against the remoter relatives when the nearer are absent, with liberty to recover from the [nearer] absentee when he returns."<sup>3</sup>

Maintenance of daughter-in-law.

Instances when maintenance is to be provided with liberty to recover from the one primarily liable.

This section and the preceding one illustrate the broad principle that only blood relation gives the title to maintenance in Muhammadan law. The daughter-in-law or step-mother has to be maintained only in so far as the father or son has respectively to provide the other's necessities: since it is the duty of the husband to maintain his wife, it is supplying part of the son's or father's necessities to maintain the daughter-in-law or step-mother.

Only blood relationship gives right to maintenance.

In England also the liability to maintain poor relations applies to blood relations only,<sup>4</sup> and a man is not bound to maintain his wife's mother. In deciding to this effect, Pratt, C. J., said, "By the law of nature a man was bound to take care of his own father and mother, but there being no temporal obligation to enforce that law of nature, it was found necessary to establish it by Act of Parliament, and that can be extended no further than the law of nature went before, and the law of nature does not reach to this case."<sup>5</sup>

English law.

Support: due to parents "by the law of nature."

By the French Civil Code, however, it is provided that sons-in-law and daughters-in-law owe support to their father-in-law and mother-in-law "who are in want," but the right "ceases on a second marriage by the mother-in-law," etc. The right is reciprocal.<sup>6</sup> But "a judgment

French Code: reciprocal rights to father-in-law and son-in-law held contrary to policy of the laws in the United States.

<sup>1</sup> Ball. I. 461 (par. 2).

<sup>2</sup> Liberty to have recourse to the husband seems to be implied. See ss. 288, 300-311, above.

<sup>3</sup> *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *faul* iv.

<sup>4</sup> Under the Poor Relief Act (1601), 48 Eliz.

<sup>5</sup> c. 2, s. 6; Campbell, "Ruling Cases," XXI, 337.

<sup>6</sup> *Rez v. Munday* (1718), 1 Strange, 190.

<sup>7</sup> French Civil Code, artt. 205-207, translation by Henry Caehard

SECTION 344. in accordance with this provision having been recently obtained from the French Courts, the American Courts refused to give effect to it in the United States, as being contrary to the policy of the laws in that country."<sup>1</sup>

§ 6.—*Maintenance of an Executor.*

Maintenance  
of 'wasi,'  
or executor.

344A. The texts refer to the right of an executor to be maintained out of the property of a minor, but this right cannot, it is submitted, be asserted in British India.

'Durr-ul-Mukhtar' on maintenance due to 'wasi' (or guardian) out of estate of minor.

The following is a translation of a passage that occurs in the 'Durr-ul-Mukhtar': "If a person is engaged in the affairs of another, then the maintenance of the former is due from the latter, as for instance the maintenance of the Qazi and Mufti and their families is due from the public treasury . . . and in the same way the maintenance of an executor ('wasi') is due from the estate of the deceased during the period that the executor is engaged in the affairs of the minor: So it is stated in the 'Zail'i.'"<sup>2</sup> The rule of Hanafi law that the 'wasi' may take the expenses of his maintenance from the minor whose property is in his charge, cannot, it appears clear, have any effect in British India, inasmuch as in his capacity both as guardian and as executor he is considered as a trustee, and as such is not allowed to derive any sort of benefit from his office.<sup>3</sup>

<sup>1</sup> Holland, "Jurisprudence," 218, referring to *Journal du Droit Int. Privé*, VI, 22.

<sup>2</sup> *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl* 1.

<sup>3</sup> See *Indian Trusts Act*, ss. 50, 51.

## CHAPTER IX.

### GIFTS.

#### § 1.—Preliminary.

##### (1) *Explanation of Terms.*

**345.** (1) When a person governed by Muhammadan law signifies his willingness to make to another, an immediate and unconditional<sup>1</sup> transfer, without consideration,<sup>1</sup> of the ownership of, or of rights in, existing and specified property, with a view to obtaining the assent of that other to such transfer, he is said to make "a declaration of gift."<sup>2</sup>

Declaration of gift.  
Immediate unconditional transfer without consideration.

(2) The person making the declaration of gift is called Donor. the "donor," the person in whose favour the gift is declared Donee. is called the "donee," and the property or rights of which the gift is made is or are called the "subject of gift."<sup>3</sup>

Subject of gift.

(3) When the donee signifies his assent to the declaration of gift, he is said to "accept the gift."

Acceptance of gift.

(4) A declaration of gift is said to be "valid" when the transfer of property or rights which is purported to be made, is capable of being given effect to in accordance with law, so that the donee is, after the completion of the gift, entitled to retain [or to be placed in] possession of the said property, or has the rights vested in him, which are so purported to be transferred.<sup>4</sup>

Valid gift.

<sup>1</sup> Hed. 482 (col. 1); Bail. I. 507; II. 203. If there is a condition, it is not enforceable, as being repugnant to a *hiba*. If a *hiba* is made from any pious or religious motive, it is considered to bring a consideration with it, and it becomes a *sadaqa*, on which see s. 437, below. A religious motive therefore does not invalidate a gift, but has the effect of making it irrevocable. The dicta of Beaman, J., in *Jainabai v. R. D. Sethna* (1910) 34 Bom. 604, 609; 12 Bom. L. R. 346 (see also comment to s. 406, below) and in *Casumooly v. Currimbhay* (1910) 13 Bom. L. R. 717, 771, 772 do not appear therefore to be accurate.

<sup>2</sup> Bail. I. 507, II. 203. The declaration or proposal of *hiba* may be in the past tense, as in *id.* (1). See comment. See also s. 437, below. A

gift which would be a *hiba* if there is no religious motive, becomes a *sadaqa* if there is any religious motive, and then the gift is irrevocable, and need not be accepted.

<sup>3</sup> In Arabic *maḥib*(=donor), *maḥhub*(*lahu*=donee) and *maḥsub*(=subject of gift) respectively.

<sup>4</sup> Bail. I. 507, 508, II. 204; Hed. 482. As possession is an essential of a valid gift in Muhammadan law, it seldom happens that the donee is entitled "to be placed in possession," but it may happen where a gift has been accepted (with possession) by one person on behalf of another. Moreover the notion of "property", has been much extended in modern systems of law, and gifts of rights that are not capable of being corporeally taken possession of, have been recognised.

D=Donor; R=Recipient (donee); G=subject of Gift; **I**=*Iwaz*;  
**Gs**=subject of Gift with *Shart*; **Is**=*Iwaz* under *Shart*.

'HIBA'	'HIBA BIL 'IWAZ'	'HIBA NA SHART UL 'IWAZ'
(1) D <sup>1</sup> makes a declaration of the 'hiba' of an article, <b>G</b> , to R,—		(1) D <sup>1</sup> makes a declaration of the 'hiba' of an article, <b>Gs</b> , to R,— <i>stipulating, that it should give, by way of 'iwaz', an article, Is, to D.</i>
(2) R accepts the 'hiba' of <b>G</b> , and,—		(2) R accepts the 'hiba' of <b>Gs</b> , on those terms.
(3) D transfers <b>G</b> to R,—		(3) D transfers <b>Gs</b> to R—
(A) <i>the transfer is revocable, and G remains in the hands of R as the subject of a 'hiba,' and—</i>		(4) <i>The transfer is revocable, and Gs remains in the hands of R as the subject of a gift, and—</i>
(B) <i>R is not bound to make any return to D—</i>		(B) <i>R is not bound to make any return to D (either of Is, or of anything else)—</i>
(4) and if R does not make any return —	(4) still, if R offers to make gift of <b>I</b> , as a return for <b>G</b> ,—	(4) and if R does not offer to make the stipulated return,—
<b>G remains in R's possession as the subject of a simple 'hiba.'</b>		<b>Gs remains in R's possession as the subject of a simple 'hiba,' which may consequently be revoked.</b>
	(5) <i>D is not bound to accept I as a return for G,—</i>	(5) <i>D is bound to accept Is as an 'iwaz' for Gs—</i>
	(6) If D does not accept <b>I</b> ,— <b>G remains in R's possession as a simple 'hiba.'</b>	(6) If D accepts <b>Is</b> as a return—
	(7) After R takes possession of <b>I</b> ,—	(7) and R gives possession of <b>Gs</b> to D,—
	<b>G and I belong to R and D irrevocably: G as the subject of a 'hiba bil 'iwaz,' and I of an 'iwaz'</b>	<b>G and Is respectively, belong to R and D with the incidents of a sale.</b>

<sup>1</sup> This point is somewhat doubtful. See s. 415 (2) below, especially the words in [ ] and the footnote thereto.

<sup>2</sup> Note that the incidents of a sale result only after the whole transaction is completed; during its completion the incidents are very different from those of an agreement to buy and sell, or to barter.



(5) A gift is said to be "void" when the transfer of SECTION 345. property or rights which is declared, or purported to be void gift. made, is of no effect in law.

(6) A gift is said to be "incomplete," or "ineffectual" Incomplete or ineffectual gift. when the gift fails, because, though the declaration of gift is valid (and the transfer which the donor intended to make was such a transfer as he could effectually have made in law), yet the intention of the donor has not been so carried out as to effectuate it in law.

(7) In the illustrations in this Chapter, the letter D Key to illustrations. generally stands for the donor; R for the donee (recipient); H for husband; W for wife; F for father; and S for son.

(1) D says to R, I have given you this or made you the proprietor of *illustrations.* this. This is a valid declaration of gift.<sup>1</sup>

(2) The following are express forms of valid declarations of gift ("which have been appropriated to the purpose").<sup>2</sup> —

"I have given this thing to thee;"

"I have invested thee with the property of it;"

"I have made it to thee;"

"This is to thee."<sup>2</sup>

(3) The following are implied forms of valid declarations of gift:—

"Thy garments is this piece of cloth;"

"I have invested thee with this mansion for thy age."

(4) D says to R, "I have mounted thee on this beast." This is a loan, unless D intends thereby to make a gift.

It is not easy to give a complete or satisfactory definition of gift. Definition of gift examined. The following remarks may serve to make up for the shortcomings of the definition given above. (1) It is often assumed in British India that the expression gift is the exact equivalent of 'hiba,' and both are taken to connote all transfers of property without consideration. Gift, however, is a word of much wider connotation than 'hiba.' (2) In the next place it is frequently supposed, in oversight of the effect of ss. 406-419, and 437-455, below, and sometimes even of the law relating to 'waqf,' that all voluntary transfers of property in Muhammadan law must fall under the designation of, and be subject to the law applicable

<sup>1</sup> Bail. II. 203; *Kacchar v. Alam Khan* (1910).  
7 Bom. 170.

<sup>2</sup> Bail. I. 509, (II. 7-10), II. 203, (II. 7-10) and  
see s. 5c, above, and comment thereto.

SECTION 345.  
Splitting up of  
ownership of a  
single object.

to, 'hiba,' and, consequently, that any attempted transfer without consideration, which does not satisfy the rules relating to 'hiba,' must be ineffectual. (3) The expressions property and transfer have very different meanings associated with them in more recent systems of law from what they denote in earlier systems. Muhammadan law, or at least the primitive notions of the Pre-Islamic customary law on which so much of the present-day law is based, may be said to have "abhorred" a splitting up of the ownership of the same physical object amongst more persons than one. It tended, therefore, to recognise only one person as having rights over one object at one time. This remark is not made in forgetfulness of the fact that the tribe or family as a whole was the owner of property in primitive times. Such joint ownership may in part have been one of the forces that helped to overcome the abhorrence of the law against the splitting up of ownership. Yet, where a body of persons hold property in common, there is no splitting up of the notion of ownership; the body of persons is considered as one unit in the eye of the law, and the law is not faced with problems caused by "confusion" of rights or "participation in the ownership" of the same corporeal object: the notion or device of property being held 'per mie et per tout' removes the difficulty. (4) A system of law may find itself forced to recognise the existence of rights short of full ownership over property, but the recognition is at first restricted to cases where circumstances make it impossible to overlook the splitting up of the component parts of ownership, and such voluntary acts as place the law face to face with problems requiring delicate adjustments are discountenanced: until the law is administered both by and for persons whose minds have reached the stage of development when questions of such delicacy are not only within their perception, but raise no feelings of abhorrence, the law does not recognise the existence of the notions themselves. A third stage is reached when subtle reasoners delight in dialectical refinements.

Declaration  
and acceptance  
by implication.

"Even when the declaration and acceptance are not expressed in words, so long as the intention is evidenced by conduct, it would be sufficient." <sup>1</sup> "If a man gives a thing to another saying, 'I give this to thee,' and the donee takes possession without saying a word, it is valid." <sup>2</sup>

Gift and bequest.

Where the declaration is in the form of a gift 'in futuro,' it may be invalid as such, but may operate as a will.<sup>3</sup> But if the words are "I have adopted A B to succeed to my property," it is neither a deed of gift

<sup>1</sup> Amerr Ali, I. 62, citing *Itaddul Mukhtar* IV: 777.

<sup>2</sup> *Ib.* I. 63, citing *id.* IV, 781, and see the

passage translated from *Jams'-neh-Shital* in the comment to s. 410, below.

<sup>3</sup> *Kusum v. Shueta Bibi* (1875), 7 N. W. 313.

nor a will.<sup>1</sup> In 'Muhammad Ikramudin v. Najiban' <sup>2</sup> the possibility of an apparent sale having been intended to be a gift was considered, and rejected.

## (2) Constituents of Gift.

**346.** Where the donor makes a declaration of gift, and the donee accepts the gift,<sup>3</sup> and the donor transfers possession of the subject of the gift to the donee without any consideration, the gift is complete; provided that <sup>1</sup> (1) where a father [or other guardian<sup>4</sup>] make a declaration of gift in favour of his minor child [or other ward<sup>5</sup>] no acceptance is necessary by the child <sup>6</sup> [or ward; <sup>5</sup>] and (2) where there is no real and 'bonâ fide' intention to make a gift the alleged gift may be of no effect, and the ownership of the property may not be transferred from the donor to the donee.<sup>7</sup>

*Explanation.*—Where possession of the subject of the gift is not transferred to the donee, the gift is void, and there is no transfer of ownership from the donor to the donee.

D purports to make a gift of two houses to R, but transfers possession of only one of them : R becomes the owner of the house of which possession is transferred; but the other house remains in the ownership of D. <sup>8</sup>

## 1. INCHOATE OR IMPERFECT GIFTS.

Confusion is frequently caused by referring to a gift as having been made, when what is meant to be expressed is that a declaration of gift has been made, or that a person has purported to accept a gift in regard to which a valid declaration may or may not have been made, or that a transfer is purported to be made with or without a valid declaration or acceptance. It is only when all the three elements, viz., declaration, acceptance, and transfer are present, that a gift can be said to be made.

<sup>1</sup> *Jeswant Singhjee Ubbay Singhjee v. Jent Sihera Ubbay Singhjee* (1844) 3 Moo. I. A. 245; 6 W. R. (P.C.) 40.

<sup>2</sup> (1898) 20 All. 447, 25 I. A. 137.

<sup>3</sup> A gift is not valid without verbal acceptance. Ball. I. 545 (I. 17), which explains the effect of Ball. I. 507 (I. 6); Ball. II. 204 (II. 1-2). See also *Sadik Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 627, 646, *et passim* (P. C.); in this case acceptance of the "gift" was important, as it purported to be in lieu of *mahr*.

<sup>4</sup> Hed. 482 (col. II.); Ball. I. 507-508, II. 204;

*Kamarunnissa Bibi v. Husain Bibi* (1880) 3 All. 266.

<sup>5</sup> See, ss. 396-399 (about possession), below.

<sup>6</sup> Ball. I. 510 (II. 18-20), 529 (par. 2).

<sup>7</sup> *Ameerunnissa v. Abedoonissa* (1875) 2 I. A. 87; 15 Beng. L. R. 67; 23 W. R. 208. See comment to s. 352, and to s. 462, below, with the case there cited: *Watoon & Co. v. Ramchand Dutt* (1890) 18 Cal. 10, 18 (P. C.).

<sup>8</sup> *Mahomed Farid v. Mahomed Abdul Gafar* (1912) 15 Cal. L. J. 11.

## SECTION 346.

## 2 IMPORTANCE OF DONOR'S INTENT.

Sham gifts.

It is necessary here to advert to another point, which might seem too clear to be controverted, but which, perhaps, for that very reason, is often overlooked. Though a gift might be purported to be made, and every overt action might appear to have been taken that the law requires to be taken for the completion of a gift, yet if there is no real and bonâ fide intention to make a gift, there may be no transfer of the ownership of the subject of gift.<sup>1</sup> The whole transaction will be merely nugatory.

Donor may be estopped.

In considering the effect of these remarks it must not be overlooked that frequently owing to estoppel or otherwise the donor or his successor in interest cannot be heard to say that no real and bonâ fide gift was intended. On the other hand, the significance of the donor's real desires is greatly enhanced where the intention to make no gift emerges in the unhallowed companionship of a desire to defraud or defeat creditors. Ameroonissa's case<sup>2</sup> is considered below in some detail, as the significance of their

Creditors' interests.

Lordships' remarks seems to have been overlooked, buried as they are in a recital of complicated facts. It will be clear from what is cited, that the intention of the donor is of importance in cases other than those where it is vitiated with a desire to defraud or defeat creditors. As remarked by Sir Barnes Peacock in the course of argument, "The mode in which the father (the donor) dealt with the profits (after the ostensible completion of the gift) would be important as regards the bonâ fides and completeness of the gift, as throwing light upon the intention;"<sup>3</sup> and in the course of their judgment their Lordships said :

Gifts pure and absolute.

"These ikrars, if genuine, modified the operation of the three hibba namahs, or deeds of gift . . . containing ostensibly absolute gifts." (p. 101).

"If the hibbas are to be construed as they (their Lordships) think they should be, by the light reflected upon them by the ikrars, absolute and pure gifts of the property were not intended; and therefore the principles of law governing such gifts are not applicable to the transaction." (p. 106).

Benami transactions, family settlements.

"Their Lordships . . . are disposed to adopt the opinion of the judge that an absolute gift was not intended and that the transaction was either purely benamie or more probably to be followed by a family settlement." (p. 111). "The rights of the parties ought, therefore, in their Lordships' opinion, to be governed by the provisions contained in the hibbas of the 19th of Assim, 1256, and the 12th of Joistee, 1258, and in the three ikrars, read and construed as a whole; and may be

<sup>1</sup> It must not be overlooked, however, that frequently, owing to estoppel or otherwise, the donor cannot be held to say that no real and bonâ fide gift was intended. What is said in the

text is subject to this important qualification.

<sup>2</sup> *Ameroonissa v. Abedoonissa* (1875) 2 I. A. 87 15 Belg. L. R. 67, 23 W. R. 208.

*declared and enforced, if necessary, in a suit properly framed for that SECTION 346. purpose.* The form of the present suit does not allow of these rights being so declared in it. The only prayer in the plaint is to have the ikrars set aside as fabricated, and the Plaintiff put into possession of the properties claimed with mesne profits. Their Lordships being of opinion that the ikrars are genuine, the prayer to set them aside cannot, of course, be granted, nor can the father's possession be treated as wrongful, so as to justify the claim of the son to remove him from it. The ikrars clearly provided that the father should have the possession and control of the property during his life, and any rights, therefore, which others may have under them to any share of the profits accruing in his lifetime could only be enforced in a suit charging him in the character of manager. The present suit which treats him as a trespasser liable to mesne profits cannot be sustained." (pp. 111, 112.)

In an earlier portion of the judgment in the same case it is said, "It is enough for their Lordships in this place to say there are circumstances in the case which favour this contention,"—*viz.*, "that the transfers were colourable, and only with the view to making the son the ostensible owner; or if not purely benamée, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future settlement." (p. 104.) But their Lordships did not think it "necessary to go at large into this question." The circumstances to which their Lordships allude as favouring this contention are thus stated by them: "although all proceedings relating to the estate were subsequently to the hibbahs in the son's name, the father remained in actual possession and receipt of the profits of the properties and in the uncontrolled management of them." (pp. 103-104.)

See also (Nawal) Ibrahim Khan *v.* Ummat-ul-Zohra,<sup>1</sup> which is more fully referred to in the comment to s. 405, below, and compare the comment to s. 402, below.

The extracts given above bring out the following sub-sidiary points—  
 (1) In determining what the intention of the donor was, the Privy Council take into consideration his acts and conduct after the completion of the gift. (2) They refer without any abhorrence to a transaction in which a gift which is not absolute and pure is intended to be made. (3) A gift with provisions for the possession and control of the property by the donor during his lifetime could, it is stated, have been declared and enforced, in a suit. (4) The actual possession and control of the donor after the gift, did not, in the particular circumstances, make their Lordships jump

Colourable transactions.

Donor's conduct after gift completed.

SECTION 346. either to the conclusion that the gift and the transaction as a whole were altogether void, or to the other extreme that such possession or control and the agreements ( ' ikrars ' ) explaining the state of affairs and the intentions of the donor, were to be entirely ignored and the gift enforced as though it were an absolute one : they refused to declare that the ' ikrars ' were void. On this last point s. 352, below, and the case there noted should also be considered.

English law

In English law there are three modes in which a gift ' inter vivos ' can be perfectly made, namely (1) by deed or instrument in writing, (2) by delivery, in cases where the subject of the gift admits of delivery, (1) by a declaration of trust, which is the equitable equivalent of a gift. <sup>1</sup>

### (3) Oral Gift.

Gift may be made orally.

Exception.

347. Neither the declaration nor acceptance of a gift governed by Muhammadan law need be made in writing, whether the subject of the gift is movable or immovable.<sup>2</sup> But registration is necessary, where (a) there is an instrument of gift<sup>3</sup> (b) of immovable property (c) situate in a district<sup>1</sup> in which any of the Acts relating to Registration<sup>5</sup> has come into force, such document<sup>3</sup> having been executed on or after the date on which such Act came into force in the said district : no such document,<sup>3</sup> unless it has been registered, will affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property.<sup>3</sup>

Gift of immovable property may be oral.

It has been stated in a decision that<sup>6</sup> : " It is firmly settled that under the Muhammadan law, a gift of immovable properties can be made verbally without recourse to a written and registered document. In the case of ' Kamarunnissa Bibi v. Husaini Bibi ' <sup>7</sup> a verbal gift of landed property if followed by a transfer of possession was considered valid. Section 123 of the Transfer of Property Act, no doubt, requires that a

<sup>1</sup> Halsbury, "Laws of England," XV, 409, s. 873.

<sup>2</sup> Macnaghten : 198-199 (para. 2). *Kamarunnissa Bibi v. Husaini Bibi* (1880), 3 All. 266 (r.c.) (see below s. 404 III). *Jabedanessa v. Najib-ul-Islam* (1910) 15 Cal. W. N. 266.

<sup>3</sup> See the Indian Registration Act XVI of 1908, ss. 17, 49. The words " instrument " and " document " have been retained in this work to conform to the phraseology of the Act.

<sup>4</sup> *I.e.*, falling under the Indian Registration

Act, s. 2 (3), 5.

<sup>5</sup> The following Acts specified in s. 17 of the Indian Registration Act are intended to be referred to and no others, viz., Act XVI of 1864, XX of 1866, VIII of 1871, III of 1877, XVI of 1908.

<sup>6</sup> *Jabedanessa v. Najibul Islam* (1910) 15 Cal. W. N. 328. See also *Karam Ulahi v. Sharfudin* (1910) 38 All. 212.

<sup>7</sup> (1880) 3 All. 266 (r.c.)

gift of immovable properties must be effected by a registered instrument SECTION 347. signed by or on behalf of the donor and attested by at least two witnesses ; but section 129 makes an exception in favour of gifts effected under any rule of Muhammadan law.<sup>1</sup> The gift in 'Kamarunnissa Bibi's case<sup>2</sup> was originally made without a registered document. But "about six weeks afterwards a mukhtar-nama was executed, which contains a reference to the gift . . . . The gift is not cursorily mentioned . . . it was intended to carry into effect the gift which it alleged that he (the donor) had made a short time before." (p. 272.) This 'mukhtar-nama' was registered, as appears from p. 273 of the report. But ss. 17 and 49 of the Indian Registration Act do not require a registered instrument for the validity of a gift. All that seems to be required is, that, where there is an instrument, it should be registered. Similarly attestation is in no case necessary.<sup>3</sup> It is, however, clear that unless there is an instrument of gift, there must be great difficulty in proving it, where disputes arise.

## § 2.—Legal Incidents of Gift in British India.

### (1) 'Hiba' under Muhammadan Law.

#### (a) Interest Transferred under 'Hiba.'

348. (1) The legal effect of a 'hiba' <sup>Legal effect of 'hiba.'</sup> is that it transfers the immediate and absolute ownership of the subject of the 'hiba' to the donee ;<sup>4</sup> and (save as herein-after provided) where the property which forms the subject of the 'hiba' is purported to be transferred to the donee with conditions, or restrictions, as to its use, or disposal, or alienation,<sup>5</sup> the conditions or restrictions are void, and the 'hiba' is absolute.<sup>7</sup>

(2) *Semble*, according to Hanafi law, the donor, by making a declaration of 'hiba' <sup>(Sunni law.) Donor presumed to transfer all his interest in subject of gift.</sup> is conclusively presumed by the use of the word 'hiba' to have intended to transfer the whole of his interest in the subject of the 'hiba,' and

<sup>1</sup> See p. 372, n. 6.

<sup>2</sup> (1880) 3 All. 266 (p.c.)

<sup>3</sup> *Karam Habi v. Sharfuddin* (1916) 38 All. 212.

<sup>4</sup> See comments to ss. 345 and 348.

<sup>5</sup> So that the creation of limited estates (below ss. 90 et seq.) cannot be called making a hiba; nor strictly speaking can a hiba be said to be

made where the donor does not have the *dominium* over the subject ; and consequently cannot transfer the *dominium* even though he transfers all the rights he possesses.

<sup>6</sup> (*Nabob Amiruddaula Muhammad Kakya Hussain Khan Bahadur v. Naderi Srinivas Charlu* (1871) 6 Mad. H. C. R. 356; and see *id.*

<sup>7</sup> *Id.* L. 508, 509 (*Id.* 1-5).

SECTION 348. any restriction that is purported to be annexed to the donee's full ownership in the subject of 'hiba' is held to be void, as being repugnant to the expressed intention of the donor.<sup>1</sup>

(Shiah law.)  
Donor may  
transfer part  
of his interest  
in subject of  
gift.

(3) According to Shiah law, the use of the word 'hiba' in a declaration by the donor does not conclusively prove his intention to part with all his interest in the subject of gift to the donee, but the intention of the donor has to be gathered, as far as possible, from the whole of the declaration; and if any limitations are imposed on the donee's ownership of the subject of gift, they are to be given effect to, unless they are opposed to any law.<sup>2</sup>

Illustrations.

(1) D makes a gift of a house to R and RA, for their residence, and that of their heirs, generation after generation, declaring that if R and RA sell or mortgage the house, D and his heirs will have a claim on the house, but not otherwise. *Held*, that under both Sunni and Shiah law R and RA take an absolute estate.<sup>3</sup>

(2) D says to R, "this mansion is to thee 'umri' [i.e., for thy age, 'umr'], or 'hyati' [for thy life, 'hyat'], and when thou art dead, it reverts to me,"—in which case, in Hanafi law, the gift is lawful, and the condition void.<sup>4</sup> In Shiah law it would constitute a life-estate.<sup>5</sup>

(3) D says to R, "this 'hiba' is to thee, and to those that follow after thee." In Sunni law it would be a gift of an absolute estate to R, "the latter words being treated as a surplusage."<sup>6</sup> In Shiah law R would have a life-estate, if it is held that the intention was that the latter words should be words of limitation.<sup>5</sup>

(4) D makes a gift to R on condition that D has an option of cancelling the gift for three days. The gift is valid, but the option is void.<sup>7</sup>

(5) D gives to R a female slave, and stipulates that R should not sell her; or that R should sell her to a particular person, or restore her to

<sup>1</sup> Ball. I. 508, 509; Hed. 488, 489, cf. *Muhammad Shaik Khan v. Mussammal Lalijan* 11 Ind. Cav. 702.

<sup>2</sup> See comment: and *id.* (7).

<sup>3</sup> *Nasir Husain v. Sughra Begum* (1888) 5 All. 505; cf. *Suleman Kadr v. Dorab Ali Khan* (1881)

8 Cal. 1; 8 T. A. 117; cf. below s. 408, *id.* 2 (stipulation that income may be returned).

<sup>4</sup> Ball. I. 509, II. 203; cf. *Suleman Kadr v. Dorab Ali Khan*, 8 Cal. 1; 8 T. A. 117, 121, 123; Hed. 309.

<sup>5</sup> Ball. II. 226-227; *Banoo Begum v. Mir Aboi*

*Ali* (1907), 32 Bom. 172.

<sup>6</sup> Ball. I. 510.

<sup>7</sup> Ball. I. 537. Of course D has general powers of "revocation" (as distinguished from "cancellation"); see s. 420 *et seq.* This *id.* occurs twice in the *Fatawa Alamoiri* and is omitted in Ball. I. 500 (l. 1). See, however, about *mahr*, s. 442. The Muhammadan law as to the release of debt is the same as that of gifts; but it would be governed in India by the Contract, Limitation, and Transfer of Property Acts.



D after a month. All these gifts would be valid absolutely under SECTION 348. Hanafi law.<sup>1</sup> Under Shiah law the last would be a valid grant for a limited period.<sup>2</sup> *Illustrations.*

(6) D says to R: "my mansion is thine 'ruqba,'" meaning thereby: "if thou diest it is mine, if I die it is thine,"<sup>3</sup> [i.e., that it will belong to R if he survives D]. This may be interpreted (a) as a suspension of the gift upon a contingency, viz., upon the decease of D, in which case the gift is void (as Abu Hanifa and Inam Muhammad hold) or (b) as a gift of a house with the condition of 'ruqba,' "in which case the gift is valid absolutely and the condition void" (so Abu Yusuf holds)<sup>4</sup> or (c) as a special class of limited interests which the Shiah law permits.<sup>5</sup>

(7) The following is a translation from a Shiah text, which occurs while the author is dealing with the forms in which limited interests ('sukna' 'umra' and 'ruqba') may be created: "The contract implies the utterance of any of the following formulæ: 'I give you the house' . . . for your life . . . by 'sukna' or 'umra' or 'ruqba' or the utterance of any of the following formulæ: 'I have made 'hiba' to you of the 'corpus' of this house, on condition that if you die before me, the same shall revert to me, and that if I die before you the same will continue to be yours.' It has been said that this (last formula) must obviously (be interpreted to) mean, that the corpus of the property is permanently settled, as is related . . . on the authority of the Sunni jurists."<sup>6</sup>

#### 1. THE TERM 'HIBA' EXPLAINED AND DISTINGUISHED

'Hiba,' according to the 'Fatawa 'Alamgiri,' "is of two kinds, 'tumluck' and 'iskat,' which means literally to cause to fall or extinguish."<sup>7</sup> 'Hiba' implies grant of absolute estate.

"When," says Syed Ameer Ali,<sup>8</sup> "a grant is made with the word 'hiba,' it implies, generally speaking, the grant of an absolute estate: for 'hiba' is defined to be an act by which one person transfers to another, gratuitously, without the motive of 'kurbat,'<sup>9</sup> i.e., of pleasing God, accompanied by immediate transfer, constructive or actual, the entire and absolute property ('milk')<sup>10</sup> in a certain thing. Such a transfer in the Arabic language is also constituted by the words 'an-nahila' (a present) and 'al-atia.' In Hindustani the word 'atia' is equivocal,

<sup>1</sup> Hed. 488; Ball I. 538.

<sup>2</sup> See ss. 447 et seq., below.

<sup>3</sup> Ball. I. 58 (ll. 4-7).

<sup>4</sup> Hed. 488 (col. 1. par. 3).

<sup>5</sup> See s. 446 et seq., below.

<sup>6</sup> *Jawahir-ul-Kalam* II. 618.

<sup>7</sup> Ball. I. 508.

<sup>8</sup> "Muhammadian Law," I. 112. This pas-

sage occurs in the chapter dealing with the Shiah law of gifts.

<sup>9</sup> Literally "approach (to God)."

<sup>10</sup> *Al'ile* is explained more fully in the next paragraph, cf. s. 366.

<sup>11</sup> Spelt *nahila*, Ball. II. 203, *nahla*, Ball. I. 91. The final *t* is not necessarily vocal in some Arabic words.

**SECTION 348.** and so are the words 'dena' and 'bakhshnâ.' When grants are made with these words, the intention of the grantor must be examined from the context of the deed and surrounding circumstances, viz., whether he intended an absolute gift, or to convey only a limited interest."<sup>1</sup>

'Milk' and  
'tamlik' ex-  
plained.

The meaning of 'milk,' as given by Richardson in his Arabic and Persian Dictionary, is "possessing, having dominion." Kasimirski is very clear and explicit about the absolute and physical nature of the dominion: "Tenir une chose, après l'avoir saisi avec la main ('av. acc.') 2. Contenir quelque chose, se rendre maître de quelque chose. 3. Posséder quelque chose, être en possession de . . . ('av. acc. de la ch.),' etc. Then as regards 'tamlik,' Richardson explains it as "constituting possessor, appointing master, or chief, giving in perpetuity," and Kasimirski "1. Mettre quelqu'un en possession de quelque chose, ('av. acc. de la p. et acc. de la ch.) 2. Faire quelqu'un roi."<sup>1</sup>

Not every  
transfer with-  
out consideration  
is a 'hiba.'

These definitions indicate that 'hiba' cannot be taken to be the generic term for transfers without consideration: it is doubtful whether, strictly speaking, the term 'hiba' can be applied to a transfer (without consideration) of rights not amounting to 'dominium,' though the donor may transfer all his interest in the subject of gift.

It would have been more accurate if our Courts had restricted the term 'hiba' or gift, to transfers without consideration which have reference to 'tamlik' or full ownership, and had given to other voluntary transfers their appropriate designations in Muhammadan law. However that may be, the Courts in British India have not followed the minute distinctions of the nomenclature of Muhammadan lawyers: and the term gift is applied to all transfers without consideration and 'hiba' is considered as the exact equivalent of "gifts": see comment to s. 345.

Another question arising in this section is of some interest. Long before the Courts had to decide whether rights in property could be the subject of gifts, they were familiar with the passage in the 'Hidaya' and other books of Hanafi law (and they were not aware that the Shiah law was to the contrary) that a person cannot create a life-interest by way of gift (or rather 'hiba'). So it was clear that one class of rights could not be disposed of by way of 'hiba,' and it raised a doubt whether a 'hiba' could be made of any interest less than full ownership. Had the doubt been restricted to the propriety of applying the word 'hiba' to such transfers, it would perhaps have been better justified. The result of some of these decisions would seem to be, that, if a person has

<sup>1</sup> Cf. also Paul. I. 607, n. 3, 508, n. 2

only a limited estate in property, he can make a ‘hiba’ of his interest in the property, but if he has the full ownership, he cannot under Hanafi law make a ‘hiba’ of a smaller interest,—in other words that a donor can make a ‘hiba’ only of the whole of his interest in the subject of gift, but cannot make a ‘hiba’ of rights that do not exhaust his interest in the subject of the gift. These remarks are made subject to the considerations referred to under s. 345, above, and ss. 444 *et seq.*, below

SECTION 348;  
Donor may transfer less than full dominion where his own interest is such.

Again, since, in British India, a Hanafi Mussulman may acquire title to a life or other limited estate in property, and such an estate is transferable, the objection to a Hanafi making a gift of a life-estate cannot be that such an estate is not known to the law by which he is governed in British India. The real difficulty seems to be that certain expressions in the texts have been so translated as to make it appear that life-estates are unknown to Hanafi law, which expressions perhaps had reference only to the interpretation of formulæ of ‘hiba.’ Life-interests are as well-known to the Sunni law as they are to Shiah law: they can easily be created, and are frequently created, in ‘waqfs,’ and it was only by a novel interpretation of the law of ‘waqfs’ that that mode of disposition had for some time been restricted in British India to charitable dispositions, but that restriction is now removed by the Wakf Validating Act.

Whether the rule offers merely to interpretation of formulæ of ‘hiba.’

## 2. THEORY OF THE MUHAMMADAN LAW OF ‘HIBA.’

The theory of the Muhammadan law of ‘hiba’ is a simple one, and the inter-dependence of one rule in it on another, is always close. The whole of it may, indeed, be apparently summed up in the words, “‘Hiba’ is a voluntary<sup>1</sup> transfer of property.”<sup>2</sup> It follows, as a corollary, (1) that no donor can be forced to take any step towards the completion of a ‘hiba,’ whether that step consists of giving possession, or of any act necessary to transfer possession (as a partition and division of the property). It follows equally (2) that the donee cannot be forced to do anything which he may have promised to do in return for, or in consideration of, the ‘hiba’—for the promise to make the ‘hiba’ being not enforceable, the consideration for the donee’s promise fails, and the donee’s promise is as much a bare agreement without consideration, as the original ‘hiba.’<sup>3</sup>

Invalidity of conditional gifts based on general principle that gifts are voluntary.

<sup>1</sup> See comment to s. 420, below, for the connection in Muhammadan law between a voluntary transaction and revocability.

<sup>2</sup> Compare the definition of gift in Roman law as an alienation “which is made without the law compelling you to do it,”—“quod nullo iure cogente conceditur.” Digest L. xvii. 82.—Hunter’s “Roman Law,” 318. “They are

completed when the giver has openly declared his intention whether in writing or not. . . . If no delivery took place, they should be fully and completely valid; the necessity of delivery should rest upon the giver.” Justin. II. vii. 2.

<sup>3</sup> This is clearly pointed out by *Abdur Rahim*, J., in *Fakir Syarif v. Muhammed Rosther* (1911) 35 Mad. 120, 128, 129, citing Hed. 482 col. ii.

**SECTION 348.** Next, it follows, (3) that if a person declares that he will make a 'hiba' in future, he is free to make the 'hiba' on the future occasion, or not, as he pleases (see s. 349, below). But, on the other hand, (4) where the voluntary nature of the 'hiba' is altogether taken away, either by the act of the parties, or by external circumstances, it can no more remain revocable, and where there is any return or consideration for the transfer, of course it cannot be considered voluntary any more. The first kind of consideration or return that is mentioned is (i) the return from God, or "approach to God." It is this that makes a 'sadaqa' or a 'waqf' irrevocable. The importance of this principle can only be realised when it is remembered that the primary mission of the Prophet was to destroy superstition, and to bring about a spirit of reverence and religion amongst the ungodly Arabs; this rule is but an exemplification of what was sought to be impressed upon them—that no return can be greater than that of being brought nearer to Allah, of whom they were constantly taught to say there is no God but 'The God,' and that an act done with His name on one's lips cannot be considered as a light or informal act. (ii) Secondly, gifts become irrevocable where the return consists in this, that the loose ligaments of family relations that prevailed amongst the Arabs (if they can be called relations) are closer tied,—hence gifts between relations cannot be revoked. (iii) Finally, where there is what would be called valuable consideration in English law, the gift may be transformed into a sale.—And such consideration may be stipulated for at the time that the gift is made, or it may be an after-thought. See comment to s. 383, below, on the importance of the rules as to transfer of possession in the theory of the law.

Also of contingent gifts.

Reason why gifts are normally revocable

and why some are irrevocable.

### 3. CONDITIONS ANNEXED TO GIFTS.

Conditions that may not be annexed to gifts.

The statement is frequently made crudely that where any condition whatever is annexed to a gift, the condition is void, and the gift valid absolutely. Grounds are furnished for the statement by such passages as the following: Gift "is not cancelled by vitiating conditions; so that if one should give his slave on condition of his being emancipated, the gift would be valid, and the condition void."<sup>1</sup> "Gift is a contract by which the property of a substance is transferred immediately and unconditionally without any exchange, and free from any pious or religious purpose on the part of the donor."<sup>2</sup> But in the same texts we find the following: "When a gift is made on a condition of an 'iwaz' or exchange all the conditions of a gift attach to the 'iwaz' in the

<sup>1</sup> Ball I. 506.

<sup>2</sup> Ball II. 20.

beginning."<sup>1</sup> Again, "if a person gives something to another on condition of that other giving something to him in exchange for it . . . a deed of this nature is in its original a gift."<sup>2</sup> And it is said that "if again a reciprocal gratuity were actually stipulated for at the time of the contract, the condition would be valid."<sup>3</sup> The latter passages are generally either entirely ignored, or are presumably considered to be inconsistent with the earlier portions, and as of no effect.—why the principle of interpretation should be that applicable to deeds 'inter vivos,' and why not that of wills, not being explained. Those, on the other hand, who think that the two classes of passages are inconsistent, and that the authors of the texts have inadvertently allowed them to come in, take no account of the circumstances under which the authors of these books acquired their knowledge of law, and devoted themselves to its constant study,<sup>4</sup>—not to refer to their eminence as jurists. It is submitted that such conditions in a gift are invalid as are referred to in the section above; while such conditions as can be brought under the terms of a stipulation for a return are valid—as will appear from the later sections of this chapter.

Conditions of some kind may be annexed to gifts.

(b) *Time when 'Hiba' comes into operation.*

**349.** Where the declaration of a gift purports to transfer the subject of the gift to the donee at a future time, or contingently on the happening of a future event, the gift is void.<sup>5</sup>

Gift 'in futuro' or contingent gift void.

There is a good deal of ambiguity in the expression conditional or contingent gifts, the former of which may mean either (i) that the transfer of property by way of gift is purported to be suspended on a condition, and cannot take effect unless that condition is fulfilled—which class of gifts are void under Muhammadan law,—or (ii) that there are certain conditions and restrictions as to the use or disposition of the property forming the subject of gift, or that obligations are annexed to the ownership of the said property.

Contingent gift explained and distinguished.

Contingent or conditional gifts, in the sense of gifts that do not

Reason why contingent gift void.

<sup>1</sup> *Bell*, I. 534.

<sup>2</sup> *Hed.* 488 (col. 1.).

<sup>3</sup> *Bell*, II. 208. The passage proceeds to say that the gift remains revocable, while the donee is not bound to give the stipulated return.

<sup>4</sup> Cf. the last paragraph of the comment to a. 61, above. One or two inadvertences have, it is true, been referred to before (ss. 87 & 167); but those consist of allowing excerpts to be included in a digest from two authorities, who take oppo-

site views on a controversial point.

<sup>5</sup> *Bell*, I. 508; *Macn.* 50; *Amul Nissa Begam v. Mir Nurudin Hussein Khan* (1896) 22 Bom. 489; *Yusuf Ali v. Collector of Tipperah* (1882), 9 Cal. 138; *Chakkona Kutti v. Ahmed* (1886) 10 Mad. 196; *Abdoola v. Mahomed* (1905) 7 Bom. L. R. 306; *Roshun Jahan v. Ennat Hussein* (1896) 5 W. R. 4, affirmed under title of *Khajooroonissa, widow of Enayet Hussein v. Rowshan Jahan* (1876) 2 Cal. 134; 3 I. A. 291; 26 W. R. 36.

**SECTION 349.** operate at all unless some contingency or condition is fulfilled, are, as above stated, void in Muhammadan law. It must be remembered that one great distinction between gifts in English and in Muhammadan law is, that in the former revocability is not an incident, unless specially provided for; in the latter revocability is normally an incident of all gifts, though there are so many exceptions to the general rule that a gift is seldom revocable in practice. But the conception of a gift in Muhammadan law is that it is voluntary, and that, as there is no compulsion to make it, so there is no obligation to let it continue in force (so to say), after it has been made. Where, therefore, the donor purports to make a gift which is to operate at some future time, or on the happening of a future event, in the eyes of Muhammadan lawyers, it is nothing different from a mere promise to make a gift in future, or on the happening of the event; 'ex hypothesi,' the promise in question is (1) gratuitous and therefore not enforceable; moreover, (2) the promise has reference to making a transfer of property or of rights, which transfer could have been revoked, even if it had actually been made. It may thus be compared to the possibility upon a possibility of English law, being uncertainty heaped upon revocability. Hence it is not difficult to understand that a contingent or conditional gift (defined as above) could have little effect in Muhammadan law (even if it were held to be valid)<sup>1</sup> beyond that of expressing a mere intention to make a gift in future; if that intention is persevered in, Muhammadan law requires it to be given effect to when the time comes for it to take effect.<sup>2</sup> There is, however, one exception to this rule. For, where the condition on which the operation of the gift is suspended is the death of the donor, the disposition constitutes a particular species of gift, namely, a bequest<sup>3</sup> and it may operate as such in Muhammadan law.<sup>4</sup>

Request a  
contingent gift.

Conditions re-  
stricting use  
or disposition  
of subject of  
gift, void.

With reference to a conditional gift in the second sense above referred to, viz., where the use or disposition of the subject of gift is purported to be restricted by obligations sought to be imposed on the donee, s. 348, above, and the rules about "stipulations for a return," in ss. 407, *et seq.*, below, should be compared. It is pointed out in the 'Jami'-ush-Shittat' that "when a return has been stipulated for in

<sup>1</sup> Under the Transfer of Property Act, s. 126, "A gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void, wholly or in part, as the case may be."

<sup>2</sup> An instrument merely expressing a desire that a person should have a chattel without any delivery of the chattel, will not, in England, pass

any property therein: *Douglas v. Douglas* (1860) 22 L. T., 127.

<sup>3</sup> *Jotindra Mohun Tagore v. Ganendra Mohan Tagore* (1872) L.R., I.A., SUPP. VOL., 47.

<sup>4</sup> See below on wills: *Kasam v. Shaita Begum* (1875) 7 N. W. 313; and cf. *Jeevunt Singhjee v. Uddy Singhjee v. Jai Uddy Singhjee* (1844) 3 Moo. L. A. 245; 6 W. R. (P.C.) 46.

the following manner: 'I give you this to be your property, on SECTION 349; condition that you do this work,' " it being meant that there is a contract " dependent on a stipulation, then in such a case the gift may become void because the contingency made originally is necessary to be given effect to." <sup>1</sup>

**349A.** A Mussulman cannot make a gift in con- 'Donatio mortis causa'   
 templation of death in the mode and with the effect of a gift in   
 contemplation of death   
 provided by the Indian Succession Act, s. 178.<sup>2</sup>

When a 'donatio mortis causa' is purported to be made, it must either be considered as a gift (provided that the transfer has been completed, <sup>3</sup>) or it may sometimes take effect as a legacy, <sup>4</sup> and the incidents of one or the other must be annexed to it. It may be that it fails as a contingent gift, or has effect only as to one-third of the estate (as a legacy). <sup>5</sup>

(c) *Possession under Invalid Gift.*

**350.** Where a gift is not valid, but the donee is in Possession of   
 possession of the subject thereof, the donee is, under Hanafi invalid gift   
 law, responsible to the donor for its loss, destruction, or with respon-   
 deterioration, <sup>6</sup> subject to the effect, if any, of the Indian sibility)   
 Contract Act, ss. 151 and 152.

(1) D gives to R nine 'dirhams' and says, "Three of them are in Illustrations.   
 payment of your right, three as a gift, and three in 'sadaqa' " R loses them all: he is under Hanafi law responsible for the three that were a gift; because the gift was invalid (being considered a gift of an undivided part of a whole), but not responsible for the 'sadaqa,' as alms of an undivided share is valid. <sup>6</sup>

(2) D gives half a mansion by way of gift to R, and delivers it (without dividing the subject of gift); its sale by R would be valid according to the 'Mabsut' of Imam Muhammad. <sup>6</sup>

Apart from the effect of the Indian Contract Act, the principle does not seem to be very strictly observed in the 'Fatawa 'Alamgiri' either. <sup>7</sup>

" If possession is taken of land given by an invalid gift, and it were

<sup>1</sup> *Jami' ush-Shittat*, 381.

<sup>2</sup> *Meer Ashruff Ally v. (Mued.) Nusserebun Beber* (1863) 2 Hay, 163; Marsh, 315; (*Syed Shah*) *Ashadoolah v. (Muwaa Beber)* *Shahab Jhawa* (1863) 2 Hay, 345. See comment

<sup>3</sup> *Sharifu Bibi v. Ghulam Mahomed Dadaoer Khan* (1892) 16 Mad, 43.

<sup>4</sup> See s. 359B, below (gifts in *marz-ul-mau*

<sup>5</sup> See footnote to s. 349, explanation, above

<sup>6</sup> *Bail. I* 518 (par 2) See s. 381, below, validating a gift of *musha'* by dividing: giving possession

<sup>7</sup> *Bail. I* 520 (*ll.* 17—21).

SECTION 350. then made a 'waqf,' it would be lawful, the donee being responsible for the value."<sup>1</sup>

(2) *Incidents of Gifts under the Law of British India.*

(a) *Effect of the Law of Contracts.*

Transfer of property made for natural love and affection is governed by Contract Act.

351. Where the declaration and acceptance of a gift are (1) expressed in writing, registered under the law for the time being in force for the registration of documents in British India, (2) made on account of natural love and affection, (3) between parties standing in a near relation to each other, and (4) if there arises therefrom an agreement as defined in the Indian Contract Act <sup>2</sup> such an agreement is not void for want of consideration.<sup>3</sup> The Muhammadan law of gifts governs such an agreement in so far as is provided by s. 1 of the said Act, but not further.<sup>4</sup>

*Illustration.*

H puts his wife, W, into possession of certain property, with the conditions, (a) that W should collect the rents and profits of the property during her lifetime in lieu of her dower debt, (b) that if W predeceases H, the dower debt shall be deemed to be paid up (no matter what portion may have been realized by that time), and the properties shall revert to H, (c) that if H predeceases W, the properties will be W's absolutely. H predeceased W. *Held*, that this was neither a hypothecation nor a will nor a 'muhabat,' and that the property belonged absolutely to W.<sup>4</sup>

Gifts in consideration of natural love and affection.

In a reported case,<sup>5</sup> where a gift was purported to be made "in consideration of the natural love and affection which Muhammad Hasan bears, as well as for all the past favours and indulgence shown by him," and it was stated that the said Muhammad Hasan was standing in a near relation to the donor, the question of its validity was decided "upon the principles of the Muhammadan law of gift, which it was stated admittedly governs this case." It does not appear whether the deed of gift was registered. No allusion is made to the Indian Contract Act, but the Transfer of Property Act, s. 54, is referred to in the judgment.

Past favours.

<sup>1</sup> Bail 1, 554 (H. 15—17)

<sup>2</sup> The Indian Contract Act s. 25 (1) seems to contemplate that the making of a gift connotes the making of an agreement. The Privy Council in *Sadat Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 627, examined the deed therein referred to in order to see whether it could take effect as an agreement, see in particular pp.

<sup>3</sup> Ss. 4 & 63, above, *Mahamad v. Hasan* (1906) 31 Bom. 143, 149, 150; *Rahim Bakh v. Muhammad Hasan* (1888), 11 All. 1, 2, 4 (par. 4), 8 (H. 1-3).

<sup>4</sup> *Mubarakunnissa v. Mansob Hasan Khan* (1911), 33 All. 421.

<sup>5</sup> *Rahim Bakh v. Muhammad Hasan* (1888) 11 All. 1.



Nor is the case mentioned in s. 351, the only one where, what SECTION 351. appears a gift, is governed by the Indian Contract Act; thus where <sup>Other cases</sup> subscriptions are promised for a public or charitable object and on the strength of the promise, liabilities are incurred by the promoters of the <sup>Promised</sup> object, such subscriptions may be recovered by suit;<sup>1</sup> or where there <sup>subscriptions when recoverable.</sup> is a compromise, there being consideration for the transfer of property, though the transfer may take the form of a gift, it is a contract, and the conditions will be enforced;<sup>2</sup> or where a dispute between a Shiah husband and wife about 'mahr' is referred to arbitrators, and they transfer the absolute ownership of the husband's property 'in present' to the wife under a registered award, though the husband does not give possession to her, reserving (as the award permits him to do, the use of the property to himself during his life; the wife becomes owner of the property.<sup>3</sup>

(b) Effect of the Law of Trusts.

352. Where a gift is purported to be made by a <sup>Condition to</sup> Mussulman, and the donee undertakes to do something in <sup>gift may be</sup> return, the gift and the undertaking may form valid consi- <sup>enforceable</sup> derations for each other, and may be enforced in the Courts <sup>trust.</sup> of British India, as an agreement raising a trust and constituting a valid obligation to perform the undertaking;<sup>4</sup> the undertaking may be given at some time after the execution of the deed of gift.<sup>5</sup>

This section is based on two decisions of the Privy Council.

The significance of the several grounds taken by their Lordships in the earlier of the two cases<sup>4</sup> is apt to be overlooked. Each of the grounds is, therefore, marginally noted in the extract given below, with some particularity. The facts were that the Nawab of Oudh made a gift to his son of Government promissory notes, with the condition that the

<sup>1</sup> *Kedar Nath v. Gorie Mahomed* (1886) 14 Cal. 64.

<sup>2</sup> *Abdu-bekar bin Haggada Hajinaba v. Maibbi*, (1889), 6 Bom. C. A. (A. C. J.) 77, and cf. *Mahummadunnissa Begum v. J. C. Bachelor* (1905) 29 Bom. 428.

<sup>3</sup> *Muhammad Tuliq Husin v. Inayat Jan* 1911), 33 All. 683; cf. *Angan Lal v. Muhammad Husin* (1891) 13 All. 409.

<sup>4</sup> (*Nawab*) *Umdat Ally Khan v. (Musummat) Mahumdee Begum* (1867) 11 Moo. L.A., 517, 548; 19 W. R. (P.C.) 25. *Lalijan v. Mahomed Shafi Khan* (1912) 34 All. 478, 9 All. L. J. 798. Cf.

(*Nawab*) *Ibrahim Ali Khan v. Ummat-ul-Zohra* (1896) 19 All. 267; 29 I. A. 1, more fully considered in the comment to s. 403, below. See also *Sadik Husin Khan v. Hashim Ali Khan* (1916) 38 All. 927 (P.C.).

<sup>5</sup> *Ameeroonissa v. Abdoonissa* (1874-5). 2 I.A. 87; 15 Beng. L. R. 67; 23 W. R. 208. The arguments were heard for 4 days in Nov. 1874, and the Judgment delivered on 30th Jan. 1876. See also (*Nawab*) *Ibrahim Khan v. Ummat-ul-Zohra* 9 All. 267; 29 I. A. 1: (cf. comment to s. 405, below).

<sup>Umdat Ally</sup>  
<sup>11 Moo J.A. 517.</sup>

**SECTION 352.** donee should, during the lifetime of the donor, make over to him the interest accruing on the notes from time to time (see s. 383, *ii*. 3.). It was argued that the gift was invalid.

Gifts of produce.—

Q 1. Whether incomplete?

A Produce distinguishable from corpus, hence reservation of produce does not affect completion of a gift of corpus.

Q. 2. Whether it is a gift with a repugnant condition?—

A (a) If so, Muhammadan law would defeat condition, not gift.

(b) But in India the agreement on valid consideration, hence even the condition is enforceable as a contract.

Intention of parties must be given effect to if not unlawful

Their Lordships say: "It remains to be considered whether a real transfer of property by a donor in his lifetime under the Muhammadan law, reserving not the dominion over the 'corpus,' of the property, nor any share of dominion over the 'corpus,' but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Muhammadan law. The text of the 'Hidaya' seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. See 'Hidaya' tit. 'Gifts,' Vol. III., Book XXX, p. 294,<sup>1</sup> where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, 'The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use [of the whole indivisible article] for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life is to be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Muhammadan law defeats not the grant, but the condition. 'Hidaya,' tit. 'Gifts,' Vol. III., Book XXX., p. 307. But as this arrangement between the father and the son is founded on a valid consideration,<sup>2</sup> the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust,<sup>3</sup> and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the 'Hidaya,' and the transfer is complete. The Muhammadan law authority whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion,

<sup>1</sup> Hed. 483 (col. ii. par. 3). This passage refers to the rule of Hanafi law that a gift of an undivided part of property which is not capable of division is valid, notwithstanding the doctrine of '*Musha*'. To this rule the objection might be raised, that the reason why undivided parts of property are not allowed to form the subject of gift, is that "the donor incurs a participation in the property;" and that this reason would apply to indivisible property as much as divisible property. The author of the *Hidaya* replies to this objection in the words cited by the P.C. Those words, therefore, are a justification of the relaxation of the doctrine of '*musha*' in cases where the property is indivisible.

<sup>2</sup> Neither the Indian Contract Act I. of 1872 nor the Indian Trusts Act II. of 1882 had then been enacted.

<sup>3</sup> Sir R. Wilson says: "Here the ground seems to be entirely shifted, and the transaction regarded not as a gift in the ordinary sense of the term, but as a transfer for consideration, in the language of Muhammadan law, a '*hiba bil 'iwar*' [A '*hiba bil 'iwar*' is not a transfer for consideration, but consists of two reciprocal gifts.] Sir R. Wilson continues: "But, with submission, it seems hardly consistent with principle, or with ordinary use of language, to treat the return of a part of a thing as consideration for the transfer of the whole" [see s. 408 on subject of '*iwar*'] "and the income . . . is, to all intents and purposes, part of that property". . . He concludes: "I do not pretend to understand the reasoning by which the conclusion was reached;" "Anglo-Muhammadan Law," 325, s. 315.

un-supported by authority; but it is to be observed, that unless some SECTION 352. authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties."<sup>1</sup>

This decision of the Privy Council must influence the law of gifts in many directions, which will be considered later. In this place, however, it must be pointed out that the Privy Council rely upon the quotation from the 'Hidaya' for meeting the argument that the gift was bad, because (1) it had not been completed, and (2) that in its terms it was such that it could not have been completed. They do not rely upon it when considering the second objection to the gift, viz., that it ought to be treated as a conditional gift. To this second objection their reply is twofold, (a) that the Muhammadan law would defeat the condition, and not the gift, and (b) that in India the condition would be enforceable as raising a trust.

The judgment of the Privy Council has been subjected to criticism.<sup>2</sup> But it is difficult to say that the actual decision could have been different. As their Lordships stated, the legal title in the promissory notes was undoubtedly in the donee; the question whether the stipulation (to return the interest to the donor) was valid, was not before them. Thus the only question that remains is whether exception can be taken to their Lordships' remark regarding the validity and enforceability of the stipulation. These remarks were made as part of the reasoning by which they uphold the gift. For their argument is twofold. (1) First they assume that the condition is invalid: even on this assumption they say that an invalid condition does not affect the gift. (2) Secondly, they hold that the condition itself was valid, and so the gift was not capable of attack even on the ground that a part of its terms was unenforceable.

It is submitted that criticism<sup>3</sup> against the reasoning of the Privy Council is based on misconception.<sup>4</sup> It does not follow that because pure Muhammadan law felt itself unable to recognise certain kinds of rights, therefore, those rights cannot be recognised in British India. Several kinds of wide and indefinite powers were exercised by the Qazi in regard to which the British Courts cannot help renouncing jurisdiction. There is, on the other hand, no reason why the Courts in British India should renounce the powers over rights and liabilities arising from the law of contract and trusts, merely because the transaction would have been governed by the more restricted law of 'hiba,' had there been no undertaking by the donee to do

<sup>1</sup> (*Nurunnabi Umjad Ali v. (Mussunnat) Mahmud Ali Begum* (1907) 11 M. P. L. A. 517, 518.

<sup>2</sup> See p. 384, n. 1.  
<sup>3</sup> *Tarabulwalla v. Umjad Ali Begum* (1917) 41 Bom. 375, 376.

The passage from the 'Hidaya' applicable on general principles.

The decision considered.

SECTION 352 anything.<sup>1</sup> The definition of consideration in the Indian Contract Act, s. 2, does not require that the act or abstinence which is promised should have no reference to property that is transferred by the promisee.

'Ameroonissa v. Abedoonissa.'

The other decision above referred to, '*Ameroonissa v. Abedoonissa*'<sup>2</sup> is also very important; and, owing to the absence of any report of the case in the Indian Law Reports series, (the case was decided prior to the commencement of that series) it is referred to in some detail below:—

The actual question that had to be decided was whether three 'ikrars'<sup>3</sup> between the donor and the donee, were valid and genuine: the donee was the plaintiff, and he prayed that the 'ikrars' should be set aside; and that he should be put into possession of the subject of the alleged gift

Nothing turns upon the relation between the parties, but it is given below for a more convenient study of the case:—(1) Wahid Ally, son of Abdool Ally and Nooroonissa: the donee (attained majority 1854); original plaintiff; on his death his widow Abedoonissa was the respondent before the Privy Council. (2) Moulvi Abdool Ally, father of Wahid Ally, the donor of gifts I & II; married three wives:—(a) Nooroonissa, mother of Wahid Ally; donor of gift III; (b) Eftekhurunnissa; (c) Ameroonissa: on the occasion of her marriage with Abdool Ally the third 'ikrar'<sup>3</sup> was executed; brought on the record as the legal representative of Abdool Ally: appellant, before the Privy Council.

There was a good deal of difference of view in the Courts:—(a) The Judge of Dacca was of opinion—(i) that the transfers to the son were purely nominal; (ii) that the father did not intend that any property should pass under the gifts; or at least while he lived; (iii) that the gifts were invalid by Muhammadan law for want of acceptance and seizin. [On this point the Judge's view was held by the Privy Council to be erroneous.] (b) The High Court held,—(i) that the transfers were not colourable [this was doubted by the Privy Council, but not decided; see s. 346 (2), above]; (ii) that they were intended to operate as real gifts [also doubted by the Privy Council, but not decided; see s. 346, (2) above]; (iii) that "when the guardian of the minor

<sup>1</sup> Which is in the following terms. "When at the desire of the promiser, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise." Hence if the donee (at the desire of the donor) promises to do something it would appear to be consideration for the donor's

gift) and the transfer (nominally by way of gift) to be in consideration for the donor's promise to return the profits of the property. See also *Tarakalabhai v. Imatigaj Begum* (1916) 41 Bom 372.

<sup>2</sup> *Ameroonissa v. Abedoonissa* (1874-5) 21 A. 87; 15 Beng. L. R. 67.

<sup>3</sup> Or *iqar*, (if spelt in accordance with the method of transliteration adopted in this work), = confirmation, settlement, acknowledgment,

is himself the donor, and in possession of the property, no formal SECTION 352. delivery and seizin is required." [This was approved by the Privy Council : see s. 400, below].

Their Lordships of the Privy Council expressed doubts as to whether there was any real and bonâ fide intention to make the gifts, but without going into that question at large they proceeded on the basis that the gifts had been made; because they held (1) that the rights of the parties must be determined on the basis of the combined operation of the 'hibbas' and 'ikrars'; and (2) that on the state of the pleadings the donor could not be allowed to aver that the gifts were not operative in as much as he had set up the 'ikrars' in his defence as being valid, and the 'ikrars' related to the gifts as being operative (p. 104).

Hence their Lordships' decision was as follows:—(1) As to the intention to make a gift, that there were indications that there was no bonâ fide intention, but that the point was not open to the donor. (2) As to the completion of the gift, that assuming (as their Lordships held that they were bound to hold) that the gift was intended to be operative, change of possession was not necessary. (3) As to the legal effects of the transactions, the rights of the parties had to be determined on the basis of the combined operation of the gifts and the subsequent 'ikrars.'

This third point was the only question of law before their Lordships, and it is of great importance. For, in accordance with it, though there were deeds (hibba namahs) purporting to be absolute and present gifts (p. 103), though their Lordships approved of the decision of the High Court that transfer of possession was unnecessary, and though they also proceeded on the basis that the donor could not be allowed to aver that the gifts were not intended to be operative, yet they held that the donee was not entitled to possession. The terms in which their Lordships expressed their decision are set out in the comment to s. 346.

(c) *Effect of the Transfer of Property Act.*

**353.** Sections 5 to 53, and 122 to 128, inclusive, of the Transfer of Property Act<sup>1</sup> do not affect any rule of Muhammadan law; but the rest of the Act applies to Mussulmans. Transfer of Property Act.

Their Lordships of the Privy Council referred to the Transfer of Property Act, ss. 122, 123 and 125 in a case governed by Muhammadan law, without direct reference to s. 129 of that Act. But they pointed out that a "transfer" in s. 122 thereof "would 'prima facie' mean a

<sup>1</sup> *I.e.*, Chapter II. on "Transfers of Property by Acts of Parties," and Chapter VII. on "Gifts" respectively. See s. 129 of the Act.

**SECTION 353.** valid transfer, and would, therefore, require the transfer to be accompanied by delivery,"—i.e., when the transfer is without consideration and is governed by Muhammadan law.<sup>1</sup>

(d) *Effect of the Law by which the donee is Governed.*

Law of donee.

**354.** Where a Mussulman makes a gift to a donee who is governed by a law of property other than Muhammadan law, the subject of gift may be impressed with the incidents of that law, and may not continue to be subject to the incidents of Muhammadan law, after the completion of the gift.<sup>2</sup>

Illustration.

Where one Uttotti, a Mussulman governed by Marumakkattayam law in order to make a gift to his wife and children, purchased property in the name of his wife Ayissa, though the property was purchased in the name of Ayissa alone, it was found that the gift was intended for her children as well, and it was held, that, as she was governed by the Marumakkattayam law, the property became the exclusive property of Ayissa, and her children, but with the incidents of 'tarwad' property.<sup>3</sup>

Joint family property.

It need hardly be stated that "the principles applicable to a purchase by one member of a joint Hindu family from another, are not applicable to Muhammadans."<sup>4</sup> Property, held by Muslims who are governed by Hindu law may, however, be subject to the incidents of Hindu law, and not of Muhammadan law, as where a Khoja or Memon governed by Hindu law, possesses joint ancestral property.

Khoja or Memon.

(e) *Effect of Equity, Justice and Good Conscience.*

Equitable doctrine of effective conveyance.

**355.** Equitable doctrines and principles prevailing in England, such as that by which the defective execution of a deed is aided, may be applicable to a gift governed by Muhammadan law, especially where it is made through a trust.

Illustration

On the 7th January 1886, JP, a Khoja Mussulman, executed a deed of trust with a life-interest to himself, without impeachment of waste; after himself upon trust to pay the net income to N (then his only son), subject to certain rights of residence, and payments of allowances to the wife and daughters of JP. In the event of N having a

<sup>1</sup> *Sadik Hussain Khan v. Hashim Ali Khan* (1910) 35 All. 627, 647.

<sup>2</sup> See comment.

<sup>3</sup> *Pallatharath Pathumma v. Munim Kunhnil Abdulla Haji* (1907) 31 Mad. 228; *Kunhacha*

*Umma v. Kathu Mamma Hayee* (1892) 16 Mad. 201, 204 (par. 4), 206, 207 (F.B.); see also *Karoth Amman Katti v. Perungottu Appu Nambiar* (1906), 29 Mad. 322.

<sup>4</sup> *Mahamad v. Hassan* (1906), 81 Bom. 143.

son, there was to be a re-arrangement in respect of all that followed in SECTION 355. the settlement; failing male issue to N, then the corpus was to be divided into ten portions, which were given to various donees, four-fifths being directed in that event to charity . . . At the end of the settlement there was the usual revocation clause appropriate to all English voluntary settlements, in common form. Thereunder the settler or donor reserved to himself full power of revocation during his lifetime, by writing signed, and also power to declare new trusts by such signed or any other writing." On the 28th October 1886, another son C (the plaintiff) was born to JP, who then became desirous of altering the trusts and a new trust deed was prepared on the 21st July 1887, approved on the 24th, engrossed on the 29th, and taken on that day for execution. A blunder was discovered in the engrossment, and it was to be re-engrossed, but before this could be done and executed, JP died, *i.e.*, at 7-30 p.m. on the 29th. By the new deed, after the death of JP N and C were to hold the trust properties as members of a joint and undivided Khoja family. During the lifetime of JP and N, they were respectively in possession of the trust properties: it was alleged by the defendants that they were in possession as trustees, but the Court held it to be proved to be otherwise. C, on coming of age, instituted this suit for a declaration that either the first deed was altogether void, or he was entitled to be placed in the same position in which he would have been if the new trust had been declared. *Held* (a) that the life-interests in favour of JP and N were valid; (b) the general rule is that the power of revocation is inherent in the donor of every gift with "innumerable exceptions;" (c) that the gifts following N's death were contingent, and therefore void; (d) that the defective execution of the new trust should in this case be aided, as it was defective not through any fault on the part of the person intending to execute it, but by reason of an act of God, and that, therefore, the second deed ought to be effectuated by the Court to the extent of making it binding upon the conscience of the trustees.<sup>2</sup>

From one point of view the present section is merely the application of s. 12, above: It has, however, to be noted that the principles of English law can be applied more freely with reference to those topics on which the Muhammadan law is not expressly required by the legislature to be enforced, but is enforced by the Courts either as equity, or as a religious institution or usage: and the law of gifts is enforced as equity in Bombay. See the table preceding the second chapter.

Applicability  
of English law.

<sup>1</sup> See p. 388, n. 3.

L. R. 717 :—J.P. represents Jaimibhai Pirbhai;

## SECTION 355.

'Cassam-  
ally v.  
Currimbhal.'

Certain remarks in the judgment which is the basis of the illustration given above, require consideration :—

It is said "If there were any hope of expecting from the vast entanglement of the Muhammadan law anything like consistent principles or intelligible classifications or accurately expressed notions, it certainly would appear to me that considering the requisites of a gift are, amongst others, finality and completeness 'in præsentī,' then it might and ought to follow that an announcement on the donor's part that he might at any time during his lifetime revoke the gift, would make the donation entirely invalid." This remark is based on a misconception of the theory of Muhammadan law of gifts, which is explained in the comment to s. 348, above, *q. v.* It is evident that its very theory requires that the gift should be completed, and that it should be revocable; it also illustrates the danger of considering that the whole of the Muhammadan law can be understood from isolated passages and extracts relating to any particular point that has to be decided.

Revocability of  
gifts is not  
opposed to the  
theory of  
Muhammadan  
law.

Then again it is said that "It is almost impossible . . . to arrive at any clear understanding of what the real underlying principles of that law upon many of the questions which in an advanced civilization have large and practical importance and are supposed to be answered by a reference to that law, really are. The English Courts are constantly making Muhammadan law for themselves . . . which, while it may flatter the conservative prejudices of good Moslems, does not in the least resemble anything which the authors of the Moslem law had themselves laid down; but is rather an attempted compromise between the rigidity and inadequacy of the legal notions of a people then living under very primitive social conditions, with their now highly complex social needs and requirements." It is proposed to deal with the assumptions expressed or implied in these remarks. These assumptions frequently underlie decisions on questions of Muhammadan law; and, being of too general a nature to form the subject of direct decision, cannot well be discussed in arguments at the bar. They are not, therefore, the less important, nor the less deserving of careful scrutiny.

Difficulties of  
Muhammadan  
law.

First, as regards the difficulty of understanding the law, it must be admitted to be very great. It is presented in British India mostly in the shape of reports of decisions on a set of specific circumstances brought before the Courts. The discussions on the law before the Courts consist, in the great majority of cases, of the citation of passages from books brought, perhaps, for the first time, to the notice of many concerned. No attempt is made at a wide and general survey of the



subject: such a survey being considered as much out of place in SECTION 355. Indian Courts as in English Courts, where the judges are dealing with their own law, and with that particular branch of it,<sup>1</sup> with which they have been familiarized in every detail through having practised it for many years. If the original authorities on Muhammadan law are *arched*, they appear extremely uninviting,—without having any punctuation, or division into paragraphs, or difference of types, or marginal or foot- Original texts. notes.<sup>2</sup> The difficulties are it must, however, be observed very much lessened by such careful translations of the texts as those by Baillic. Few questions can be left quite in the dark when the chapter in Baillic's volumes on the subject is read. But the difficulty is very great when only isolated sentences are read. It is not implied that the application of the law to a particular set of circumstances in modern times is easy under any circumstances: but from this stricture even law that is well settled and quite recent, cannot always escape. In any case, our difficulties even in understanding—still less in applying—the law laid down in the ancient texts do not prove that the text-writers were confused or inconsistent: though being long dead they cannot rise up from their graves, and defend their classifications, or overawe us by the depth of their learning.

Secondly, there seems to be an allusion, conscious or unconscious, to Expansion through decisions, the controversy whether judges make the law or merely interpret it. It would be presumptuous (even if it were possible) in this work to attempt to contribute to the literature dealing with it. But, in so far as the allusion is based on the assumption that this mode of making the law is a peculiarity of English law, not shared by Muhammadan law, it would Forces of expansion within Muhammadan law. probably not have been made, had the learned judge's attention been called to the history of Muhammadan law, to the first general principles enunciated in the Quran, or 'Sunna,' and the effect given to them in the practice of the Prophet or by his approval, followed by the extension of it through 'ijma' and 'qiyas,' and the development of it by 'ihtisān' or 'istislah,' and finally the full result of it as expounded in the 'fatawa' of the Qazis. Had these stages in the growth and development of Muhammadan law been present to the mind of the learned judge he may have taken the view, that has been consistently put forward in this work, a view opposed to every criticism, on the basis that the expositions of the principles of Muslim Jurisprudence to which lives were devoted, as to a task of religious duty, should contain any inconsistencies of so glaring a

<sup>1</sup> *E.g.*, common law, criminal law, equity, etc.

<sup>2</sup> The early printed books, before printing became a fine art in Europe, and the MSS. of a prior date, present the same characteristics. Even

when an English lawyer refers to the more ancient authorities on his own law, expressed in his own language, he is called, with more or less contempt, a black-letter lawyer.

SECTION 355 nature as may be discovered on the casual attention being given to it which they generally receive at present. His Lordship might also have then come to believe that the prejudice is on the part of those who think that, because it is a characteristic of English law to expand, it must be a characteristic of Muhammadan law to be absolutely rigid, and that all expansion of the latter must be from forces brought to its aid from English law.<sup>1</sup>

Decisions of  
English  
Courts,

Thirdly, with reference to the conservative prejudices of good Muslims being flattered by the expositions of their law in the English Courts, can the remarks be supported in the light of the criticisms levelled against the expositions of Muslim law by even so exalted a tribunal as the Privy Council, and even on a question which seems to Mussulmans so elementary as that of 'waqf bar farzandan'? But prejudices apart, it is submitted that the first duty of the Court is to grasp the real principles of Muhammadan law, such as they are, and then introduce any new principle, that may be necessary or expedient.

Method and  
consistency of  
Muhammadan  
law.

The interdependence of one part of Muhammadan law is so close on another, that were every branch of it studied as carefully as Sir William Jones studied the law of inheritance, the admiration that that great judge and scholar expressed for the branch which he studied, would in great measure be extended to every other branch. But the incidents of the law of succession, arising as they all do out of one central fact, make it almost imperative that it should be studied as a whole, whereas the lot of the other parts of the law is to be applied and considered in fragments.

Muhammadan  
law and  
modern wants,

Finally, it may not be quite easy to say whether the social needs of the Mussulmans at the time when the most famous texts were written, were more primitive than of the vast majority of the Khojas to-day—for that is the instance referred to. If they were, then those notions are wrong which prevail amongst the Muslims, and (as it seems) amongst all who have professionally studied the past history of Islam; since they were agreed that the Muslims were far more advanced when they were rulers of great empires and the torch-bearers of learning, than they are at the present day.

Influence of  
English law.

The remarks made above have seemed necessary in order to

<sup>1</sup> As suggested by an English writer, the prejudice to which attention has just been drawn, appears to include in its composition two elements: (1) A desire to avoid the common mistake of explaining what is unfamiliar, by what is familiar in one's own experience,—leading to the opposite error of considering that no reasoning which is to be found in a familiar system of law, e.g., English law, can be applied to Muhammadan law: that, therefore, reasoning and logic must

be altogether banished from the exposition of Muhammadan law: and (2) a surrender to what has been described as "patriotic ignorance," and defined as follows "It is a voluntary closing of the mind against the disagreeable truth that another nation may be, on certain points, equal to our own, or, even though inferior, in some degree comparable to our own." P. G. Hainerton, "Human Intercourse," Essay XIX. *ad init.*

justify the very existence of Muhammadan law in British India. They SECTION 355. do not necessarily militate against the result ultimately arrived at, nor the points that were actually decided in the case referred to (except in so far as the inadvertence mentioned in the footnote<sup>1</sup> is concerned). It is clear that the expansion of Muhammadan law must, in British India, necessarily take its colouring from English law. Yet it would be an extreme hardship on the Mussulmans if the whole foundation of their law were liable to be shaken and made uncertain on the ground that the law seemed unintelligible, or inconsistent, or primitive.

In a more recent judgment the same learned judge used language which indicates that he was at that time fully alive to the considerations referred to above: "By the time of Aurangzeb," said his Lordship, "Mahomedanism, as a temporal power, had perhaps passed its zenith, but through the centuries which separated Mahomed from the leading lawyers of Aurangzeb's Empire, Mahomedanism had absorbed and represented in more than one important sphere the highest mental culture. The codification of the Mahomedan law, as it had, in the meanwhile, been shaped by its leading exponents, was the work of men whose minds may be allowed to have been strictly trained to systematize and reduce to coherent and practically applicable principles, much that had been matter of dispute, uncertainty and controversy."<sup>2</sup>

(f) *Creation of Joint Tenancy.*

356. It has been held that a gift may be validly made Joint tenancy, of undivided [immovable<sup>3</sup>] property to two or more Mus- sulman donees as joint tenants (without discrimination of shares); and that where an intention is shown on the part of the donor to give the property in the whole subject of gift to each of the donees, it will be given effect to as creating a joint tenancy; <sup>4</sup> *sed quaere*.<sup>5</sup>

<sup>1</sup> "A Muhammadan may devote his property in *waqf* and yet reserve to himself and his descendants in a very indefinite manner, the usufruct of the property." (*Cassamally v. Currambhui*, 13 Bom. L. R. at p. 762.) The word *waqf* is no doubt inadvertently used. Under a *waqf*, except according to Abu Yusuf's exposition of Hanafi Law, the settler cannot reserve any benefit to himself. *Heb.* 237; *Bail.* I. 567, II. 218. The parties in *Cassamally's* case being governed by Shiah law it would have been invalid if it were held to be a *waqf* (which it certainly was not); as all the parties were interested in upholding the validity of the life interest (see *ib.*

739, *Inverarity, sup.*), the point no doubt escaped the attention of his Lordship.

<sup>2</sup> *Tajbi v. Morla Khan* (1917) 11 Bom. 485, 493.

<sup>3</sup> The decisions on which this section is based do not seem to refer expressly to immovable property. But they are in terms based on the English law and joint tenancy is an incident of real (or immovable) property.

<sup>4</sup> *Rajabhai v. Ismail Ahmed* (1871), 7 Bom. II. C. R. (O.C.S.) 27, (per Sargent, J.) See also *Fatima Alima v. Gulam Kadar Mokidin* (1869), 6 Bom. II. C. R. (1 C.) 25, and s. 379, below.

<sup>5</sup> See comment.

## SECTION 356

*Illustration*

In a Bombay case it was stated that certain property had been bequeathed to GR and GA as joint tenants, and that on the death of GA the tenancy was not severed, but that it continued between GR and the heirs of GA; then GR having made a gift of the whole property to GM, it was held that this gift was valid, subject to the right of GA's heirs.<sup>1</sup>

## Privy Council decision.

The decisions referred to in s. 356 and the last paragraph above, must be read in the light of the decision of the Privy Council in '*Jogeswar Narain Deo v. Ram Chandra Dutt*.'<sup>2</sup> In this case the terms of a Hindu will had to be construed, and the contention of the appellant was that the legatees became, in the sense of English law, joint tenants, and not tenants in common; and that the alienation by one of them of her share, before it became severed, and without the consent of the other joint tenant, was ineffectual. The same view of the effect of a similar will was taken in the case of '*Vydinada v. Nagammal*.'<sup>3</sup> The Privy Council over-ruled that decision on two grounds: "The learned judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law except in the case of co-parcenary between the members of an undivided family. In the second place the learned judges misapprehended the law of England, because it is clear according to that law, that a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants operates as a severance."<sup>4</sup>

(g) *Creation of Vested Remainder.*

## Vested remainder

**357.** It has, in one case, been assumed by the Privy Council<sup>5</sup> that a Mussulman may by deed confer a definite estate like what would be called in English law a vested remainder in succession to a previous life estate.<sup>5</sup> The contrary is implied in another case.<sup>6</sup>

<sup>1</sup> *Golam Jafar v. Mastudin* (1880), 5 Bom. 238, 239 (l. 7 of par. 4).

<sup>2</sup> (1896) 23 Cal. 670; 23 I. A. 37.

<sup>3</sup> (1888) 11 Mad. 258.

<sup>4</sup> *Jogeswar v. Ram Chandra* (1896) 23 Cal. 670; 23 I. A. 37; *Mooryat Putikayil Kunhamina v. Mooryat Putikayil Kunhami* (1908) 32 Mad. 315; see also [1912] Mad. W. N. 932.

<sup>5</sup> *Umes Chander Siraz v. Mumtaz Zuhoor Fatma* (1890) 18 Cal. 164; 17 I. A. 201. The case has been followed in *Banoo Bryun v. Abet Ali* (1907) 32 Bom. 172, see s. 368, *ult.* below.

I am indebted to Mr. J. D. Inverarity of the Bombay Bar for drawing my attention to the fact that in this case both parties contended that the vested remainder was good; and the only question at issue was whether it was capable of attachment. The question of limited interests is considered at length below. See s. 444, *et seq.*

<sup>6</sup> *Abdul Walid Khan v. (Mumtaz) Nuran Bibi* (1885) 12 I. A., 91, 102; 11 Cal. 597. See the penultimate paragraph of the judgment.

## § 3.—Parties to a Gift.

SECTION 358.

(1) *The Donor of a Gift.*(a) *Competence of the Donor.*

**358.** No person can make a valid gift who either has not attained puberty, or is not of a sound mind.<sup>1</sup> *Quere,* whether a gift purported to be made by a person who has attained puberty, but who is a minor under the Indian Majority Act is valid, or voidable, or void.

Competence of donor.  
Puberty  
Minority.

The question as to the effect of the Indian Majority Act on the age of competence as to various matters has been previously discussed, and need not be repeated here.<sup>2</sup>

It may be pointed out that English law differentiates between the acts of minors and of lunatics. A gift by an infant is merely voidable,<sup>3</sup> but by an idiot or lunatic so found is void.<sup>4</sup> Under Muhammadan law gifts by infants and by lunatics are alike void.

(b) *Married Woman as Donor.*

**358A.** A married woman does not, under Muhammadan law, acquire by marriage a special status, nor thereby become subject to any peculiar disabilities; and gifts by a married woman are subject to the same incidents as gifts by any other person.<sup>5</sup>

Gift by a married woman.

(c) *Person in Insolvent Circumstances as Donor.*

**359.** Where a Mussulman who is in insolvent circumstances purports to make a gift with intent to defraud, defeat or delay his creditors, it is voidable at the option of any person so defrauded, defeated or delayed.<sup>6</sup>

Insolvent circumstances.

<sup>1</sup> Hed. 525 (col. II); Bail. I. 508; II. 203 (II. 10-13). In *Amul Nissa Begum v. Mir Nurudin Husain Khan* (1896), 22 Bom. 489, the gift was originally by a minor, ratified after attaining majority.

<sup>2</sup> See comment to ss. 5A, 229, 285.

<sup>3</sup> *Zouch, d. Abbot, and Hall v. Parsons* (1765) 3

Burr. 1794; *Allen v. Allen* (1842) 2 Dr. & War. 307

<sup>4</sup> *Elliot v. Loe* (1875), 7 De. G. M. & G. 473, *Itc Walker* [1905], 1 Ch. 160 (C.A.)

<sup>5</sup> Cf. s. 24 (8), above; *Lutfoonnissa Bibee v. Rajnoor Rukman* (1867) 8 W. R. 84; *Nichhabhis v. Issakhan* (1886) 2 Bom. H. C. R. 297.

<sup>6</sup> See, however, *Macn.*, 217 (case 15) APPX, p

441, No. 45; *Azimunnissa v. Dale* (1871) 6 Mad. H. C. R. 456, 468, 469. The Transfer of Property Act, s. 53, applies to prior as well as to subsequent transferees; but that section does not apply to Muslims: Cf. *(Nabob Amraddaula Muhammad Kaka) Husain Khan Bahadur v. Naderi Srinivasa Charlu* (1871) 6 Mad. II. C. R. 356; *Dor, dem. Ramtonoo v. Bibee Jynt* (1843) Fulton. 152. Cf. *Chunder Modhub Doss v. Ameer Ali* (1876) 25 W. R. 119: the fact that there are other creditors does not make a sale necessarily fraudulent, if the sale is for valuable consideration. See also *Sadek Husain Khan v. Hashim Ali Khan* (1916) 38 All. 627, 647, 648 (P.C.)

**SECTION 359.**

Evidence of  
intent to defraud  
creditors.

The following indicates what is generally alleged and proved under s. 359: "This deed then being of a prior date, the subsequent purchase must impeach it for fraud; all those grounds on which a deed is generally impeached are, however, wanting in this case. There is no evidence before us that the donor was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency, or with a view to defraud creditors."<sup>1</sup>

(d) '*Pardanashin*' lady as donor

'Pardanashin'  
lady.

**359A.** Where a gift is purported to be made by a 'pardanashin' lady, the ordinary presumption that a person of competent capacity signing a deed, understands the instrument to which he affixes his name, does not arise; and it is incumbent on the donee to satisfy the court that the transaction was explained to the donor and that she knew what she was doing.<sup>2</sup> The most usual mode of discharging the onus, is for the donee to show that the donor had good independent advice in the matter, and acted therein at arm's length from the donee.<sup>3</sup>

Origin of the rule.

The rule contained in this section is based on the protection extended by the Court of Chancery in England to the weak, ignorant and infirm, and to those, who, for any other reason, are specially likely to be imposed upon by undue influence,—which is presumed to have been exerted unless the contrary be shown.<sup>4</sup> The rule is not applicable to a woman, not being of the 'pardanashin' class, even though it be alleged that she is so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her: outside the class of 'pardanashins' it must depend in each case, on the character and position of the

<sup>1</sup> *Doe dem. Ramdoo Mookerjee v. Biboo Jervat* (1843) Fultou 152, 154. See also the remarks of Kemball, J., in *Mohamud v. Mancherajah* (1882) 6 Bom. 650, 657, quite a different view of the transaction was taken by Pinhey, J., at p. 659.

<sup>2</sup> See, for instance, *Agbar Ali v. Dehrao Banno Begum* (1877) 3 Cal. 324 (a case "where there was no consideration and without any equivalent this lady has executed a document which deprives her of all her property" (p. 327), *Arresh Chander Lohoree v. Bhagubutty* (1870) 13 Moo. I.A. 119, 11 W. R. (P.C.); *Fazul Hossain v. Amjad Ali Khan* (1872) 17 W. R. 523; *Amjad*

*Mohun Rai v. Mohini Debi* (1901) 28 Cal 346, 348; *Shamshuddin v. Abdul Hossain* (1906) 31 Bom. 165; *Mariam Bibi v. Sakina* (1891) 14 All. 8; *Mulka Mukhaderah Osman Navab Padshah Khan Mehal v. Administrator-General of Bengal* (1900) 5 C.W.N. 505 (a case where a will was in question) *Kali Bakhsh Singh v. Ramgopal Singh* (1914) 19 Cal. W. N. 172.

<sup>3</sup> *Rakhun v. Ahmed Hossain* (1871) 22 W. R. 443. In *Khatija v. Ismail* (1899) 12 Mad. 389 the onus was held to have been discharged.

<sup>4</sup> *Rakhun v. Ahmed Hossain* (1874) 22 W. R. 447.

individual woman whether those who deal with her are, or are not, SECTION 359A. bound to take special precautions that her action shall be intelligent and voluntary, and that it was so, in case of dispute.<sup>1</sup>

(c) *Gifts in Death-illness.*

**359B.** The capacity of a donor, who is in ‘marz-ul-maut’ or death-illness, to make a gift of his property is subject to the same restrictions (with reference to the proportion of his property that he may give by way of gift, and to the persons to whom he may make gifts) as his capacity to make a will, (referred to in ss. 579, 581, 582 and 600, below); and his attempts to make a gift in disregard of the said restrictions are of no effect.<sup>2</sup> The Shiah authorities are not agreed on the details of the law which are considered in the comment to this section.

*Explanation.*—In order to establish the existence of death-illness there must be present at least three conditions to the illness which has caused death; (a) proximate danger of death; (b) there must be some degree of subjective apprehension of death in the mind of the sick person; (c) there must be some external ‘indicia,’ chief among which are the inability to attend to ordinary avocations.<sup>4</sup>

It is hardly necessary to point out that the basis of the rule contained in s. 359B is the desire to prevent the disregard of the restrictions on testamentary capacity. Whether the operation of the gift or other transaction is expressly postponed till after death, or the transaction is intentionally undertaken at a time when its operation must necessarily come into effect only after death, the result is the same. The Shiah authorities are not agreed as to the details of the subject. These will be

<sup>1</sup> *Hodges v. The Delhi and London Bank, Ltd.* (1900) 23 All. 137, 145, (the term *quasi yardana-shis* was invented to describe such a woman).

<sup>2</sup> See ss. 579, 581, 582 and 600, below. The authorities are cited in the comment. The masculine in this section includes the feminine.

<sup>3</sup> *I.e.*, that at the given time death is more probable than life. Cf. “The most valid definition of death-illness is, that it is one, which it is highly probable, will issue fatally”; Ball. 1,548.

<sup>4</sup> *Sarabhai v. Rabinchandra* (1905) 30 Bom. 581; 8

Bom. L. R. 35 (per Baichlor, J.) followed by C. A. in *Rasheed v. Sherbanoo* (1907) 31 Bom. 264. See also *Fatimahib v. Ahmed Bakhsh* (1903) 31 Cal. 319; (1907) 35 Cal. 271; 35 I. A. 67; *Hassarat Bebee v. Goolam Jeffer* (1898) 3 Cal. W. N. 57; *Wazirjan v. Sayed Altaf Ali* (1887) 9 All. 357; *Labbi Bebee v. Rebban Bebee* (1874) 6 N. W. 150; *Muhammad Gulshere Khan v. Maryam Begum* (1881) 3 All. 731; *Ibrahim Goolam Ariff v. Saiboo* (1907) 35 Cal. 1. 34. I. A. 107.

SECTION 359B. considered in the present comment after the expression 'marz-ul-maut' has been explained.

Death-illness.

Whether or not a particular illness is to be considered, 'marz-ul-maut' is a mixed question of law and fact. But it may be stated that pains of childbirth are considered by the Muslim authors as 'prima facie' a death-illness, whereas lameness, gout, paralysis, consumption, a withered or palsied hand, after they have continued for a long time, and have no immediate danger of death, are not considered to constitute death-illness.<sup>1</sup>

'Hidaya' 01  
'marz-ul-maut'

The following is a literal<sup>2</sup> translation of the passage from the 'Hidaya' dealing with 'marz-ul-maut': "Paralytic, gouty or consumptive persons when their disorder has continued for a length of time [the length of continuance is to be measured by one year,<sup>3</sup> and the meaning of fear is that which takes hold of the mind, not the cause of it]<sup>4</sup> and they are in no immediate danger of death, do not fall under the description of sick, hence deeds of gifts executed by such take effect to the extent of the whole property; because when a long time has elapsed, the patient has become familiarized to his disease, which is then not death-illness. The reason being that that which brings on a change in the matter of management is the sickness of death, viz., such an illness as is generally fatal; and an illness cannot be so considered except when the patient is in a condition which increases (in virulence) from stage to stage till it ends in death. Where, however, it has become chronic, and such that it does not increase, and there is no fear of death from it, then it cannot be the cause of death—as blindness and the like. This cannot be regarded as death-illness in the beginning of his illness; and a consumptive man until he becomes bed-ridden cannot be regarded as 'mariz' (sick) because a man is seldom free from little illnesses. Hence, so long as he can go out for his necessary purposes, and is not bed-ridden, he cannot be popularly considered to be in his death-illness. So 'Qazi Khan' says."

Shiah authorities.

The Shiah authorities describe 'marz-ul-maut' similarly. Thus in the 'Sharaya'-ul-Islam'<sup>5</sup> it is laid down that every disease which is usually accompanied with apprehension of death is said to be dangerous<sup>6</sup> and

<sup>1</sup> Bail. I. 543; Hed. 684; *Mima*, 262 (Bk. 29 s. 3).

<sup>2</sup> The commentary on the *Hidaya* which is given both in the editions of 1280, A. H., (Bombay *Mabai-c-Hidayat*) and of 1304 (*Mustafas Press*), is enclosed in [ ] to distinguish it from the text. In Hamilton's translation (Hed. 685, col. 1, par. 3) certain words (enclosed in parentheses) are interpolated by the translator, which do not occur in the original.

<sup>3</sup> "This limit of one year does not constitute a hard and fast rule, and it may mean a period

of about one year," *Fatima Bibi v. Ahmed Baksh* (1903) 31 Cal. 319, affirmed by P. C. (1907) 35 Cal. 271, 35 I. A. 67.

<sup>4</sup> *I.e.*, Subjective apprehension of death, so that if a man is actually in fear of death, it does not matter if really there was no reason to fear.

<sup>5</sup> As translated by Baillie.

<sup>6</sup> Bail. II. 257. Hectic fever, consumption, hæmorrhage, bilious or bloody swellings, icteric, purgings, and such as are mixed with oleaginous matter, or black excrement, are given as examples



has the effect of restraining a man from disposing of more than a third SECTION 359B. of his property; that diseases from which there is usually recovery<sup>1</sup> have no other effect on a man's disposal of his property than if he were in a state of health. “It were, however, better to ascribe the effect under consideration to all diseases which are in fact accompanied by, or terminate in, death, whether they are customarily dangerous or not.”

The Shiah authors are divided on the question whether where the <sup>Shiah authorities.</sup> donor, (being in his death-illness) has given possession of the subject of gift to the donee, the gift should take effect only if its value is less than one-third of the donor's estate. The authorities are considered in a very learned judgment by Rafiq, J., in ‘Khurshed Hussain v. Faiyazal Husain’<sup>2</sup> delivering the judgment of Tudball, J., and himself. In the result the court concluded that under the Shiah law a gift made in ‘marz-ul-maut’ (death-illness) holds good to the extent of only one-third of the donor's estate in spite of the delivery of possession prior to his death.”<sup>2</sup>

In the same case<sup>2</sup> it was unsuccessfully argued that because <sup>Long contem-</sup> the gift had been intended long before it was actually made, the donor's <sup>plation of gift.</sup> death-illness at the time when it was made, did not affect it. Rafiq, J., in delivering judgment points out that the delay in making the gift indicated that the donor intended not so much to benefit the donee as to deprive his other heirs, and that, in any case, the donor did not intend to part with his property while he expected to live, nor to place himself at the mercy of the donee by parting with all his property to him.

## (2) *The Donee of a Gift.*

### (a) *Competency of the Donee.*

**360.** Any person capable of holding property may <sup>Competence</sup> be the donee of a gift.

### (b) *Gift to Heirs and Children.*

**361.** (1) The legal incidents of a gift, are not affected <sup>Gift to heirs.</sup> by the donee being presumptive heir of the donor.<sup>3</sup>

(2) It is lawful<sup>4</sup> but abominable for a Muslim to <sup>Unequal gifts to children abominable.</sup> prefer one child over another in making gifts,<sup>5</sup> unless

<sup>1</sup> Temporary fever, headache, whether with continued augmentation or not, ophthalmic and tubercle on the tongue, are mentioned as examples.

<sup>2</sup> (1914) 36 All. 289; 12 All. L. J. 417, 423.

<sup>3</sup> *Megayee Alloochoy v. Metha Nuthoo* (1832),

Sel. Rep. 80, Morl. Dig., I. 267 (c. 46).

<sup>4</sup> *Gulam Jafar v. Mo-hudis* (1880), 5 Bom. 238, 242-243, where the intention was to “disinherit” one of the sons.

<sup>5</sup> Ball. II. 205 (H. 0-8), 26-27; I. 529,

SECTION 361. preference is given to a child who is superior in religion or learning,<sup>1</sup> without any intention of injuring any of them. Where a gift is made by a Muslim of the whole of his or her property to one child, it is lawful judicially, but it is sinful to do so.<sup>2</sup>

The second sub-section may be of some applicability where equitable reliefs are asked for.<sup>3</sup> In law the gifts referred to are valid, and as the law allows alienation so as to defeat succession, "the design to alter, and so in one sense to defeat the disposition of property, is simply a design to conform to the law, while working out an unforbidden design."<sup>4</sup>

(c) Gift to Unborn Person.

Gift to unborn person.

362. A gift to a person not in being is void,<sup>5</sup> but limited interests (referred to in ss. 444-454, below) may be created in favour of a grantee who is not in being; provided that when the grantee's interest opens out he is in being.

There does not seem to be any reference to unborn persons in the texts, except where limited interests are dealt with. As the 'hiba' or gift of the whole ownership requires that the donee should take possession, it follows that a 'hiba' to an unborn person is invalid.

Example.

A gift was purported to be made, subject to a prior life-interest, to one Pathumma "and to children born to her." It was held<sup>6</sup> that the gift to Pathumma was void. (1) because it was contingent, being subject to the life-interest; and (2) assuming that a gift would be valid subject to a previous life-interest, it would be invalid, because (a) gifts to all unborn children must be contingent, (b) the gift to Pathumma could not be defined as it would depend on the number of children that might be born to her, and "no one could make seisin for an indefinite number of future children."<sup>7</sup>

English Law.

On the ground of public policy future illegitimate children cannot, in England, be donees of gifts.<sup>8</sup>

<sup>1</sup> See the Introductory Chapter on the constitution of Muhammadan law and religion.

<sup>2</sup> *Bail. I* 529. Cf. *Saudraim v. Mangulsa* (1909) 31 All. 359 (Hindu Law).

<sup>3</sup> *Nizamuddin v. (Musunnat) Zubeda Bibi* (1871), 6 N. W. 338, 340, 341. Cf. *Cremumalla v. Sir Currambhai* (1911), 36 Bom. 214.

<sup>4</sup> (*Nasab*) *Umayd Ally Khan v. (Musunnat) Mahmood Begum* (1867), 11 Moo. I A. 517; 16 W. R. (P.C.) 25. *Mahomed Zahurul Haq v.*

*Bulachun* (1861), 1 W. R. 79; *Khajooramissa v. Ronehan Jehan* (1876), 2 Cal. 181; 3 I. A. 291; 26 W. R. 70, affirming 5 W. R. 4.

<sup>5</sup> *Chellakumkattu v. Ahmed* (1886), 10 Mad. 196; *Abdul Cader v. Turner* (1881), 9 Bom. 158; *Mahomed Shah v. Official Trustee of Bengal* (1906) 36 Cal. 431. See ss. 449, 485, below.

<sup>6</sup> *Hill v. Crook* (1873) 6 H. L. 265; *Crook v. Hill* (1876) 1 Ch. D. 573; *Roberts v. Forster* [1901] 1 Ch. 578 (C.A.).

(d) Gift to Mosque or other Institution.

SECTION 363.

**363.** A gift may be made to a mosque or other institution. Gift to 'masjid' or other institution.

"A man gives money for the repairs of a 'masjid' and for its maintenance, and for its benefit. This is valid; for, if it cannot operate as a 'waqf,' it operates as a transfer by way of gift to the 'masjid,' and the establishing of property in this manner to a 'masjid' is valid, being completed by taking possession. . . If he say 'I have given my mansion to the masjid,' it is valid as a transfer requiring delivery. If he should say, 'this tree to the masjid,' it would not belong to the 'masjid' until delivered to the manager of the 'masjid.'"

The question whether the 'mutawalli,' or other trustee of an institution is legally bound to accept a gift that is offered to him, on behalf of the institution, has not, it seems, been brought before the Courts in any case governed by Muhammadan law. Though a gift is a voluntary transaction, and, it would appear that, prima facie, its acceptance or refusal must be as much at the option of the donee as making it is at the option of the donor, yet in the case of trustees some peculiar considerations may come into operation, such as are referred to in 'Elayalwar Reddiar v. Namberumal Chettiar.'

(e) Gift to Person holding Fiduciary Relation.

**364.** Where the donee stands in a fiduciary relation to the donor, or the relation between the parties is such that the donee is in a position to dominate the will of the donor,<sup>3</sup> the Court will not give effect to the gift but will declare it void,<sup>4</sup> unless the donee can show to its satisfaction that the donor had competent and independent advice in making the gift.<sup>5</sup> Presumption of undue influence.

<sup>1</sup> Bail. I. 607 (par. 2): *Minhaj*, 250, 260 (Bk. 29, s. 1). Cf. *Ismael Arif v. Muhammed Ghous* (1898) 20 Cal. 834; *Bhusabi v. Narasingrao* (1906) 31 Bom. 250; 9 Bom. L. R. 91 (penult. paragr. of judgment); *Jinda Ram v. Husain Baksh* (1914) 49, Punj. Rec. 197, 200 (No. 97).

<sup>2</sup> (1899) 23 Mad. 298.

<sup>3</sup> Cf. Indian Contract Act, ss. 16, 19A and the illustrations to the Indian Succession Act, s. 48, which were held to afford a useful guide as to what constitutes undue influence in this country, notwithstanding that the section does not apply to the will of Muslims: *Khas Mehal v. Administrator-General of Bengal* (1901) 5 C. W. N.

505. See also English text-books on equity on the subject. Only a few cases are cited to illustrate the incidence of this well-known principle.

<sup>4</sup> It is not void *ab initio*: *Allcard v. Skinner* (1887) 36 Ch. D. 145.

<sup>5</sup> *Bhusabi v. Ismael Ahmed* (1870) 7 Bom. H. C. R. (O.C.J.) 27 (gift by a lady to a confidential adviser and two other persons, of the house in which she dwelt; no independent advice; the deed was read over and explained to her, by a clerk who acted for the donor as well as the donee; deed set aside at instance of the heirs of the donor); *Sumsoodin v. Abdul Hossain Kaimuddin* (1906) 31 Bom. 165 (relating to release by

## SECTION 365.

## (3) Agents of Parties.

Agency in  
gifts.

**365.** An agent may be validly authorised by the donor to make a gift, and to transfer possession of the subject of the gift on his behalf.

Discretion to  
executor.

It may be of interest to note here the case of *Gangbhai v. Thaver Mulla*,<sup>1</sup> in which a Khoja lady, Rahimatbai, devised "one-fourth to be disposed of in charity as my executors shall think right." The disposition was held to be valid, and Sausse, C. J., directed a scheme to be framed.<sup>2</sup>

## § 4.—Subject of Gift.

## (1) What may be Transferred by way of Gift.

Gift allowed  
of any property

**366.** A gift may be made of any existing property,<sup>3</sup> whether or not it is capable of manual delivery, and [where the property is immovable,] whether the donor's rights over it amount to full ownership, or consist of merely a limited interest in it.<sup>4</sup>

Subject of  
gift must be  
in existence

*Explanation I.*—The subject of the gift must be in existence, at the time when the gift is purported to be made,<sup>5</sup> otherwise the gift so purported to be made is void. A gift cannot be made of anything to be produced in future,<sup>6</sup> notwithstanding that the means of its production may be in the possession of the donor.<sup>6</sup>

Donor's owner-  
ship and control.

*Explanation II.*—The subject of the gift must be owned<sup>7</sup> by the donor, and under his control<sup>8</sup> at the time the gift is made.

daughter of her right to inherit). Cf also *Nizam-uddin v. Zoheda Bibi* (1874) 6 N. W. 338; (*Moulvie*) *Wajied Ali v. (Moulvie) Abdool Ali* [1864] W. R. 121, 127 (col. II, par. 1). For the difference between reserving legal rights and pressure by threatening criminal proceedings, see *Williams v. Bayley* (1866) L. R. 1 H. L. 200 and *Wallace v. Harland* (1807) 1 Camp. 45.

<sup>1</sup> (1893) 1 Bom. H. C. R. 71.

<sup>2</sup> *Fatawa Alamgiri*, *Hib*, ch. XI., giving instances and details, which seem unnecessary, or inapplicable in British India. Cf *Moham-uddin v. Mancherhah* (1882) 6 Bom. 650 662, (last 2 sentences, par. 3).

<sup>3</sup> But not services, nor natural love and affection. *Rohim Baksh v. Muhammet Hassan* (1888) 11 All. 1, 5 (par. 2), 6 (par. 2, 3).

<sup>4</sup> *Mudrick Abdoel Gaffoor v. Muleka* (1884) 10 Cal 1112; *Awari Begum v. Nizamuddin Shah*

(1898) 21 All. 165, 171 (*II* 1-7); and cf. *Keke-wah v. Manning* (1851) 1 De. G. M. & G. 176 (C.A.) (Knight Bruce L. J.) 187, 188; *Mahomed Fariz Ahmad Khan v. Ghulam Ahmed Khan* (1881) 3 All. 490; 18 I. A. 25; *Sahibunissa v. Hafiz Bibi*, and *vice versa*, (1887) 9 All. 213 (gift of pension under Pensions Act, s. 7, cf. 2, valid).

<sup>5</sup> *Bail. I.* 508.

<sup>6</sup> *E.g.*, Rs 4,000 annually out of an undivided share in jaghir villages: *Amul Nissa Begum v. (Mir) Nurudin Hussein Khan* (1896) 22 Bom. 480; cf. *Ahmed-uddin v. Haki Baksh* (1912) 34 All. 465; and *Tarakalbhai v. Imtiaz Begum* (1916) 41 Bom. 372.

<sup>7</sup> *Mohomed Noor Khan v. Hur Dyal* (1866) 1 Agra 67: widow, holding possession of her husband's property in lieu of dower, cannot make a gift of it.

<sup>8</sup> *Bail. I.* 529.

(1) D purports to give to R, "the fruit that may be produced by my palm tree"; "what is in the udder of this sheep"; "the butter in milk"; "the oil in sesame"; or "the flour in wheat,"—and D authorises R to take possession of the subject of the gift. The gifts are invalid in each case,<sup>1</sup> in accordance with Hanafi law.<sup>2</sup>

(2) D says to R, "I give thee the pearl which I have lost, recover and take it." According to Abu Yussuf this is a void gift,<sup>3</sup> being the gift of a mere speculation. Zuffer, however, holds it to be valid.<sup>4</sup>

(3) On the 1st of January, D purports to make the gift of a house to R, and puts him in possession of it. On the said date the house does not belong to D, but to X. On the 1st of February, X dies, and D inherits the house. On the 1st of March, D sells the house to Y. The sale is valid because the gift was void.<sup>5</sup>

(4) In the last illustration if D had made the gift on the 2nd of February, believing that X was living, and that the house belonged to X, the gift would, nevertheless, have been valid, and the sale void.<sup>5</sup>

We find it stated in the 'Hidaya' that "as the profits of a thing may be transferred by a person during his lifetime, with or without consideration, so they may in like manner be transferred after his death."<sup>6</sup> There were, however, doubts expressed on the point in the Courts of India, as to whether a gift may be made of mere rights in property, not amounting to full ownership. These doubts were, no doubt, caused, in part, at least, by the notion that the term 'hiba' is exactly equivalent to "gift," and that the former expression connotes all transfers of property or rights without consideration, that were known to Muhammadan law. 'Hiba' is defined as conferring a "right of property"<sup>7</sup> ('tamlik' from 'milk' ownership), and it is stated in the 'Hidaya' that 'hiba' "in its literal sense signifies the donation of a thing from which the donee may derive a benefit."<sup>8</sup>

With reference to the law in England, it has been said: "At common law a man could not grant what he had not": Perkins' Profitable

*Illustrations.*

Transfer of rights in property without consideration.

Donor must own and possess subject of gift.

<sup>1</sup> Bail. I. 508 (ff. 10-15). In Hed. 484 (col. 1 par. 1) it is stated that the gift of flour which is not yet ground, or of oil which is not yet pressed, being not in existence at the time of gift, is altogether void; whereas gifts of milk in the udder, of wool on the goat's back, of grain or fruit upon the ground, and of fruit upon trees, are gifts of undefined parts (*musah*) and hence capable of being validated by subsequent division and possession.

<sup>2</sup> Some of them are invalid on the ground of *musah*; which doctrine is not known to Shiah law.

and if possession is subsequently taken, or course, the gift will be valid under the Hanafi law also.

<sup>3</sup> Macn. 201, (case 6); *Abdoonissa Khatoon v. Amcroonissa Khatoon* (1865) 9 W. R. 257; *Isahim Balah v. Muhammad Hanan* (1888) 11 All. 1, 3 (par. 2), 8 (par. 3), 9 (par. 2, 3), 11 (par. 2).

<sup>4</sup> Amcer Ali, I. 87, citing *Fatawa Qazi Khan*, IV. 235.

<sup>5</sup> Bail. II. 207.

<sup>6</sup> Bail. I. 632.

<sup>7</sup> Bail. I. 507.

<sup>8</sup> Hed. 482. Sec. s. 348, above.

**SECTION 366.** Book (translated 1642), where the doctrine is stated in all its crudity ;"<sup>1</sup> similarly in Muhammadan law a gift of property, not at any time in the possession of the donor, but in that of a trespasser (and consequently never delivered by the donor to the donee) is void,<sup>2</sup> and the fact that the donor had brought an action to recover the lands forming the subject of the gift (pending which action, he died) does not make the gift valid.<sup>3</sup> It has also been held that the execution of a deed of gift, the subject of which are lands in the possession of a third party, claiming them adversely to the donor, does not give to the donee a right to sue for them after the death of the donor.<sup>4</sup> But where a mother makes a gift of her one-sixth share of inheritance in her daughter's estate, to the children of the daughter, and authorises the donees to take possession, and "in fact they do take possession," the fact that the mother herself has never been in possession does not invalidate the gift.<sup>5</sup>

Gifts of rights  
in property.

A gift has been held to be validly made where its subject has consisted of shares in villages which were under attachment by the Collector for arrears of revenue; of rights in 'zamindari' lands,<sup>6</sup> of 'zamindaris,' shares in 'zamindari' lands let out to tenants, 'lakhiraj' property let out to tenants, 'malikana' rights,<sup>7</sup> and rights to collect rents and profits; and of a right to receive rents of shares in revenue-paying villages<sup>8</sup> and a right to receive one-third share of the profits of certain villages after payment of Government revenue, village expenses, and costs of collection.<sup>9</sup> "Similarly," says Mr. Ameer Ali, "under the Mahomedan Sovereigns assignments of revenue which were called 'Suyurghul' grants, were often transferred by the grantees."<sup>10</sup>

Where the subject of gift consists of rights in property not amounting to full ownership, the donor must have authority to transfer the rights in question.

It is not perhaps easy to reconcile all the decisions. But the tendency has been to discountenance mere technical difficulties in the way

<sup>1</sup> *Tadby v. Official Receiver* (1883) App Cas. 523, 525 (argument of Counsel).

<sup>2</sup> *Rohm Baksh v. Muhammad Hasan* (1888) 11 All. 1.

<sup>3</sup> *Macn.* 201 (case 6)

<sup>4</sup> *Meherali v. Tajudin* (1884) 13 Bom. 156.

<sup>5</sup> *Mahomed Baksh Khan v. Hossaini Bibi* (1888) 15 Cal. 689, 702; 15 I. A. 81, and cf. *Kuldas v. Kashya* (1884) 11 Cal. 121, 131, 11 I. A. 218.

<sup>6</sup> *Sarjot Ahmad v. Kadr Begum* (1895) 18 All. 1.

<sup>7</sup> *Mullick Abloek Guffoor v. Mulka* (1884) 10 Cal. 1112. A *malikana* right is "the right to receive from the Government a sum of money

which represents the *mulck's* share of the profits of a revenue-paying estate, when, from his declining to pay the revenue assessed by the Government, or, from any other cause, his estate is taken into the *hats*, possession of Government, or transferred to some other person who is willing to pay the rate assessed;" *Ibid.* 1123. Cf. *Rameshwar Singh v. Sec. of State for India* (1911) 39 Cal. 1, 20-24, (P.C.)

<sup>8</sup> *Muhammad Munazz Ahmed v. Zubaida Jan* (1889) 11 All. 460; 16 I. A. 195.

<sup>9</sup> *Jivan Baksh v. Intiaz Begum* (1878) 2 All. 93.

<sup>10</sup> "Mahomedan Law," I. 28.

of making gifts ; and to hold that where there is a real ' bonâ fide ' in-  
tention to transfer property or rights, and the donor has done all that he  
could be expected to do, in order to effectuate his intention, the gift  
will be operative ; this is subject to a desire on the part of the Courts to  
prevent gifts from being used as a means of oppression, or for depriving  
those who ought in fairness to benefit from the subject of gift.

**367.** A Mussulman may give the whole of his property by way of gift to any person ;<sup>1</sup> and his expectant heirs<sup>2</sup> cannot avoid the gift, even though the gift may have the effect of evading the Muhammadan law of succession.<sup>3</sup>

Donor's powers  
not restricted  
by expectant  
heirs' rights

Gifts made in death-illness are governed by the law of wills.<sup>4</sup>

(2) *Rights in Property as Subject of Gift.*

**368.** The grantor or grantee of a limited interest in property under s. 446, below, may validly dispose of, or transfer, his interest in the subject of the grant by way of sale or gift or other mode of alienation.<sup>5</sup>

Property may  
be transferred  
subject to  
limited  
interest

*Explanation.*—Where a limited interest in any property has become vested in the grantee, the transfer or alienation of the said property by the grantor does not affect the said interest,<sup>6</sup> and the transferee or alienee of the said property takes it subject thereto.

By a consent decree it was ordered that a certain house be held and enjoyed by *U* for life, and after her death it be sold and the net proceeds divided amongst *RA*, *RB*, *RC*, *RD*, *RE* and *RF*. *RA* purported to take a transfer of the interests given by the decree to *RC* and *RD* on the 11th of January 1898, of *RE* and *RF* on 11th June 1903, and of *RB* on 27th March 1905. The last transfer alone was made after the death of *U* (who died on 2nd. December 1903). *Held*, (a) that a vested remainder may be created under Muhammadan law, (b) that life estates are known to Shiah law, (c) that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, or otherwise, provided that there is no

*Illustration*

<sup>1</sup> Cf. *Mt. Saherbanu v. Sheikh Khoda Burr*, (1885) 6 S. D. A. Rep. 44 ; *Morley*, I. 268, s. 50.

<sup>2</sup> Cf. s. 285 (11), above.

<sup>3</sup> (*Narain*) *Unjaid Ally Khan v. Mohamud Begum* (1897) 11 M. L. A. 517, 546 ; *Chaudhri Mehdi Hasan v. Muhammad Hanan* (1905) 28 All. 439 ; 33 I. A. 68 ; *Gulam Jaffar v. Mustafiz*

(1880) 5 Bom. 238.

<sup>4</sup> See s. 600, below.

<sup>5</sup> *Bail. II. 227* (par. 2). *Banoo Begum v. Mir Abd Al* (1907) 32 Bom. 172, 178. (Exhibit 4, 5, 9).

<sup>6</sup> *Ibid* (Exhibits 6, 7, 8).

**SECTION 368.** interference with the particular estate, and (d) that it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.<sup>1</sup>

Authority to  
collect  
share of rent—

**369.** The right to collect a specified share of the rents of undivided land may validly form the subject of a gift, and s. 375, below, does not apply to it.<sup>2</sup>

Share of offerings.

**369A.** It has been held that the right to receive a definite share of the offerings that might be made at a shrine may validly form the subject of gift.<sup>3</sup>—*Sed quaere*.<sup>4</sup>

Mortgaged  
property

**370.** Where the subject of the gift is mortgaged, and the mortgagee is in possession, a gift purporting to give the mortgaged property is valid, if constructive possession of the mortgaged property is given to the donee in accordance with s. 395, below; a gift may be validly made of the equity of redemption by the donor completely transferring it.<sup>5</sup>

This section seems to follow so clearly from ss. 367, 369, and 395, that it would have hardly been necessary to state the proposition contained in it, had it not been for the decisions referred to below.

'Mohinudin v.  
Manchershah.'

With reference to 'Mohinudin v. Manchershah' it was remarked by Mahmood, J.,<sup>6</sup> "I may respectfully say that it probably carries the rule of seisin too far." And by Syed Ameer Ali<sup>7</sup> "The view taken by the majority of the judges is founded upon an erroneous impression of Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject, there is nothing to preclude the mortgagor from granting his equity of redemption to another."<sup>8</sup> These opinions are, it is submitted, supported by

<sup>1</sup> *Banoo Begum v. Abed Ali* (1907) 32 Bom. 172.

<sup>2</sup> *Ameeroonissa v. Abadoonissa* (1875) 2 I. A. 87; 15 Beng. L. R. 67; 23 W. R. 208; *Juwan Bakh v. Imtiaz Begum* (1880) 2 All. 93; *Kasim Hussain v. Sharifun Nissa* (1883) 5 All. 285; *Mulrik Abdul Gaffoor v. Muleks* 10 Cal. 1115, 1128. Cf. Bail. I. 521 (par. 1, 2); also *Mahomed Bakh Khan v. Hosseins Babi* (1888) 15 Cal. 699, 702, 15 J. A. 81; *Rahim Bakh v. Muhammad Hasan* (1888) 11 All. 1.

<sup>3</sup> *Ahmad-uddin v. Ishki Bakh* (1912) 34 All. 465, the subject of gift in such a case being held to be not the future offerings, but the present right to receive them.

<sup>4</sup> See *Purba Thakur v. Binsawari Thakur*

(1915) 43 Cal. 28 (Hindu law case).

<sup>5</sup> See comment; cf. s. 477, *ill.* (4), below *Harnam Singh v. Sajawal* (1910) 45 Punj. Rec. 247, (No. 66).

<sup>6</sup> *Rahim Bakh v. Muhammad Hasan* (1888) 11 All. 1, 10 Mahmood, J., also pointed out the "distinction between cases where . . . from the nature of the gifted property itself, actual possession could not be given to the donee, and cases where such possession might be given to the donee, or actual possession held by the donor."

<sup>7</sup> "Muhammadan Law," 61.

<sup>8</sup> *Ameer Begum v. Nizamuddin Shah* (1896) 21 Cal. at p. 170 (*per* Blair and Alkmin, JJ.)



the following extract from the 'Fatawa 'Alamgiri' (Hiba, Chapter XI., SECTION 370. last sentence). "If the father makes a gift of a house to his minor child . . . and if the house is at the time of the gift entrusted to (let, deposited or committed to the charge of) some one, and the person to whom it is entrusted is living in the house, then the minor will become the owner of the house by the contract of gift,"—in other words property which is "entrusted" to another, may, for purposes of gift, be considered to be in the possession of the person "entrusting."

It will be noticed that the answer to the question, whether a gift can validly be made of mortgaged property when the mortgagee is in possession of it, rests on whether or not such possession can be given of the mortgaged property as is required to validate a gift. It has been said "that the owner of property which is in the possession of a mortgagee . . . cannot make a gift of it," that where the mortgagee has been in possession "it follows as a necessary consequence that the mortgagor was not in possession, and could not, therefore, under Mahomedan law pass it by way of gift."<sup>1</sup>

The remarks cited above were made in a case where the facts were as follows: In 1871 certain lands were mortgaged with possession to one Manchershah.<sup>2</sup> After the mortgage, one Nurbibi successfully claimed, in a partition suit against the mortgagors, to be entitled to a share in property of which the said lands formed part, and she obtained a decree for partition in 1876 to this decree Manchershah the mortgagee was not a party. In execution of the decree the said lands were measured and marked out with pegs, as the land which fell to Nurbibi's share; Manchershah, (the mortgagee in possession) protested against this. Nurbibi, on her part, took no steps to eject him, or "to get rid of his lien on the land in his possession."<sup>3</sup> On 10th. February 1877 she purported to make a gift of the land to Mohinuddin.<sup>4</sup> Subsequently the mortgagee having obtained a decree against his mortgagors, proceeded to attach the

Gift of mort-  
gaged property  
is in  
possession  
when the  
mortgagee is  
in possession.

Mohinuddin v.  
Manchershah.<sup>2</sup>

<sup>1</sup> *Mohinuddin v. Manchershah* (1882) 6 Bom. 650, per Melville, J., at p. 661, per Pinhey, J., at pp. 650, 658.

<sup>2</sup> The relations between the parties appear from the following. The mortgagors to Manchershah were Sahibul Nissa and Abdul Rahim, the mother and uncle of the plaintiff. Nurbibi was his father's mother (p. 658).

<sup>3</sup> *Ib.* p. 650, per Pinhey, J.

<sup>4</sup> The deed of gift stated: "Having executed the said decree I have taken the said property into my possession, and there remains some property of which possession is still to be taken. The remaining right under the said decree I have

also given you in gift. You are therefore entitled to execute the said decree and take possession of the said property. I have made over the said decrees to you." *Ib.* pp. 651-652. The subject of gift was therefore twofold: (1) the property alleged to be taken possession of by the donor, (2) the right to execute the decree and take possession of the said property. It was only on the former that the plaintiff sued. Melville, J., specifically left undecided the question whether the plaintiff (donee) could sue to enforce "all rights which might be recovered under the decree [for partition] in so far as it had not been executed at the date of the gift."

SECTION 370. land. Mohinuddin (the alleged donee of the gift) applied, without success, to have the attachment raised, and then brought a suit to establish his right of proprietorship in the lands (through the gift) and for a declaration that the mortgagee was not entitled to sell and attach them. The facts of the case were, therefore, as follows: Two persons purported to mortgage certain lands with possession. The lands at the time of the mortgage did not belong exclusively to the mortgagors but belonged to them jointly with one Nurbibi; subsequently there was a partition suit (between the mortgagors and Nurbibi) and in execution of the decree for partition the lands were (inequitably according to Pinhey, J., see p. 659 of the report) allotted to Nurbibi. The result was that the whole of the lands purported to be mortgaged became the sole property of one who had not executed the mortgage, and who was not bound by it. The mortgagee had, in the meantime, been in possession of the lands from 1871-1876. Even in executing the decree in the partition suit, the mortgagee was not ejected; all that was done was that the lands were measured and marked out with pegs, as the lands which fell to Nurbibi's share. The mortgagee was, it would appear, therefore, a trespasser, after Nurbibi became exclusively entitled to the lands, and yet he was not ejected by Nurbibi. Allowing the trespasser to remain in possession, Nurbibi purported to make a gift of the property to her grandson, the plaintiff. The question according to Pinhey, J., at p. 659, was whether there could be found some technical rule subserving the justice and equity of the case, by which the plaintiff could be prevented from obtaining possession of the land without paying off the mortgage on it by his own mother and uncle. Melville, J., who agreed with Pinhey, J., in the result said that the question was whether Nurbibi was in such possession as entitled her to make a gift of it. He sets out the fact that Nurbibi did not execute the mortgage and yet speaks of Nurbibi being simply the owner of property which was in possession of a mortgagee. This is manifestly inaccurate. Manchershah (the person in possession) was not mortgagee of the land, at least as against Nurbibi. The actual decision, therefore, was that a person who finds his land in possession of one claiming as mortgagee under an invalid mortgage—invalid because executed by persons who had no power to mortgage the land—is not in such possession as to be able to make a gift of the land.<sup>1</sup>

The point  
actually decided

<sup>1</sup> On p 655 Kemball, J., in his dissenting judgment adverts to the Assistant Judge's opinion "that though the act of measuring and marking out the land might amount to taking possession by Nurbibi as against her relatives, against

adequate to prove that defendant lost possession and Nurbibi acquired it," and Melville, J., said that though symbolic possession is against the defendant in the suit equivalent to actual possession, it is of no avail against a third party.

The reasoning on which the decision is based is, that the donor has, SECTION 370. in such a case, no possession in himself, and therefore he cannot have transferred that which he had not. The decision does not affect the principle that the donor might put the donee in the position occupied by himself (the donor) clothing the donee with all the rights that were vested in the donor, and empowering the donee to assert those rights. In '*Mohinudin v. Manchershah*' the plaintiff did not rely upon the enforcement of the right to obtain possession under the decree obtained by Nurbibi, his donee, but claimed that the property in suit was properly already in the possession of the donor, and it was held (upon the authority of the two decisions cited) that the donor was not in possession.

The facts of the case furnish a good illustration of the inaccuracies, <sup>" Possession "</sup> to which one is liable by speaking of "possession" and "transfer of of rights," with reference to subjects of gift which do not include the whole dominion over lands or other corporeal objects; and applying the original texts to the gift of such rights. '*Mohinuddin v. Manchershah*' may shortly (but technically) have been decided on the ground that the only question arising on the plaint was whether the lands in suit formed part of the first of the two heads under which the subject matter of the gift was divisible, viz., whether they consisted of property which had already been taken possession of by the donor before the gift; (the second head of the subject of gift being the right to further execute the partition decree and to take possession). The answer to that question is in the negative, because the donor having taken only symbolical possession, she could not be taken to have been in possession of the lands as against a stranger to the decree: '*Juggobundhu Mukerji v. Ramchunder*.'<sup>1</sup> Had the second head of the subject of gift been in question, the principles applicable would have been quite different.

In '*Ismail v. Ramji*,'<sup>2</sup> it will be found on examination, that the '*Ismail v. Ramji*,' question referred to in s. 370 did not arise at all. In that case the question was twofold: (1) whether possession had been given; (2) whether the gift had not in any event been revoked. The second question was answered in the affirmative; this was in itself sufficient to decide the case. As regards the first question it was held that direct physical possession was not given, because it could not be given, but it was also found that there was no transfer to the name of the donee, and that no constructive possession had been given to the donee. The point whether a gift of mortgaged property in possession of the mortgagee is 'per se' invalid (if the point was argued) was not decided, and could not be decided;

<sup>1</sup> (1879) 5 Cal. 581.

<sup>2</sup> *Ismail v. Ramji* (1890) 23 Bom. 682.

SECTION 370. for the question of the sufficiency or otherwise of such constructive possession as is possible in the case of mortgaged property, which is in the actual possession of the mortgagee, did not arise, the Court having found that even such constructive possession had not been given. On the other hand, the Court expressly referred to constructive possession as a possible alternative which the law allowed and held that in the case before it constructive transfer of possession had not been made.<sup>1</sup>

Indeed, the remarks in the judgment referring to constructive or symbolical possession are sufficiently definite, in the opinion of the learned editors of the Bombay Law Reporter, to make this case an authority for the proposition that constructive possession is recognised in Muhammadan law.<sup>2</sup>

Conclusion ;  
How gift of  
mortgaged  
property  
can be made.

In the result, it would appear more in accordance with the trend of the more recent cases to say that, where the property is in the possession of a mortgagee, it can form the subject of gift, and the same kind of possession is required to complete the gift, as is given in cases where the property is in the occupancy of tenants, or of any other person not holding adversely to the donor, *viz.*, that the gift may be completed by the donor conveying the equity of redemption to the donee, giving notice to the mortgagee that the legal estate had been transferred by him, and letting the donee exercise all the rights of the legal owner : see s. 393A, below.

### (3) What cannot be Subject of Gift.

'Spes  
successoris,'

371. The expectation of succeeding to the estate of a living Mussulman cannot validly form the subject of a gift.<sup>3</sup> This rule is subject to the rule of Shiah 'Ithna 'Ashari' law under which the expectant heirs of a living person may empower him by will to dispose of property exceeding the bequeathable third of his estate.<sup>4</sup>

Vested  
remainder.

*Explanation I.*—The heir's interest after it has become vested on the death of the ancestor, may be transferred.<sup>5</sup>

<sup>1</sup> *Imaid v. Ramji*, 23 Bom. 682. In *Mokindin v. Manchershak* (1882) 6 Bom. 650, 651, the Court said. "The possession which she obtained was only such symbolical possession as could be obtained under s. 224 of Act VIII. of 1859," *i.e.*, the Civil Procedure Code, 1859, according to which delivery of land in the occupancy of roots could be made by the Court ordering a copy of the warrant to be affixed in some conspicuous place, and proclaiming, by beat of drum, the substance of the decree. Compare with this *Imaid v. Hanji*, 23 Bom. 684 (ff. 6-7).

<sup>2</sup> See headnote (1899) 1 Bom. L. R. 177, 178.

<sup>3</sup> Transfer of Property Act, s. 6 (a); *Sunnsodun v. Abdul Husain* (1906) 31 Bom. 165 (purporting to be a transfer for consideration); *Mahanguni Rowthen v. Naqur Meera Labhai* (1913) 24 Mad. L. J. 258; *Asa Beni v. Karuppan Chetty* (1917) 41 Mad. 365; *cf. Abdul Wahid Khan v. Musamat Nurun Nabi* (1885) 11 Cal. 597, 12 L. A. 91, 101. See *id.* (1) to s. 371.

<sup>4</sup> See s. 57D, below.

<sup>5</sup> *Mahammadunissa Begum v. J. C. Bachelor* (1905) 29 Bom. 428 (case of contract, not gift).

*Explanation II.*—A vested remainder in succession to SECTION 371. a previous interest, though it may be made liable to be displaced by the happening of some future event, is not such an expectancy in succession by survivorship, or other merely contingent, or possible, right or interest, as cannot be transferred.<sup>1</sup>

(1) *D*,<sup>2</sup> in the lifetime of her father, *R*, executed a document purporting to be a release addressed to him, in which, after reciting that *D* had a right of inheritance in *R*'s property, and a claim to receive ornaments which *D*'s mother had directed *R* to give to *D*, she purported to relinquish the said rights and claims, in consideration of Rs. 9,000 credited to her name by *R* in his account books. The document further purported to provide that *D* would have no right or claim on the property of *R* on his death, that *D* was to receive Rs. 250 every year during the lifetime of *R* as interest on the said sum of Rs. 9,000, and that though she may withdraw portions thereof for urgent purposes, the principal could be demanded only on the death of *R* for the purpose of purchasing property yielding income, or of depositing the same with interest; and that *R* "may give to his heirs" the whole of his property subject to a charge for the said Rs. 9,000. The document was signed by *D* alone (and not by *R*). *R* died intestate; and then *D* sued for her share in *R*'s estate, contending that she was not bound by the said document on the grounds that: (i) it was void 'ab initio' under Muhammadan law, and otherwise under the law of British India, as *D* purported to give up a mere expectancy, or (ii) that it was voidable (a) being an unconscionable bargain by reason of its gross inadequacy of consideration, (b) because *D* was an ignorant 'pardanashin' female, and (c) *R* misused his parental authority. *Held*, by Jenkins, C. J., and Beaman, J., (reversing Chandavarkar, J.) that *D* was entitled to succeed to *R*'s estate on the following three grounds:— (i) The Transfer of Property Act, s. 6, clause (a) provides that the chance of an heir-apparent cannot be transferred; though the section does not apply to Muslims, the Muhammadan law does not conflict with it.<sup>3</sup> By parity of reasoning there cannot be a release of such chance;<sup>4</sup>

<sup>1</sup> See *ill.* (2) to s. 371

<sup>2</sup> *Sumoodin v. Abdul Husain* (1906), 31 Bom. 105; 8 Bom. L. R. 781 (per Chandavarkar, J., *ibid.* 252). *R* is Kallimuddin Amiruddin (whose estate was in question); *D*, Fatmabon, wife of Gulam Husain Abdul Ali.

<sup>3</sup> *Clinging (Muzummat) Khanum Jan v. (Muzum-*

*mat) Jan Beeber* (1827) 1 S D A. 210, *Abdul Wahid Khan v. Musummat Nurun Bibi* (1885), 12 I. A. 91, 101.

<sup>4</sup> *Clinging Kemp v. Kishy* (1720) Prec. Chan 545. On this point, it is submitted, that the decision may require to be canvassed. See comment.

SECTION 371. nor can the principle that equity considers that to be done which ought to be done, apply, where applying it would defeat the provisions of the law (Indian Contract Act, s. 23), and to hold, by an application of that principle of equity, that the chance had in this case been effectually transferred, would be to defeat the provision of law contained in the Transfer of Property Act, s. 6 (a), which consists of a special exception made with reference to such chances: such chances being the first and only exception made in the Act to the general law laid down in it that future property may be transferred.<sup>1</sup> The chance cannot be bound any more than it can be transferred.<sup>2</sup> (ii) *D* being a 'pardanashin' lady it was requisite that the document should be explained to her; but it was never explained to her, nor (as her acts showed) understood by her, nor had she any independent legal advice, nor had she received any benefits under the document, understanding either that she got the Rs. 9,000 only conditionally, or that the document purported to deprive her of Rs. 25,000 which she would otherwise be entitled to receive as inheritance. (iii) There was undue influence, and abuse of parental authority on the part of *R*.<sup>3</sup>

(2) On 26th January, 1871, *D* purported to grant property to his wife, *R*, on the terms that if *R* had a child by *D*, it was to be taken as a perpetual 'mokurruri': in case of no child being born to *R* by *D*, it was only to be a life 'mokurruri' in favour of *R*; and after *R*'s death it was to go to *RA* and *RB* (*D*'s sons by another wife). During the lifetime of *D* and *R*, a creditor of *RA* attached *RA*'s right, title, and interest in the said property (no child having been born to *R* by *D*). Soon after, *D* died; and on the 22nd September, 1879, the said interest of *RA* was sold. Held that *RA* had a definite interest in the property like what is called in English law a vested remainder, which did not fall within the description of an expectancy, or of merely a contingent, or possible right or interest.<sup>4</sup> The Privy Council also wished to "guard themselves against being supposed to concur in an argument . . . to the effect that if between the time of attachment, and the time of sale, events should happen which would have the effect of accelerating or enlarging the interest of *RA*, the judgment-debtor, as it stood at the time of attachment, that

<sup>1</sup> "There is nothing fantastic in this; though future property could be bound in equity, yet we find Lord Eldon in *Carleton v. Leighton* (1805), 3 Mer. 667, 671, saying that the expectancy of an heir-apparent was not capable of being made the subject of an assignment"; *Sumsoodin v. Abdul Husain* (1900): 31 Bom. 173.

<sup>2</sup> *Sham Sunder Lal v. Achhan Kumar* (1898), 25 L. A. 183, 189; *Nand Keshore Lal v. Kanee*

*Ram Tewarij* (1902), 29 Cal. 355; *Mawickam Pillai v. Ramalingam Pillai* (1905) 29 Mad. 120; *Balkrishna Trimbak Tewulkar v. Suciirbat* (1878), 3 Bom. 54.

<sup>3</sup> *Sumsoodin v. Abdul Husain* (1906) 31 Bom. 165.

<sup>4</sup> *Umec Chauder Sircar v. (Musamat) Zahur Fatima* (1890) 17 L. A. 301, 208, 209, 18 Cal. 164; Cf. s. 367, above, & "therein."

augmented interest would not pass by the sale, which purports to convey all that the judgment-debtor has at the time."<sup>1</sup> SECTION 371.

The reasoning on which 'Sumsoodin's' case<sup>2</sup> has been decided has been summarised in the first illustration to this section. Attention must be drawn to one or two points. *First*, that Kalimuddin (R, the donor) left no will. Where a will co-exists with a document purporting to be a release, the latter may, under certain circumstances, operate as a consent to the will, in accordance with Shiah 'Ithna 'Ashari' law, under which (though not under Hanafi law) the heirs may give, during the lifetime of the testator, such consent to a will as is necessary for validating it, if it disposes of more than the bequeathable third—though that may involve the question (which has still to be decided) whether such consent may validly be given in general terms, authorising any testamentary disposition that the testator pleases to be made, or whether the consent must have specific reference to a will already made. Can release operate as consent to wills ?

Two considerations (amongst others) must affect the answer to that question : (i) such a release, if taken as a general consent to the will, has a double effect, for it not only enhances the portions of the heirs, but also excludes the releasing heir from inheritance : Now bequests to an heir (within the bequeathable third) do not require the consent of the other heirs under the 'Ithna 'Ashari' law, but exclusion of an heir from inheritance is strongly opposed to the policy of the law. Bearing these considerations in mind, it would seem that, though the judges make no reference to the circumstance that the 'Ithna 'Ashari' law permits the chance of succession to be "bound" in one particular manner, *viz.*, by the heir consenting to the ancestor bequeathing more than a third—still that circumstance could not have altered the decision in Sumsoodin's case ;<sup>2</sup> but it is conceivable that in some other case it may affect the result. If it does it causes exclusion of heir.

This question leads to the *second* consideration above referred to : (ii) The decision under reference applies accurately no doubt to the Hanafilaw, which does not empower any person to make a testamentary disposition (a) of more than the bequeathable third. (b) or so as to disturb the relative shares that his heirs take under the general law ; and according to which the apparent exception to this rule is none in reality, for the apparent exception is that the heirs can validly consent to a will infringing it, only after the death of the testator, at which time they have already become entitled to the estate, and then their consent can Does heir's power to consent to will in lifetime of testator make his expectant rights transferable ?

<sup>1</sup> *Umes Chunder Sircar v. (Musumet) Zakur Fatima* (1890) 17 I. A. 201 ; 18 Cal. 164.

<sup>2</sup> (1906) 31 Bom. 165.

SECTION 371. operate to all intents and purposes as a gift by themselves. The statement, therefore, that the right of an expectant heir cannot, under any circumstances, be bound, may be an accurate statement of the Hanafi law. Is it accurate in regard to 'Ithna 'Ashari' law? Can that question be answered in the affirmative consistently with the provision that an 'Ithna 'Ashari' Shiaah may consent to his ancestor making a will of more than the bequeathable third, and in derogation of the consenting heir's expectant right?

Release and  
transfer not  
always the same.

Finally, with reference to the statement that what cannot be transferred, cannot, by parity of reasoning, be released, attention may be drawn, *first* to the other clauses of the Transfer of Property Act, s. 6: clause (b) in terms excepts (from the rule prohibiting a transfer of a right to re-entry) the release of such a right. Under clause (c) an easement cannot be transferred apart from the dominant heritage. Can it be said, that by parity of reasoning, the owner of the dominant heritage cannot release the easement, and that an easement can only be extinguished by transferring the dominant heritage to the owner of the servient heritage? Again, "a mere right to sue cannot be transferred": clause (e);—but it can certainly be compounded for; and is that different from releasing for a consideration? Similar remarks would seem to apply to some of the other clauses of s. 6. *Secondly*, Muhammadan law does seem to differentiate between the release and transfer of rights, and the rules applying to the one are different from those applying to the other.<sup>1</sup> *Thirdly*, it was said by a very learned judge, "A man may validly renounce rights which have not even accrued and of which the accruing is altogether doubtful."<sup>2</sup>

English law.

A more expectancy, such as a 'spes successionis' to property cannot be transferred in England by way of gift (either at law or in equity)<sup>3</sup>; though an assignment of it for value would be supported in equity as a contract.<sup>4</sup>

Services.

**372.** Services cannot form the subject of a gift;<sup>5</sup> provided that a gift may be made of 'mahr,' notwithstanding that its subject consists of services.<sup>6</sup>

<sup>1</sup> Cf. *Bail. I.* 522, 523, II., 203, *Hed.* 332, 448, 451, 489.

<sup>2</sup> *A. Sheehachellam Chetty v. T. Govindappa* (1870) 5 *Mad. H. C. R.* 444, 450; *Holloway, J.* citing *Wachter*, II. 648.

<sup>3</sup> *Re Ellenborough Towney Law v. Burne* [1903] 1 *Ch.* 697; *Mask v. Kellwell* (1812) 1 *Marc* 464, affirmed (1843) 1 *Ph.* 342, *Re Till*,

*Lampitt v. Kennedy* (1896) 74 *L. T.* 163 (per Chitty, J.) 184.

<sup>4</sup> *Taitby v. Off. Receiver* (1888) 13 *App. Ca.* 523, 548.

<sup>5</sup> *Rahim Bakh v. Muhammad Hasan* (1888) 11 *All. I.* 6 (par. 2), 6 (par. 2-3).

<sup>6</sup> See s. 94, above.



**373.** Natural love and affection cannot form the subject of a gift. <sup>1</sup>

Natural love and affection.

The proposition seems to be too plain to require to be stated, except for some remarks in ‘Solah Bibi v. Kurim Bibi,’<sup>2</sup> and for the fact that natural love and affection take the place of consideration under the Indian Contract Act, s. 25 (see s. 351, above).

‘MUSHA’ AS SUBJECT OF GIFT.

The gift of an undivided part of property (‘musha’) which is capable of division, is invalid under Hanafi law. The objection, however, is not so much that such part is not a proper subject of gift; but it has reference to the transfer of possession being necessarily incomplete owing to the property being undivided. Hence the rules relating to the doctrine of ‘musha’ (which are somewhat complicated) are treated under a special head, midway between the law relating to the subject of gift, and to transfer of possession.

‘Musha’ cannot be subject of gift on the ground of imperfect possession

5.—The Gift of ‘Musha’.

(1) The ‘Musha’ Doctrine under Hanafi Law.

**374.** According to strict Hanafi law,<sup>3</sup> where the subject of a gift<sup>4</sup> consists of a ‘musha’ or undivided part of a thing that is capable of division<sup>5</sup> then the gift is not complete and valid, unless the part forming the subject of the gift is divided off,<sup>6</sup> and separated from the rest;<sup>7</sup> and

Gift of ‘musha’ (or undivided part of property) invalid if the property capable of division. Except in the cases provided in ss. 369, 377-379.

<sup>1</sup> *Rahim Baksh v. Muhammad Hasan* (1888) All. 1. 5 (par. 2) (par. 2, 3), (per Mahmood, J). Cf. *Usud Ali Khan v. (Musamat) Oluf Beebe* (1868) 3 Agra 237.

<sup>2</sup> (1871) 10 W. R. 175, 176 (per Paul, J.) A *hiba bil’iqtizaz* is, as so often, the stumbling block.

<sup>3</sup> Sections 374-381 must be read subject to s. 382, at the end of the comment to which will be found a summary of the law relating to gifts of *musha*.

<sup>4</sup> As to *hadiqa* and *musha* see s. 437, below, and comment thereto.

<sup>5</sup> But the rule of Muhammadan law as to *musha*, which makes the gift of undivided property invalid, does not apply to definite shares in *zamin-daris*, the nature of the right in which is defined and regulated by the public Acts of the British Government, so that they form, for revenue purposes, distinct estates, each having a separate number in the Collector’s books, and each liable to the Government only for its own assessed revenue, the proprietor collecting a

definite share of the rents from the rayats, and having a right to this definite share and no more: *Ameeroonissa Khatoon v. Abadoonissa Khatoon* (1875) 2 I. A. 87; 15 Beng. L.R. 67; 15 W. R. 208; *Sayjad Ahmad Khan v. Kadr Begum* (1895) 18 All. 1; *Kasim Hossain v. Sharfunnissa* (1883) 5 All. 285; *Abdul Aziz v. Fateh Mahomed* (1911) 38 Cal. 518. *Jivan v. Imtas* (1878) 2 All. 93. So a definite share in a pension under the Pensions Act XXIII. of 1871 s. 7, cl. (2) can be assigned: *Sahibunnissa Bibi v. Hafiz Bibi and vice versa* (1887) 9 All. 213. Cf. *Rahim Baksh v. Muhammad Husen* (1888) 11 All. 1, 12.

<sup>6</sup> The division or separation need not be made by the donor himself: “If the donor authorizes the donee to make the division with his partner this makes the gift complete (*kamsi*)”: *Raddul Mukhtar*, IV. 780, cited *Ameer Ali* I. 44. This refers primarily to a gift to two persons jointly.

<sup>7</sup> E.g., in the case of the two anna share, in *Abdul Aziz v. Fateh Mahomed Haji* (1911) 38 Cal. 518.

**SECTION 374.** possession of the part so divided off is thereafter given to the donee;<sup>1</sup> provided that a gift of undivided property is valid where one of the donees is a minor son of the donor.<sup>2</sup>

Indivisible property.

*Explanation I.*—Where the subject of gift forms part of a thing that is incapable of division, or of such a nature that some kind of benefit or advantage can be derived from it so long as it is undivided, which cannot be derived from it after division, the gift may be validly completed without the said part being divided off.<sup>3</sup>

Shafi'i and Shiah law.

*Explanation II.*—According to the Shafi'i<sup>4</sup> and Shiah<sup>5</sup> law the gift of 'musha' or undivided property is valid, provided that possession of the subject of gift is given to the donee by the donor vacating it, or withdrawing his control and permitting the donee to exercise control over it.<sup>6</sup>

Illustrations.

(1) D<sup>6</sup> purports to make a gift to R of his share in a house, the share being unknown; the gift is invalid according to Hanafi law.<sup>7</sup>

(2) D makes a valid gift of a house to R. Subsequently he revokes the gift to the extent of half or other undivided share in it. The gift remains valid to the extent that it is unrevoked.<sup>8</sup>

(3) D makes a gift to R of half of his horse. The gift is valid.<sup>9</sup>

(4) D gives to R his house with all its rights and boundaries, which include a party-wall or a right of way, held in common with others. The whole gift is valid.<sup>10</sup>

(5) D makes a gift to R of a share in a 'malikana.' The gift is valid as the 'malikana' is incapable of division.<sup>11</sup>

(6) Two persons jointly make a gift of a house to one man: the gift is valid according to all schools.<sup>12</sup>

<sup>1</sup> Hed. 483; Bail. I. 512 (ll. 11-12), 515 (par.

2) 516, 517 (par. 3), and note.

<sup>2</sup> *Wajed Ali v. Abdool Ali* [1861] W. R. 121. But see comment.

<sup>3</sup> Hed. 480, 483; Bail. I. 512 (ll. 4-7), e.g. "a small house or a small bath," Bail. 512 (l.

7). Where a staircase, privy, and door are used in common by the occupants of several adjoining houses, the right to use them is not capable of being divided, and a gift may be made of a share in the said rights together with one of the said houses: *Kasim Hussein v. Sharifunissa* (1883) 5 All. 285. Cf. *Sharifa Bibi v. Ghulam Mahomed Durdagir Khan* (1892) 16 Mad. 43.

<sup>4</sup> Hed. 483.

<sup>5</sup> Bail. II. 204 (par. 6); *Gulam Jafar v. Mastudin* (1880) 5 Bom. 238.

<sup>6</sup> Illustrations (1), (7), (11) as indeed the whole doctrine of gifts of *musha* must be taken subject to s. 382, below.

<sup>7</sup> Bail. I. 515; Hed. 483 (col. ii.); Macn. 211. So even the gift of an undivided moiety was held to be void: *Kamatbai v. Hajirabai* (1888) 13 Bom. 352. But see *Sakiba Begum v. Aitchamma* (1868) 4 Mad. H.C.R. 115.

<sup>8</sup> Bail. I. 517. Cf. *Cochrane v. Moore* (1890) 25 Q. B. D. 57 (C.A.) where a quarter of a horse was the subject of gift.

<sup>9</sup> Bail. I. 518; *Kasim Hussein v. Sharifunissa* (1883), 5 All. 285, where a staircase, privy, and door were held in common.

<sup>10</sup> *Mullick Abdool Gaffoor v. Muleka* (1884) 10 Cal. 1112, 1120.

<sup>11</sup> Hed. 484 (col. i).

(7) A<sup>1</sup> gift to two persons jointly is valid according to the two SECTION 374. disciples, but not according to Abu Hanifa.<sup>2</sup> *Itus: atona.*

(8) D<sup>1</sup> makes a gift of half of his property to the widow and daughter of his predeceased son. If the subject of gift consists of divisible property, the gift is invalid, unless it was divided on and the share of each donee given to her, but if it was indivisible, it is valid.<sup>2</sup> If the donees were paupers, or in indigent circumstances, the gift would be valid in any circumstances.<sup>3</sup>

(9) D<sup>1</sup> and R are partners, and D makes a gift to R of D's share in the partnership stock, capable of division: the gift is stated to be invalid in the 'Hidaya,'<sup>4</sup> but it would seem to be valid.<sup>5</sup>

(10) The<sup>1</sup> gifts of milk in the udder, of wool upon the back of a goat, of grain or trees upon the ground, or of fruit upon trees are each invalid under Hanafi law.<sup>6</sup>

(11) D<sup>1</sup> makes a declaration of gift, to R, of half of a mansion which can be divided off; and D purports to give R possession of the half, then D purports to make a gift of the other half, and again purports to give R possession of the said other half: both the gifts are said to be invalid.<sup>7—sed quare.</sup><sup>8</sup> If, however, both declarations had been made first and after both declarations, possession had been purported to be given under both declarations at the same time, then it is admitted that there would have been a valid gift of the whole of the mansion.<sup>7</sup>

(12) D was possessed of a large number of shares in six limited liability companies and of 19 pieces of freehold land and buildings thereon; he notionally divided the whole of his property into a thousand shares, and gave to R, Ra, Rc, and Rd, 100 of such shares, each; and to Re, and Rf, 25 shares, each: *Held*, concurrently by the Rangoon Divisional and Appellate Courts, and by the Privy Council that the gifts were valid without actual division as the property could not be considered to be divisible.<sup>9</sup>

'Musha'<sup>10</sup> in Arabic means undistributed or common;<sup>10</sup> in legal language it refers to undivided portions of property, and, in particular, to such property with reference to its forming the subject of a gift. *Musha' explained.*

The principle underlying the doctrine is, shortly, that the subject of gift must be transferred as completely as possible, and that when it is

Doctrine of 'Musha'. General principle: donor must do every thing—

<sup>1</sup> Illustrations (1), (7), (11), as indeed the sole doctrine of gifts of *musha'* must be taken subject to s. 382, below.

<sup>2</sup> Hed. 484 (col. 1).

<sup>3</sup> Macn. 211 (case 12).

<sup>4</sup> Hed. 483, (col. II.); Macn. 211.

<sup>5</sup> See s. 377, below.

<sup>6</sup> Hed. 484 (col. 1), Macn. 205 (citing *Sharh-i-Viqaya*).

<sup>7</sup> Bail. I. (II. 13-20).

<sup>8</sup> See s. 382, below.

<sup>9</sup> *Ibrahim Goolam Ariff v. Saiboo* (1907) 35 Cal. 1, 11 (par. 1), 17 (par. 4), 23.

<sup>10</sup> From *sha'* to leave undivided.

SECTION 374. capable of division from other property, the transfer of possession is not complete unless it is divided off.<sup>1</sup> The rules about 'musha' have become technical, but they are based on a principle that is of universal application: the donor cannot be compelled to do anything that he has left undone,<sup>2</sup> and which is necessary for completing the gift.<sup>3</sup> *E.g.*, where a donor, D, purports to give to the donee, R, half of a field, D ought to give possession of the half of the field to R, and this cannot properly be done unless the half which forms the subject of gift is first divided off, and separated from that of which neither gift is made nor possession given. The donor cannot be compelled to do this (if he has not done it voluntarily) any more than he can be compelled to take any other step in furtherance of an agreement without consideration. This is a principle which would seem to be applicable in most cases to all Muslim systems, and would not have been confined to the Hanafi law,<sup>4</sup> but that that system has refined it far beyond the limits of the original principle. For, though the donor cannot be compelled to take any step which he has not taken, yet there is no reason why the steps that he has already taken should be considered nugatory. In other words, where such possession as can be given of undivided property has already been given, why should the donor be considered not to have taken those steps, any more than the donee be permitted to compel the donor to do what he has not done? See s. 382, below, and comment thereto.

Nor have the technicalities of the Hanafi lawyers stopped here.

Where a donor makes a gift to two or more persons jointly, it may well be considered that there is nothing more left for the donor to do, than to give joint possession of the subject of gift, and to leave the donees to divide it amongst themselves, if they so desire. Thus, if, instead of making

to transfer subject of gift to donee, i.e., he cannot be compelled to take any step for the purpose.

1 Where donor purports to make a gift of a portion of his own property, he must separate the portion given from the portion retained.

2 Where donor gives possession to several donees, but gives away the whole property—difference of view between Hanafi and disciples.

<sup>1</sup> So that, in the eyes of the Hanafi lawyers, it is a *siue qit'ana* of valid transfer of possession that the *musha'* should be divided off. This seems to be lost sight of when the rule that "the gift of a *musha'* may be validated by subsequent possession" is considered. (See, *e.g.*, *Mahomed v. Bai Cuneibat* (1904) 6 Bom. L. R. 1044, 1050 (Russell, J.)). For transfer of possession is taken to imply division and when it has been divided it is no more *musha'* (undivided). The rule just cited in fact means, the fact that at the time of the declaration of gift its subject is *musha'* does not necessarily mean that the gift cannot be operative, inasmuch as the part which is to form subject of the gift may be subsequently divided off and possession thereof transferred to the donee (see s. 381), and cf. s. 382.

<sup>2</sup> *Ibid.* 181 (col. ii, ll. 2-10); and cf. s. 383, *explan. I* (donor must do everything to transfer

possession). Cf. *Mahomed Balkh Khata v. Hussain Bibi* (1888) 15 Cal. 689, 702, 15 I. A. 81; *Baham Balkh v. Muhammad Hasan* (1888) 11 All. 1, 9 (par. 1).

<sup>3</sup> *Talib Daffar v. Mas'adah* (1880) 5 Bom. 248, 249.

<sup>4</sup> The Hanafi exponents are agreed amongst themselves on this point. *Ibid.* 1 516, (ll. 8-9), 517 a. Thus, we find that when the fruit on a tree is the subject of a gift, the Hanafis say it cannot be valid, because it is an "undivided portion." *Ibid.* 484 (col. par. 1). Under other systems the invalidity of the gift would be established under some circumstances because possession of the fruit would be held not to have been given. Of course, if the fruit were unripe the case might be different, in which case, under Hanafi law, the property would not be considered to be divisible.

a gift of half of the field, and keeping the ownership of the other half SECTION 374, with himself, D makes a gift to two separate donees, R and RA,—according to Abu Hanifa<sup>1</sup> the transaction consists of two parts and the gift to R and RA must, each in its turn, be completed by D, and if he has not done so, each gift has remained incomplete, and cannot be completed, except by the donor himself. Abu Yusuf and Imam Muhammad on the other hand, have taken a less technical view, and hold the gift to be valid

But where there are two or more persons jointly entitled to the subject of the gift, and “they combine in making a gift of it entire to one person,” none of the reasons given above apply, and there is no doubt amongst the three exponents of the Hanafi law that the gift is valid<sup>2</sup>

It was a corollary from this last rule that if two persons are joint owners of property, and one of them makes a gift of his share to the other thus making the donee owner of the entire subject of gift, the gift must be valid. The Privy Council have extended this rule, and permitted a gift amongst joint owners, even where the donee does not become by the gift the sole owner of the property, part of which is the subject of the gift<sup>3</sup>

Exactly the reverse of the proposition contained in the proviso to this section is stated in a case from the North-West Provinces : “It appears from a passage in the ‘Durr-ul-Mukhtar’ and a passage in the ‘Fatawa ‘Alamgiri’ that in a special case like the present, in which one of two donees is an adult and the other an infant son, a gift of undivided property is absolutely invalid, not merely ‘fasid’ but ‘batil.’”<sup>4</sup>

**375.** According to Hanafi law,<sup>5</sup> the subject of gift must be separated, or removed so as not to be joined to what is not given;<sup>6</sup> and transferring possession of the subject of gift joined to something not intended to be transferred is not a valid transfer of possession.<sup>7</sup>

**376.** The subject<sup>8</sup> of gift may be validly delivered to the donee contained in a thing belonging to the donor

3. Gift of entire interest by joint owners (a) to stranger (b) to co-owner.

4. Gift to joint owner of undivided part

5. Gift to joint donees of whom one is minor.

Subject of gift alone must be transferred

Gift of contents without that which holds them is valid ; not ‘vice versa’

<sup>1</sup> Bail. I. 615, (l. 1)

<sup>2</sup> Bail. I. 517.

<sup>3</sup> See s. 377, below.

<sup>4</sup> *Nizamuddin v. Zaheda Bibi* (1871) 6 N. W. 338. The judges were, however, strongly impelled to decide against the validity of the gift on the grounds of justice, equity, and good conscience.

<sup>5</sup> See s. 374-381 must be read subject to s. 382, below, at the end of the comment to which will be found the result of the law relating to gifts of

*musha*, summed up.

<sup>6</sup> Bail. I. 508 (ll. 18-20). Marn. 213 (case 22); Hef. 483 (col. i. last lines). Compare the rules about *musha*, ss. 374, 380-383.

<sup>7</sup> Bail. I. 520. But see comment to s. 376 and Bail. I. 530 (ll. 2-4). The distinction between the gift of “a palm tree in bearing without its fruit,” which is invalid, Bail. I. 508 (l. 21), and of the fruit without the tree, which is valid if the donee is asked to take possession : Bail. I. 520 (ll. 7-18), is based on the same ground.

SECTION 376. and not forming part of the subject of gift; but there is no valid delivery of possession where the subject of the gift is delivered containing something that does not form part of the gift.<sup>1</sup>

*Illustrations.*

(1) D makes a gift to R of his mansion and gives possession of it, leaving in it effects belonging to himself. The gift is not valid,<sup>1</sup> unless R is the minor son, or the husband, or wife<sup>2</sup> of D<sup>3</sup> [or D is otherwise the legal guardian of R.<sup>4</sup>]

(2) The gift of land without the crop then standing on it, or of a palm tree in bearing, without its fruit, or *vice versa*, or of a house or vessel in which there is something belonging to the donor, without the contents of the house or vessel, is stated to be invalid, in each case.<sup>5</sup> But if the donee is directed to reap or gather the fruit, and he does so, the gift of the fruit is valid.<sup>6</sup> The gift of a leathern bag in which there is food of the donor's is not valid, while a gift of the food in the bag is lawful. So also the gift of a pitcher without the water in it is not lawful but the gift of the water without the pitcher is valid.<sup>7</sup> The law contained in the ancient texts relating to the strictness of possession has, however undergone considerable change; and the present illustration is given merely to show how the law would operate if it were applied rigidly: see s. 382, below.

*Reason of rule.*

The rule in s. 376 is technical. It seems to be based on the idea that it may be necessary for the donor to deliver the subject of gift in some object which should contain it; but in the converse case, the jurists suspect that if the donor wished to make a gift, he would not leave his own property within that which he transfers to the donee. Moreover, it may appear that the gift of a receptacle is not complete if the alleged donor continues to use it by keeping in the receptacle things belonging to himself.

*Shafi'i law.*

In the 'Minhaj-ut-Talibin' (a Shafi'i text) it is stated that whether the receptacle is to be considered part of the subject of gift, depends upon the "custom."<sup>8</sup>

<sup>1</sup> Bail, I. 519.

<sup>2</sup> *Amia Bibi v. Khatusa Bibi* (1864) 1 Bom. H.C.R. 157.

<sup>3</sup> Bail I. 520 (II 2-4), 530 (II 2-4), Macn 231, Prec. Gifts, VIII.

<sup>4</sup> See s. 400, below, (on whether transfer of possession by legal guardian other than father or grandfather is not necessary see also *Rahman B. v. Mahomed* [1915] M. W. N. 430, 15 M. L. T. 315; 23 Ind. Cas 651; *Muhammad Sulfalia Sahib v. Yashuddin Sahib* [1915] M. W. N.

876; 2 L. W. 1018; *Alamanayakumigari v. Murkoti* (1915) 20 Mad. L. J. 733.). Cf. s. 462, Illustration (1), below.

<sup>5</sup> Bail I. 508 (II 20-24), 519 (II 18-24). But when the crop or fruit is not yet ripe, and it cannot be gathered, the gift should be valid. See s. 374, and *cf.* I. (Bail. I. 530, II 2-4).

<sup>6</sup> Bail. 520 (II 16-21),—<sup>7</sup> on a favourable construction."

<sup>7</sup> See the last footnote to s. 375, above.

<sup>8</sup> *Minhaj-ul-Talibin* 235.

(2) *Gifts where Parties are Co-owners.*

## SECTION 377.

**377.** An undivided part of a property that is capable of division may validly form the subject of a gift where the donor and donee are co-sharers in the said property, or joint owners thereof.<sup>1</sup>

Gift from co-owner to another valid.

**378.** Two or more persons who are entitled to the whole of a property in undivided shares, may validly make a joint gift of the whole of it to a single donee.<sup>2</sup>

Two or more joint owners may validly give to one donee.

"When the donor purports to make a gift the subject of which is capable of division, and consists of an undivided part of property, the whole of which belongs to the donor, the gift is invalid."

**379.** A gift to two or more persons jointly is valid, notwithstanding that the donor has not divided the shares of the donees, nor given separate possession to each of his respective share; provided that the interest of each donee is defined in the declaration of gift.<sup>3</sup>

Gift of whole property to two or more joint donees in undivided shares valid.

This is the opinion held by Imam Muhammad. According to Abu Hanifa such a gift is invalid, unless it is a 'sadaqa'. Abu Yusuf held the gift to be valid only if (i) it is either a 'sadaqa,' or (ii) the donor either expressly states that the donees are to take in equal shares, or (iii) if their shares are not specified; so that according to him the gift is invalid if the donor purports to give the subject of gift in unequal shares to the donees.<sup>4</sup> The opinion of the disciples has been stated "to be generally adopted," and, after the often quoted remark of the Privy Council,<sup>5</sup> there cannot be much doubt that the Courts in British India would follow Imam Muhammad's opinion, which is the most liberal.<sup>7</sup>

Dissentient views

(3) *Some Incidents of the Doctrine of 'Musha'.*

**380.** A gift is not invalidated by the fact that after

Supervening "confusion."

<sup>1</sup> *Mahomed Buksh Khan v. Hoseini Bibi* (1888) 15 Cal. 684, 701 (F.C.), *Jabedanees Bibi v. Nazibat Islam Molla* (1910) 15 Cal. W. N. 328. But see *Hed. 483* (col. II, par. 5); *Macn.*, 212 R. 1, 214 R. 4 (restricting the validity to the case where there is no other person possessing a proprietary right in the property, except the donor and donee). This must be considered to be over-ruled by the P. C. decision; *Amerat v. Zeifa* (1860) 3 W. R. (O.V. RUL.) 37.

<sup>2</sup> *Bail. I.* 517 (par. 1, H. 7-8); *Macn.*, 215.

<sup>3</sup> *Bail. I.* 516 (H. 8-10), 517, *Abu Hanifa* and the two disciples agree as to this.

<sup>4</sup> *Bail. I.* 516-517.

<sup>5</sup> *Rajabai v. Ismail Ahmed* (1870) 7 Bom. II, C. R. (O.C.) 27.

<sup>6</sup> See s. 383, below, and cf. comment to s. 11A, above, and s. 140, above, and footnotes thereto.

<sup>7</sup> *Jabedanees Bibi v. Nazibat Islam* (1910) 15 Cal. W. N. 328, see also s. 382, below, and comment on it.

**SECTION 380.** it has been completed, its subject becomes 'musha', and that it is then left undivided, and possession not given again in accordance with s. 381, below.<sup>1</sup>

*Illustration.*

D makes a complete and valid gift of a property to R, and then revokes it as to half of the subject of the gift. The gift remains valid to the extent that it is unrevoked.<sup>2</sup> Similarly, if the right of a third person is established in the subject of gift after the gift is completed.<sup>3</sup>

The rule contained in this section may be stated in the following terms: "Supervient confusion does not invalidate a gift,"—"confusion" being the term used to denote the objection to gifts of 'musha', viz., the confusion arising from what has been given away as gift being undetermined.

Subsequent possession validates gift of 'musha'.

**381.** A gift that is invalid in its inception, because its subject is a 'musha', may be validated by its subject being subsequently divided off from the rest of the property of which it forms part, and by possession being given to the donee of the said divided part.<sup>4</sup>

This rule is not of much practical importance, as the subsequent partition and possession would amount to a new gift. The first gift being invalid, possession under it would, in Muhammadan law, be no doubt, "with responsibility," (cf. s. 350, above) but where the donor is willing to make a fresh gift, he would presumably not be desirous of making the donee responsible for any deterioration in the subject of the gift.

Doctrine of 'musha' to be strictly confined.

**382.** The doctrine relating to the invalidity of gifts of 'musha' is unadapted to a progressive state of society, and will be confined within the strictest limits.<sup>5</sup>

*Illustration.*

Hence a gift having been purported to be made of a four anna share in a 'kaimi rayati' without demarcating it, or giving separate possession,

<sup>1</sup> Bail I 517; *Gulam Jafar v. Mushkin* (1880) 5 Bom 238, 240; *Ameer Ali*, I 56, citing *Iskand-ul-Mulkhar*, IV 784.

<sup>2</sup> Bail I 517 (par 2); see, however, Bail I 720.

<sup>3</sup> *Maan*, 208 A. n.

<sup>4</sup> *Hed* 483 (col. ii par 6); Bail, I 512 (II, 11 12) 516, 517 (par 3); *Muhammad Munday Ahmed v. Zubaida Jan* (1889) 11 All. 460, 6 I A 205; *Mahomed v. Corrbas* (1904) 6 Bom. L. R. 1043; *Mohib Ullah v. Abdul Khalik* (1908), 30 All. 250 (where it is not clear whether or not the

possession was given by dividing the property), *Jabedamunissa Bibi v. Nayibul Taban Mulla* (1910) 15 Cal. W. N. 328, *Dawood Darjee v. Momtazuddin Bhagya* (1909) 17 Cal. L. J. 85.

<sup>5</sup> (*Shreikh*) *Muhammad Munday Ahmad v. Zubaida Jan* (1889) 11 All. 460, 475, 10, I A; 195, 205, applied by P. C.; *Ibrahim Ibrahim Ariff v. Saiboo* (1907) 35 Cal. 1; 34 I. A. 167; "The attitude of the law towards this doctrine of musha does not involve any constructive application of the doctrine" . . . "The doctrine which in its origin applied to very different sub-



it was held that it would be extremely inequitable to let the donor question **SECTION 382.** the validity of the gift after the lapse of about fourteen years, during, When not applied. which he had ratified and acknowledged the gift, and permitted the donee to be in joint possession with himself; and the gift was held valid and operative <sup>1</sup>

Benson, J., went so far as to say that the doctrine of ‘musha’ was <sup>is the doctrine opposed to equity?</sup> opposed to equity, justice, and good conscience, and so did not apply at all in Madras,<sup>2</sup> where the Muhammadan law of gifts is not made expressly applicable; but this ruling was not followed in later cases<sup>3</sup> in which it has been pointed out that Benson, J.’s opinion was ‘obiter,’ and not concurred in by his colleague, Shephard, J.

The Hanafi lawyers were themselves astute to avoid the doctrine; <sup>Device to see comment to s. 379, above; and of</sup> “A gift of a moiety of a house (which <sup>is the doctrine opposed to equity?</sup> otherwise would be bad for ‘mushaa’) may validly be effected in this way (according to the ‘Bazâzia’), that is, the donor should sell it first at a fixed price, and then absolve the debtor of the debt that is the price.”<sup>4</sup>

It is submitted, that, though the Courts have not expressly said so, <sup>Result of decisions summed up.</sup> the true result of the authorities applicable in British India is, that the validity of a gift of ‘musha’ must be tested in the same way as of any other gift: there must be as complete a transfer of the possession of the subject of gift as the circumstances permit; and the donee is not entitled to claim anything to be done in his favour that the donor has not done: the Courts are inclined to uphold a gift of ‘musha,’ i.e., of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the rest of it, is taken as an indication that there has been, in effect, an incomplete transfer, which the donor would have completed by partition, had he intended to complete the gift.

## § 6.—Possession of Subject of Gift.

### (1) Possession defined.

**382A.** A person <sup>5</sup> is said to be in possession of a <sup>Possession defined.</sup> thing, or of immovable property, when he is so placed with

jects of property” “cannot be applied to shares in companies and freehold property in a great commercial town: (per Lord Robertson), *Ebrahimbai v. Fulbai* (1902) 28 Bom. 577.

<sup>1</sup> *Abdul Aziz v. Fateh Mahomed Haji* (1911) 38 Cal. 518.

<sup>2</sup> *Alabi Koya v. Musa Koya* (1901) 24 Mad. 513; cf. *Basa v. Mahomed* (1896) 19 Mad. 343

<sup>3</sup> *Vahazullah Sahib v. Royapatti Nagayya*

(1907) 30 Mad. 519, (Wallis and Miller, JJ.) *Fakir Nymur Muhammed Rauter v. Kandasawmy Kolathu Vandan* (1912) 35 Mad. 120, 128, (Munro and Abdur Rahim, JJ.) followed in *Abdul Rahiman Nachiyal v. Muhammad Nurdin Maricarayer* (1914) 23 Ind. Cas. 547 (Miller and Sadasiva Iyer, JJ.)

<sup>4</sup> *Amcer Ali, I.* 55.

<sup>5</sup> “Person” includes “body of persons.”

**SECTION 382A.** reference to it that he can exercise exclusive control over it, for the purpose of deriving from it such benefit as it is capable of rendering, or as is usually derived from it.<sup>1</sup>

Connotation of possession.

Possession is so commonplace an expression that it may seem to require no elucidation; it is for that very reason that the greatest difficulty is encountered in an attempt to give it a definition. Sect. 382A is consequently framed with great misgivings, and rather with the intention of bringing into prominence the elements involved in the very important question whether a gift has been completed by transfer of possession, than in any hope that the suggested definition should in itself be final or complete. Attention may be drawn to the following points: (1) Possession is a state of circumstances, or condition of things, (2) the state of circumstances is regarded from the point of view of the relation borne by (a) a particular person or body of persons, towards (b) a thing; (3) the particular point, in the relation between the person and thing, scrutinized, is his ability to exercise control over it; (4) the nature or mode of the control exercised or sought to be exercised is determined by the benefit (a) which has to be derived from the particular thing, and this depends upon the nature of the thing itself, and (b) the person who is to benefit by it.<sup>2</sup>

Possession and ownership.

In connection with point (3), above, the distinction between ownership and possession may be alluded to. In regard to possession the actual existing ability to exercise control is considered,—not the right to do so. The exact control contemplated in each particular case admits of the greatest variation, depending as it does on two elements capable of infinite variety: (a) the thing itself and (b) the person.

Where the subject of rights property.

It may be observed, with regard to the last paragraph, that where the "thing" consists of rights, and not a material object, or, to be more accurate (since law is always concerned with rights not with material objects),—where the "thing" does not consist of the whole bundle of rights constituting the dominion over a physical object, but of one or more of the rights making up that bundle, which the law permits to be transferred without consideration,—the difficulty in determining whether control is exercised by one person or another is greatly enhanced: when the right is of such a nature that it has to be exercised by a constant series of overt acts, this difficulty is diminished.

<sup>1</sup> The right to be in, or to obtain, possession must be kept distinct from the fact of being in possession; similarly the power to resume possession is not the same as being in possession; though the two states of facts are not often distinguished. The expression "possession through another"

is used to express that possession is held by some person on behalf of another, the latter having the power to resume possession if he chooses.

<sup>2</sup> See the cases mentioned in the last footnote to illustration (1) to s. 376, above.

" Primarily," it has been said, with reference to the term possession, SECTION 382A. it " denotes a state of fact, but this fact carries with it legal advantages, and so is the source of rights. If the state of fact could always be as-  
Possession denotes a state of fact.  
 certain with certainty, and if it always produced the normal effects, the subject of possession would present little difficulty; but it is frequently uncertain to whom the actual control of a thing is to be attributed, and when this question is settled, the law may credit the advantages of possession to some person other than the apparent possessor. Hence arises the distinction between actual and legal possession. Actual possession denotes the state of facts; but the person to whom are credited the advantages of possession has the legal possession."<sup>1</sup>

It may be of interest to quote here some definitions and Definitions of possession. explanations from authors who have written on possession. The first may be appropriately cited as an introduction to the definitions that follow: "As the name of possession is . . . one of the most important in our books, so it is one of the most ambiguous. Its legal senses (for they are many) overlap the popular sense, and even the popular sense includes the assumption of matters of fact which are not always easy to verify. In common speech a man is said to possess or to be in possession of any thing of which he has apparent control, or from the use of which he has the apparent power of excluding others."<sup>2</sup> The word possession, as understood in law, has been defined in Murray's "New English Dictionary" in the following terms: "The visible possibility of exercising over a thing such control as attaches to lawful ownership (but which may also exist apart from lawful ownership); the detention or enjoyment of a thing by a person himself or by another in his name; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons, especially the having of such exclusive control over land; in early instances sometimes used in the technical sense of seisin."<sup>3</sup>

The meaning of 'qabz-ul-kamil' (complete seisin) has been thus Complete seisin. alluded to: "With reference to movables, it depends on their nature; and with reference to immovable property, as is suitable to its nature, as the taking of the key of a house, which is equivalent to its seisin."<sup>3</sup> Compare: "By possession is meant possession of that character of which the thing is capable."<sup>4</sup>

<sup>1</sup> J. M. Lightwood, in the Encyclopedia of the Laws of England, XI., 310.

<sup>2</sup> Pollock and Wright "Possession in the Common Law."

<sup>3</sup> *Majma-ul-Anwar*, 342, cited and translated in Ameer Ali, I. 42.

<sup>4</sup> *Lord Advocate v. Young* (1887) 12 App. Cal. 544, 556.

SECTION 382A. As to the kinds of possession, the following are translations of extracts from Shiah texts :—

Kinds of  
possession \*  
(a) Removing  
movables

1. " Possession in the case of movable things, like an animal, or pieces of cloth, or a thing that can be measured or weighed or numbered, is by removing it, and with reference to other things, it is to leave it alone between the thing and him (the transferee) after raising the hand from it."<sup>1</sup>

(b) Customary  
control.

2. " Possession and its kinds<sup>2</sup>—What is meant by it (*i.e.*, by 'qabz' or possession) in all places where the 'shar' (jurist) has considered it regarding its validity, its binding force, or other effects, is as follows : The transfer of the customary ('urfīya) control ('sultanat') from the transferor to the transferee, equally whether the legal (shar'ia) control has accrued to him permanently, by a contract, (as in the case of sale and the like), or not, (as in the case of 'waqf' and 'hiba' and the like). There is no doubt regarding its accruing by vacation, 'takhliat,' in the case of immovable property ; in the sense that all obstructions are removed from the way of the transferee, and also that the hand of the transferor is raised, and his permission is given to the transferee : for this is necessary in order that he (the transferee) may become thereby like the transferor, as regards his taking possession of landed property, and it is not then necessary for the transferee to get at the property by himself, or through his agent, or by his dealing with it, indeed there is no necessity even for the lapse of time, although it (the property) may be remote from the transferee, because of its absolute validity without it (*i.e.*, the lapse of time,) like the validity of the property coming under his possession ('qabz') control ('wilayat') and power ('istilat') thereby in the same manner as it was with the transferor."<sup>3</sup>

(c) Vacating  
Immovables,  
Lapse of  
time not  
necessary.

Possession  
defined and  
exemplified  
by Domat

A great exponent of Roman law has dealt with possession in the following terms :—" Possession, taken in a proper sense, is the detention of a thing, which he who is master of it, or who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses. . . . Thus one may possess movables by keeping them under lock and key, or having them otherwise at one's disposal : thus one possesses cattle by shutting them up, or giving them to be kept : thus one possesses a house by dwelling in it, or having the keys thereof, or trusting it to a tenant, or by building in it : thus one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure."<sup>4</sup>

Key  
control  
dwelling,  
use.

<sup>1</sup> *Sharrh-Luma'a*, 265.

<sup>2</sup> This heading is in the original.

<sup>3</sup> *Jawahir-ul-Kalam, Kitab-ul-Turajja*, IV.

136, (*ll. 18 et seq.*).

<sup>4</sup> Domat, "*Civil Law*," (1861) translated by Wm. Strahan, I. 845, 846, ss. 2127, 2130.

"We must not confound," he continues, "the ways of acquiring the right to possess . . . with the ways of entering and getting into possession, and of having a thing in one's power to use it, to enjoy it, and to dispose of it. The ways of acquiring the property of things, and by means of the property, the right to possess them, are infinite. For one acquires them by a sale, by exchange, by donation, and by different titles which the laws have regulated. . . We are now to consider how one becomes possessor, and the ways of entering upon a real and actual possession. Seeing the use of possession is to exercise the right of property, it implies three things: (i) a just cause of possessing as master. (ii) the intention to possess in this quality, and (iii) detention. . . Without intention there is no possession . . . Without the detention, the intention is useless. . . And without a just cause the detention is only usurpation."<sup>1</sup>

Right to  
possess.

Actual  
possession  
implies

(i) just cause  
(ii) intention,  
(iii) detention.

Possession is defined in the French Civil Code as "the retention or enjoyment of a thing or of a right which we have, and which we make use of, either ourselves, or by another person, who holds it or makes use of it in our name."—Art. 2228. The following is taken from the American Encyclopædia of Law and Procedure: "The term has been defined as follows: Simply the owning or having a thing in one's power; the present right and power to control a thing." . . . "That condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons." . . . "The detention or enjoyment of a thing which we hold or exercise by ourselves or by another who keeps it or exercises it in our name." "Natural possession" is that by which a man detains a thing corporeal as by occupying a house, cultivating grounds or retaining a movable in possession." "It is also defined to be the corporeal detention of a thing which we possess as belonging to us without any title to that possession, or with a title which is void."<sup>2</sup>

Definition in  
French Code.

### (2) Gift Completed by Transfer of Possession.

(a) Acts on the part of the donor.

**383.** (1) The declaration and acceptance of a gift do not operate to transfer the ownership of the subject of gift, unless and until the gift is completed by the transfer to the donee of such seisin or possession<sup>3</sup> as the subject of

Transfer of  
possession  
necessary to  
complete gift.

<sup>1</sup> Civil Law," L. 853-858, ss. 2147, 2161.

<sup>2</sup> Amer. Alt., I. 55.

<sup>3</sup> Bail. II, 203 (ll. 5-7), 204 (ll. 3-4, 9-11), I. 508 (l. 17), 512-513; Hed. 482, *Obedur Rezu v. Mahomed Muner* (1871) 16 W. R. 88; *Shah Jan Bibre v. Shih Chunder Shaha* (1874) 22 W.

R. 314; *Jaswant Singher Ubbay Singia v. Jet Singher Ubbay Singier* (1814) 3 Moo. I. A. 245; 6 W. R. (P.C.) 46, *Meherat v. Tanyutan* (1886) 13 Bom. 156; *Mahomed Farid v. Mahomed Abdul Gafar* 15 Cal. L. J. 14; 13 I. C. 434; *Bahiman Bi v. Mahomed Fatima* (1913) 15 Mad. L.T. 345;

**SECTION 383.** the gift permits :<sup>1</sup> where possession of the subject of a gift is given to the donee at a time subsequent to the declaration and acceptance of the gift, the ownership of the subject of the gift is transferred to the donee as from the date when possession is given, and not before.<sup>2</sup>

Transfer of subject of gift effected from time when possession given.

Except under Maliki law.

Transfer of possession necessary.

Power to take possession

(2) Imam Malik holds that the right to the gift property relates back to the time of the declaration.<sup>3</sup>

• *Explanation I.*—The donor must do everything, which, according to the nature of the property that forms the subject of the gift, is necessary to be done in order to transfer ownership of the property, and to render the gift complete, and binding upon himself.<sup>4</sup>

*Explanation II.*—The donor will be held to have done everything that is necessary to be done in order to transfer possession, when he has put it within the power of the donee to take possession of the subject of gift, if he so chooses.<sup>5</sup>

*Illustrations.*

(1) On 21st. Oct., 1891, D made a gift to his daughter, B, of the whole of his property, consisting of shares in two villages, which were then and subsequently held, under attachment by the Collector, for arrears of revenue. The deed of gift provided that B should give D Rs. 120 annually for his maintenance. Held, that D having transferred to B, and having divested himself of, the rights which he had, and which

23 Ind. Cas. 65, *Muhammad Humid Ullah Khan v. Muhammad Majid Ullah Khan* (1917) 52 Panj. Rec. 356, (No. 92)

<sup>1</sup> This rule, it is submitted, has been misapprehended in *Nawab Khan v. Muhammad Nudiy* (1913) 11 All. L. J. 726, where the judgment seems to proceed on the basis that because it was not in the power of the intending donor to obtain mutation of names owing to her death within 4 or 5 days of the declaration of gift, therefore the gift must be considered to be as complete and effectual as if she had obtained mutation of names. Similarly, with reference to the suggestion that the tenants should have been directed to pay rent in future to the donee it is said: "It is also difficult to see how such directions could be given to the tenants at the time of making the gift unless they happened to be present." In the first place the directions need not be given at the very moment of the declaration of the gift, secondly, if death prevents some essential part of the transaction to be performed, the transaction remains incomplete and ineffectual. This remark appears, however,

from what immediately follows, to have been *obiter*.

<sup>2</sup> *Badl* II 207 (second), *Moshaj-ut-Talab* 234, e.g., in *Ameer Begum v. Nizamuddin Shah* (1896) 21 All. 165, 171-172, *Saddik Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 627, (p.c.) In *Maen* 201, (case 5) it is stated that possession subsequent to the declaration of gift does not validate the gift, though it is taken (or rather completed—as the property had to be divided off) with the consent of the donor, and *quere*. Cf. *Khader Hussain Sahib v. Hussain Begum Sahiba* (1869) 5 Mad. H. C. R. 114, 119; *Fakir Syarif Muhammad Rosther v. Kandamancy Kalathu Vandan* (1912) 35 Mad. 120, 129.

<sup>3</sup> *Ibid.* 482 (col. 1).

<sup>4</sup> *Mitrag v. Lord* (1852) 4 De. G. F. & J. 274; cf. *Mahomed Baksh Khan v. Huseini Bibi* (1888) 15 Cal. 689, 702, 15 L. A. 81, referring to *Kalidas Mullick v. Kashya Lal Poddal* (1884) 121 133, 11 L. A. 218.

<sup>5</sup> *Badl* I. 511 (par. 2), II. 204; *Ameer Ali*, I. 65, citing *Fatawa Qazi Khan*, 282, and *Mama-ul-Ashraf*.

he purported to give to R, and having got R's name entered in the SECTION 383. Government records there was a valid gift, notwithstanding that suits were filed by D after the date of the gift for rent due—such suits having been brought before the mutation of names took place.<sup>1</sup>

(2) On 12th Feb., 1879, D made a deed of gift transferring her right in half of certain properties to R, her daughter and co-sharer.<sup>2</sup> On 22nd Feb., 1879, the deed was registered. The evidence of transfer of possession, as stated by their lordships of the Privy Council, was as follows : (a) A declaration in the deed that possession was transferred, and that D had abandoned all connection with the properties, and that R was to have complete control of every kind in respect thereof (R's husband was the general manager of both D and R) (see p. 475 of the report); (b) on the 22nd Feb., 1879, the deed was registered. (c) On the 24th April D gave a power of attorney to C to present and verify a petition for mutation of names, and (d) a petition was presented on 28th April; (e) On 5th June a 'parwana' was issued by the Assistant Collector for proclamation of the deed of gift, and for enquiry as to possession (f) which was done; and on the 27th July the village 'patwari' reported that the deed was made, and possession transferred; and (g) on 28th July he reported that the notification had been proclaimed. (h) H, who became heir of D on her death, did not raise any objection to the mutation of names. R died on 3rd December, 1879. The mutation of names took place on 4th February 1880 (after the death of the donee). As against this it was proved that (i) there were 5 decrees in suits by D for rent accrued after the date of the deed of gift; (j) that D paid revenue on 26th Nov., 1879; that (k) in January, 1880, there was an order of the Assistant Collector speaking of D as being in possession. [The suits were, however, commenced, the payment of revenue was made, and the order issued before the mutation of names in the Collector's books.] (l) That D continued to reside in one of the houses forming part of the gift; (m) R's husband made an attempt to acquire the whole of the property, and it was argued that if the gift had been valid there would be a question as to only one-sixth of it.<sup>3</sup> Held, that it was proved that possession was taken, and that there was a complete and valid gift.<sup>4</sup>

<sup>1</sup> *Anuari Begum v. Nizamuddin* (1896) 21 All. 165; relying upon 11 All. 460; see the next illustration.

<sup>2</sup> A point was taken in this case that the gift was invalid as a *musaka*. It does not seem to have been pointed out in reply that the gift was from one co-sharer to another.

<sup>3</sup> The P. C. characterise points (l) & (m)

as "tuttle;" and the other three, (i) (j) & (k), as "weak and unavailing."

<sup>4</sup> *Muhammad Mumtaz Ahmad v. Zubaida Jan* (1880) 11. All. 460. The P. C. reversed a finding of fact by the Subordinate Judge though the High Court had not expressed any opinion on it; see at p. 470 of the report.

## SECTION 383.

*Illustrations.*

(3) In 1848 D<sup>1</sup> transferred and indorsed to R, his son,<sup>2</sup> Government promissory notes of the value of Rs. 6,74,000, with the stipulation that the proceeds of the notes should be paid to the donor. In 1853 Government notified that certain Government notes, of which the notes so transferred formed part, were about to be paid off, and option was given to the then holders *Held*, that the legal title was undoubtedly in R (p. 544),<sup>3</sup> the probability being that it was intended as a transfer of property in the lifetime of D, with a reservation of the use or proceeds of the money transferred, during the lifetime of D only: "The design to alter, and so in one sense to defeat, the disposition of property is simply a design to conform to the law whilst working out an unforbidden design" (See pp. 547-8.)<sup>1</sup> Their lordships added: "The gift relates to the substance of the article and not to the use of it: there is no such participation in the thing given as would invalidate the gift. Again, the Mahomedan law defeats, not the grant, but the condition; but the arrangement between D and R was based on valid consideration, the son's undertaking is valid and could be enforced in India as a trust constituting a valid obligation to make a return of the proceeds during the time stipulated. The Mahomedan law authority whom Mr. Campbell consulted supported it. His opinion is treated somewhat lightly as a nude opinion unsupported by authority; but it is to be observed that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties. . . . The consideration, two rings, may be small and inadequate in the sense of purchase money; but it cannot be treated as of no pecuniary value." (p. 550.)<sup>2</sup> *Held*, there was a valid gift 'inter vivos' as to the Company's paper. Costs of both parties out of residuary estate of deceased.<sup>3</sup>

(4) D executed in favour of R, a deed of gift of all his rights of inheritance in the estate of the deceased, ('. The deed recited that the gift was made in consideration of natural love and affection, and of past services. *Held*, that this was not a 'hiba bil 'iwaz, which consists of two transactions (both the 'hiba' and the 'iwaz' being gifts); and that only such properties can be the subject of 'iwaz' as can be the subject of gift, and that natural love and affection and past services can neither be the subject of a gift nor of 'iwaz': that possession was necessary to be transferred, and the gift property (i. e., share in the estate) being immovable, and not of a nature which renders it impossible to deliver

<sup>1</sup> Nawab Moonawarood Dawlah.<sup>2</sup> Nawab Umjad Ali Khan.<sup>3</sup> *(Nawab) Umjad Ally Khan v. (Mussummat)**Mohumder Begum* (1867) 11. Moo. L. A. 516, 544, 548; 10 W. R. (P.C.) 25. The figures in ( ) refer to pp. of 11 M. L. A.



actual possession to the donee, actual possession was necessary. No SECTION 383. such actual possession having been given, the gift was ineffectual.<sup>1</sup> *Illustrations*

(5) One Humera Bibi, on 14th January 1888 executed a deed of gift of certain property, including a house, in favour of her brother's son Mun-nat-ullah. The donor subsequently sued to have the gift declared void, on the ground that possession had not been transferred to the donee. The evidence bearing on possession as appearing from the Judgment was as follows: (a) at the time of the gift the donor and donee were living together in the house; (b) after the gift, the donor continued to live there; (c) the deed was executed in autograph by the donor; (d) attested by 31 witnesses; (e) and registered; and (f) it recited that possession was given and taken; (g) mutation of names followed on 24th January 1888. (h) government revenue was afterwards invariably paid by the donee in his own name; (i) the donee treated the property as his own; (i) in various partition proceedings the donee was regarded, and acted, as proprietor; (ii) in 1896 and 1899 he executed mortgages on it, describing himself as full owner; (j) 7 or 8 months after the gift, the donor in answer to interrogatories stated in her affidavit that (i) she had made a gift of the property, (ii) that she resided in it with the permission of the donee, (iii) that the donee was in possession of the whole property. (k) a musical entertainment was given to celebrate the gift, and give it publicity, (l) not a single receipt for rent was produced in the name of the donee. (m) the receipts produced were in the name of the donee; (n) after the death of the donee, the donor claimed to succeed as his heir, and when she found that she was not his heir, she set up, 13 or 14 years after the date of the gift, the case of the gift being invalid. Held that possession of the whole subject of gift was proved to have been transferred, including the house; for the intention to transfer possession of the house was unequivocally manifested in the most clear and emphatic language to the effect that the donor had divested herself of all her interest in it, and withdrawn her possession of it; and such intention having been given effect to, as appears from the facts above mentioned, neither the actual physical departure of the donor from the house with all her belongings, nor a formal entry by the donee, was necessary: so that the donor's continuing to live in the house with the permission of the donee did not derogate from the completeness, or the validity of the gift.<sup>2</sup>

<sup>1</sup> *Rahim Bukhsh v. Muhammad Hassan* (1888) 11 All. 1; *Macn.*, 201 (case 6.); with reference to the allusion to a *khiba-bul-tawaz* see ss. 406 et

<sup>2</sup> *Humera Bibi v. Satriannissah Bibi* (1905) 28 All. 147; see *Rahim v. Sulaiman* (1884) 6 Bom. 146, and s. 196 below.

## SECTION 383.

Necessity of  
transfer of  
possession to

Reason as  
explained in  
'Hidaya.'

Via donor  
cannot be  
obliged to do  
that which he  
has not done :  
the transaction  
being  
voluntary.

Beque-1.

## 1. NECESSITY FOR TRANSFER OF POSSESSION.

The necessity for possession, in order to complete a gift, is based on the same ground on which a contract without consideration cannot be enforced. Transfer of possession is, to a certain extent, necessary for transferring complete ownership under Muhammadan law, even when the transfer is for consideration : thus the purchaser of movable property is not, in Muhammadan law, entitled to resell it, until it is delivered to him.<sup>1</sup> Where the donor has not done everything to divest himself of the property, in order to complete the gift, some third party must make him do what he has left undone, and this infringes the principal notion connected with a gift—its voluntary nature. The 'Hidaya' thus explains the requirements of a gift : "Gifts are rendered valid by tender, acceptance and seisin. Tender [or declaration] and acceptance are necessary because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts ; and seisin is necessary in order to establish a right of property in the gift, because a right of property according to our doctors is not established in the thing given merely by means of the contract, without seisin. The arguments of our doctors are twofold.—First, the Prophet has said a gift is not valid without seisin (meaning that a right of property is not established in a gift until after seisin).—Secondly, gifts are voluntary deeds ; and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent, before he had voluntarily engaged for it." <sup>2</sup> In other words, if a gift were valid without possession being given to the donee, the law would be decreeing specific performance of an agreement without consideration. in many cases not even an agreement, but a mere wish on the part of the donor, or a surmise that he must have wished it. The same reasoning is the basis of the rule of Hanafi law that when the subject of gift is capable of division, the gift should not be considered complete unless the division is made. "If the gift of part of a divisible thing without separation were lawful, it must necessarily follow that a thing is incumbent upon the giver, which he has not engaged for, namely a division." <sup>3</sup>

In the case of a bequest, on the other hand, under Muhammadan law, the "transfer is to be decreed as having effect from the death of the testator, and not from the time of taking possession, though there should have been some delay in taking it." <sup>4</sup>

<sup>1</sup> Hed. 286.

<sup>2</sup> Hed. 482 (ed. 1.)

<sup>3</sup> Hed. 482 (coll. i. ii.) ; the case must be distinguished where a transfer is made for a valid consideration and operates as a contract :

*Mahammadunnissa Begum v. J. C. Bachelor*  
(1905) 29 Bom. 428.

<sup>4</sup> Ball. II. 207-208 ; but see Probate and Administration Act, s. 116, and on Wills below.

It has been held that the donor cannot sue the donee for cancellation of the gift, on the ground that he did not give possession : because either the deed of gift is a nullity, from which the plaintiff would not apprehend any injury, or "if possession was non-essential to its validity, then it would be a good deed of gift."<sup>1</sup> On both these points the learned judges cautiously declined to express an opinion. It is conceivable that if the question again presents itself for decision the Court having to deal with it may (fortified by the authorities referred to in s. 383 (1), above) feel that it would not be too bold a proposition to affirm that "possession is essential to the transfer of a gift"; and in that case the decision may proceed on different grounds—grounds based on the terms of the Specific Relief Act.

Suit to cancel a gift where possession not given.

## 2. TRANSFER OF POSSESSION IN THEORY OF LAW OF 'HIBA.'

Transfer of possession in the theory of the Muhammadan law of 'hiba' <sup>2</sup> is not merely a form, nor something merely supplying evidence of the intention to make a gift. The necessity for the transfer of possession is expressly insisted upon as part of the substantive law, in order that that may be effectuated, which is sought to be effectuated by a gift, viz., the transfer of the ownership of the property from the donor to the donee. And it may be said that transfer of possession is no more a matter of form than the necessity for consideration for the validity of a contract is a matter of form. The law does not ask, Did the donor really intend to give the subject of gift, i.e., did he really intend to transfer the ownership of the subject of gift from himself to the donee? What the law asks is, Has the donor actually given away? or Has the ownership been actually transferred from the donor to the donee? In regard to contracts it has been well expressed: "It is often difficult to determine whether what is said amounts only to a willingness to treat about a matter, or is an absolute contract; and the adoption of a form removes the difficulty."<sup>3</sup>

Transfer of possession not matter of form.

In the Muhammadan law of gift what has to be determined is not whether the donor had finally resolved to make a gift, but whether he had actually transferred away the property—and even where the transfer is for consideration possession has in most systems of law an

<sup>1</sup> *Umrao Bibi v. Jan Ali Shah* (1898) 20 All. 465 (per Blair & Burkitt, JJ.)

<sup>2</sup> At least in the Muhammadan law as finally developed into the form in which we now find it: for as Lord Mansfield and Mr. Justice Holmes pointed out, even the doctrine of consideration in the English law of contract had its origin merely

in form: cf. Holmes's Common Law 273, *Pillans v. Van Mierop* (1765) 3 Burr. 1064, cited in the comment to s. 213, above.

<sup>3</sup> Brantley, "Contracts," 36, cited Harvard Law Review, XXVII, 208—53, in the article "The End of Law" by Pound.

**SECTION 383.** important bearing on the rights of the parties and others claiming through them;<sup>1</sup> since (under Muhammadan law) the owner's right ceases on his death, and devolves upon his heirs, it follows that where the owner dies without transferring the property to another, the person to whom a voluntary transfer was intended to be made, has no claim against the heirs.

It may require dividing of the property.

*Explanation II* is adapted from the following words of Lord Justice Turner: The settlor must have done everything which according to the nature of the property was necessary to be done in order to transfer the property and render the settlement binding."<sup>2</sup> With this statement may be compared the decisions cited in the footnote and Syed Sahib Amir Ali's statement that the 'Majmaul Anhar' uses similar language, viz., "possession so far as its nature admits."<sup>3</sup>

Registration:

**384.** The registration of a document constituting the declaration and acceptance of a gift does not, without delivery of possession by the donor, complete the gift.<sup>4</sup>

See the Indian Registration Act, s. 17; and ss. 347 and 390 of this work.

(b) *Acts on the Part of the Donee.*

Donee already in possession.

**385.** Where the subject of a gift is in the possession<sup>5</sup> of the donee at the time when the declaration of gift is made, the gift is completed by the donee signifying his

<sup>1</sup> Cf. Pollock and Wright, "Possession in Common Law," 1-4, 6-9. "It [possession] imports something which at an earlier time constantly made the difference between having the benefit of prompt and effectual remedies, of being left with cumbersome and doubtful ones, which in modern times has constantly determined and often may still determine the existence or non-existence of a right to restrain acts of interference with property (*Overdale v. Charlton* (1878) 4 Q.B.D. 104; *Earlly v. Grimaldi* (1876) 3 Ch. D. 826), the relative priority of the claims of competing creditors (*Aronson v. Rogers* (1876) 1 Ex. D. 285), or the incidence of public burdens (*Allan v. Liverpool*, 1874) L. R. 9 Q. B. 180 191, cf. the Public Health Act, 1875, s. 257), and which for centuries has been and is still capable of being (*R. v. Ashwell* (1885) 16 Q. B. D. 190) of critical importance in defining the boundaries between civil wrongs and crimes," *ib.* p. 1.

<sup>2</sup> *Milroy v. Lord* (1852) 4 De G. F. & G. 274; cf. *Mahomed Bukh Khan v. Hussain Bibi* (1888) 15 Cal. 689, 702, 15 I. A. 81, referring to *Kalidas Mullick v. Kashya Lal Pandit* (1884) 11 Cal. 121, 133; 11 I. A. 218.

<sup>3</sup> "Mahomedan Law," I. 86.

<sup>4</sup> *Fahazulak v. Bayapatti* (1907) 30 Mad. 519; *Ismael v. Ramji Sambhaji* (1900) 23 Bom. 682; *Rahim Jan Bibi v. Imam Jan* (1912) 17 Cal. 1; 3 173; *Muqim-Joh v. Mahomed Sahib* (1887) 11 Bom. 517, referring to *Fauzud Bibi v. Narayan Daji Dande* (1882) 7 Bom. 131; *Dango Deher v. Mahant Nuth Chhatrapadhy* (1883) 10 Cal. 854 and adding that these rulings between Hindus "would appear to be equally, if not especially, applicable to gifts under the Mahomedan law." In ROMAN LAW the gift could be complete without delivery, and it required registration if the subject of gift was 200 (later 500) solidi or over.—Justin II vii. 2; Cf. *Bar Romanus v. Bar Mani* (1808) Bom. P. J. 147.

<sup>5</sup> I.e., actual possession—mere collection of rents from the tenants by an agent does not constitute such possession, *Valayat Hussain v. Mastan* (1879) 5 Cal. L. R. 91. Cf., however, "The doctrine of possession has been extended under the name of 'quasi possession' or of 'possession juris' to the control which may be exercised over advantages, short of ownership which may be derived from objects," Holland "Jurisprudence," 179.

acceptance of the gift; and no formal transference of the **SECTION 385.** possession of the subject of the gift is necessary.<sup>1</sup>

A piece of cloth belonging to D is deposited with R. R says, "Give it *Illustration* to me," and D answers "I have given it to thee." This is a gift. But if the cloth had been in the hands of D himself and the same words had passed between them, it would have been a deposit.<sup>2</sup>

"Nor is it necessary that any time should elapse to enable the donee to repeat his seisin as some of our doctors have said"<sup>3</sup> Similarly, possession in the hands of the legal guardian of a minor is possession in himself (see ss. 400, *et seq.*, below) and no transfer is necessary.

With reference to that portion of the Transfer of Property Act, s. 54 *Change of possession.* which provides for the completion by delivery of the transfer of ownership of property (of a less value than Rs. 100) it has been held that delivery of possession in s. 54 implies a change of possession, and that, where the vendee (or other alleged transferee) is already in possession, there can be no change of possession, and s. 54 cannot operate.<sup>4</sup> The delivery of possession in the Muhammadan law of gift must be considered, therefore, to be different from transfer of possession under the Transfer of Property Act, s. 54, as explained in the decision referred to.

**386.** (1) Where possession is taken by the donee of his own accord, he must do so with the express or implied consent of the donor.<sup>5</sup> *Donor must consent to donee taking possession.*

(2) The mere declaration of a gift does not amount to the donor's consent that the donee should take possession; but, where possession is taken by the donee at the same meeting as the declaration of gift, and the donor does not raise any objection to it, the donor will be presumed<sup>6</sup> to have consented to possession being taken by the donee.<sup>7</sup> *Mere declaration of gift does not amount to such consent.*

(3) Where the declaration of gift is made in the vicinity of the subject of gift,<sup>8</sup> and the donee takes possession *When subject of gift present.*

<sup>1</sup> Bail. I. 514, II. 204, (II. 14-19); *Radd-ul-Mukhtar*, IV. 783; *Hed.* 484 (col. I. par. 4); *Muthur Sahib v. Hossain Sahib* (1910) 23 Mad. L. J. 734 (Abdur Rahim and Ayling, JJ.).

<sup>2</sup> Bail. I. 510.

<sup>3</sup> Bail. II. 204 (II. 17-19), (par. 4).

<sup>4</sup> *Sikendrapadmanath Banerjee v. Secretary of State for India* (1907) 34 Cal. 207.

<sup>5</sup> *Hed.* 482 (col. II.); Bail. I. 513, II. 204 (par. 4).

<sup>6</sup> *Hed.* 483 (col. I, II. 13-15); cf. s. 54 above.

<sup>7</sup> Bail. II. 204 n. 6: according to the author of the *Tahrir-ul-Ahkam* (Shiah), permission is necessary even though the donor is present at the time of the gift. Cf. *Macn.*, 215.

<sup>8</sup> The distinction about the gift being made in the vicinity of its subject is not expressly made in Bail. II. 204, but, where the subject of gift is not at hand at the time of the gift, a reasonable time must, it is clear, be given to the donee to take possession. But see Bail. II. 204 n. 6.

**SECTION 386.** of the subject of the gift not at the same meeting, but subsequently, it is not valid, unless the consent of the donor has been expressly obtained.

**When not present** (4) Where the declaration of gift is not made in the vicinity of the property,<sup>1</sup> possession may be taken after the separation of the meeting, without the express consent of the donor.<sup>2</sup>

**Illustration.** D gives his slave to R, (all three being present together) without saying: "Take possession of him," and R goes away, leaving the slave behind; he cannot afterwards take possession of him.<sup>3</sup>

(c) *Intervention of Third Parties.*

(i) *Gift through a Trust*

**Gift through a trust.** **387.** Where a gift is purported to be made through the declaration of a trust, possession of its subject must be given to the trustee in order to complete it,<sup>4</sup> unless the trust is declared by will, or the donee declares himself to be the trustee.<sup>5</sup>

**Illustrations.** (1) D executed a deed of trust relating to certain properties, on the 9th of October, 1876, appointing two trustees. D did not transfer possession to the trustees during his lifetime. Subsequently D made a will confirming the trust deed; and died on the 6th of May 1883. *Held*, that the interest of the beneficiaries did not arise in the lifetime of D, as the gift was not completed, but that it operated as a part of the will, and was given effect to as such.<sup>4</sup>

(2) A gift of immovable property may be made to A, B, and C, providing that the management of the property shall be in A, and that certain sums out of the net income should be paid by A to B and C, respectively. In such a case B, or C may enforce his rights under the gift as against A, or A's transferee.<sup>6</sup>

**Trusts in Muhammadan law.**

Where a Muslim voluntarily declares himself trustee of any property (whether for the benefit of others, or of himself and others), it may be a question of some nicety whether the disposition is governed entirely by

<sup>1</sup> See p. 435, n. 7.

<sup>2</sup> *Bail. I.* 513 *Hed.* 482; (col. ii.).

<sup>3</sup> *Bail. I.* 514 (ii. 7-11).

<sup>4</sup> *Saidk Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 827 (P.C.); *Moonbhai v. Yacobbhai* (1904) 29 Bom. 267, 7 Bom. L. R. 45.

<sup>5</sup> The Indian Trusts Act, s. 6, requires the trust property to be transferred to the trustees "unless the trust is declared by will, or the author of the trust is himself to be the trustee." *6 Tawakalibhai v. Imtiaz Begum* (1916) 41 Bom. 372.

the Indian Trusts Act, or to any extent by Muhammadan law, and Section 387<sup>3</sup> whether, in either case, it is necessary for the completion of the (gift or) trust, that it should have been acted upon: such action on the trust being, in this form of gift, either the equivalent of that transfer of possession which Muhammadan law requires, or being necessary for "indicating with reasonable certainty . . . an intention . . . to create . . . a trust," under the Indian Trusts Act, s. 6.

With reference to the doubts that have been expressed whether "private trusts are known to Muhammadan law,"<sup>4</sup> it must be pointed out that the word trust is ambiguous, and is used sometimes to refer to the obligation that is annexed to the ownership of property (as in the Indian Trusts Act, s. 3) and sometimes to the deed containing the trusts, and in particular to deeds containing family settlements in England. It may be admitted at once that the family trusts of Sunni Muhammadan law took the shape of 'waqf,' which was wrongly excluded from the term private trusts prior to the Waqf Act. But it seems equally beyond dispute that in the sense of annexing obligation to the ownership<sup>5</sup> of property, trusts are not only known to Muhammadan law, but they abound in it. Thus trusts are recognised not only in the case of the 'mutawalli' of a 'waqf,' the guardian of the property of a lunatic or minor, and the executor, but there is specific recognition of ownership "with responsibility" to another person<sup>6</sup> in such texts as the 'Fatawa 'Alamgiri,' the 'Sharaya-ul-Islam' and the 'Hidaya.' It is difficult, of course, for a technical term representing a very complex notion in one system of law, to have an exactly equivalent term, connoting identical incidents in another system of law.<sup>7</sup> But their Lordships of the Privy Council,<sup>8</sup> and, long before them, so great an authority both on law and on the meaning of Arabic terms as Sir William Jones, and the careful and accurate translator of the 'Fatawa 'Alamgiri' and 'Sharaya-ul-

Notions in Muhammadan law corresponding to the trusts of English law.

<sup>1</sup> In doing so he seems to overlook (a) that in any view, even according to the Privy Council decisions, prior to the Waqf Act a *waqf* may consist of a private trust, provided that it is followed by a trust for charity; (b) that there is probably no person now in existence who contends that there is any foundation in Muhammadan law for the theory that a *waqf* for a person with life interests to his descendants in perpetuity is invalid. cf. *Puran Atab v. Durshan Das*, (1911) 9 All. L.J. 709, 11 Ind. Cas. 146, 170,—where Karamat Hussain, J., states that the creation of a public or private trust, save by making a *waqf*, was unknown to Muhammadan law.

<sup>2</sup> The ownership of the trustee is not necessarily insisted upon, e.g., guardians and agents

are said to be trustees.

<sup>3</sup> Bail. I 514, 518 (par. 2, 3), 591, 537, 665, II. 250; Hals. 119, 214, 317, 414, 471, 478 (col. II. par. 4), 484 (col. I par. 3, 4) 644, 632, 636 (col. II par. 2).

<sup>4</sup> See the remarks of Subramania Aiyar, J., in *Chelati Zamindar v. Ranaoora Dhora* (1890) 23 Mad. 318, 323.

<sup>5</sup> In *Farden Seth Sam v. Lukpathy Bajire Lala* (1862) 9 Moo. I. A. 303, 321 Lord Kingsdown, after citing Hulewa, IV. 208, tik. "pawas," said: "By the Muhammadan law such a contract . . . would be one not of *pawa*, but of trust." See also (*Narenb*) *Ustad Ally Khan v. (Muhammad) Mohunder Begum* (1867) 11 Moo. I. A. 517, 548

**SECTION 387.** Islam,' who had a good deal of experience in the administration of law (with whom may be mentioned the translators of the 'Hidaya') have concurred in using the terms trust and trustee in order to render into English the meaning of Muslim writers on law.<sup>1</sup> The question would, however, seem to be of hardly any but academical interest in India, inasmuch as the Indian Trusts Act is made applicable to Muslims.

(ii) *Gift through Agent.*

Possession to agent of donee.

**388.** The donee may authorise an agent to take possession of the subject of the gift on his behalf,<sup>2</sup> and a gift may be validly completed by transferring possession of the subject of gift to any person authorized to receive possession on behalf of the donee.<sup>3</sup>

(d) *Continuance of Possession.*

Continuance of possession unnecessary.

**389.** After a gift has been completed, its validity is not affected by the fact that the donee does not continue to be in possession of the subject of the gift.<sup>4</sup>

*Illustration*

A gift of a house is made by a mother to her daughter, and exclusive possession given of it; the fact that the donor afterwards continues to reside in it, does not necessarily detract from the value of the evidence that there was a complete gift and transfer of possession, nor is inconsistent with it: the circumstance is explained by the relation between the parties.<sup>4</sup>

Donor coming back to the property.

Compare the comment to s. 383, above. This section is based on the following words of Saussure, C. J.: "The circumstances of possession, once given, being subsequently continued, does not appear to be a necessary condition of a 'complete seisin,' or its non-continuance to invalidate the 'hiba.'" Cf. "None of the authorities, even in cases of gift, show that possession must be continuous; indeed it would be absurd to suppose the necessity of the husband's never occupying those premises which he has given to his wife."<sup>5</sup> "After possession

<sup>1</sup> See also the translation from the *Radd-ul-Mukhtar*, IV, 783, in *Jabdanassa v. Nazimul Islam Mulla* (1910) 15 Cal. W. N. 323, 331.

<sup>2</sup> *Fatima 'Alamgiri*, *Hiba*, ch. xi, giving various details, which are unnecessary, or inapplicable in British India. See the Indian Contract Act, s. 90.

<sup>3</sup> Cf. Indian Contract Act, s. 90, *Mohinudin v. Mancheriah* (1882) 6 Bom. 650, 662, II. K-9, from the bottom.

<sup>4</sup> *Amina Bibi v. Khatoon Bibi* (1864) 1 Bom. H. C. B. 157, referring to *Jaffer Khan v. Husein Beebe*, I. S. D. A. Rep. of Bengal, Morley's Dig. "Gifts," pl. 55, p. 298, cf. *Kandah Vettil Bava v. Musalam Vettil Fokrukutti* (1907) 30 Mad. 303.

<sup>5</sup> *Doe, dem. Ramtano Mookerjee v. Bibee Seenut* (1843) Fulton, 152, 154. This case is respectfully doubted in other respects. See comment to s. 410, below.



has once been acquired, it is preserved without an actual detention."<sup>1</sup> SECTION 389. Instances of the donor coming back into a house which forms the subject of gift will be found amongst the cases noted under ss. 396, 401, *q.v.*

"Non-continuance of possession" may, however, (1) in some cases, Revocation of gift. be evidence of a revocation of the gift, where the gift is revocable. For the idea underlying the phrase of the Muslim jurists that a gift is not obligatory is twofold: (a) that it need not be made at all, (b) that even after it has been made the subject of gift it need not ('exceptis excipendis') be allowed to continue in the possession of the donee, as his property, *i.e.*, the gift may be revoked. See ss. 420, *et seq.*, below. (2) In other cases, and especially where creditors are concerned, it may throw doubt on the good faith or the real intention to make a gift. See also comment to s. 346, above.

### (3) Different Modes of Transferring Possession to Donee.

#### (a) As Affected by Character of Property.

##### (1) Possession of Movable Property.

**390.** Where the subject of the gift is movable pro- Possession of movable property, it is not complete unless its subject has been the property. gift actually delivered.<sup>2</sup>

The gift of movable property is styled 'hadia' as distinguished from 'hiba'; see s. 437, below. Compare comment to s. 383, above.

The Indian Contract Act, IX. of 1872, s. 149, provides that delivery Delivery under the Contract Act. to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

The Transfer of Property Act, s. 123, gives, as an alternative for Transfer of Property Act. delivery of movable property, the execution of a registered instrument of transfer, but that section does not apply to Muslims.<sup>3</sup> See s. 384, above.

**391.** Where the subject of the gift consists of money, Book entry, transference of possession of an entry in books of account to the effect that the money has been paid over to the donee, does not in itself operate as a completion of the gift.<sup>4</sup>

But see 'Emnabai v. Hajirabai'<sup>5</sup> noted under s. 404, below, referring to acts of ownership as evidence of possession.

<sup>1</sup> Domat, I. 847, s. 2132. Code, vii. 32.

<sup>2</sup> *Majma-ul-Anhar*, 342, cited and translated in *Ameer Ali*, I. 42. See comment to s. 282a, above.

<sup>3</sup> Transfer of Property Act, s. 120, and cf. Indian Contract Act, ss 90-94, as to delivery of articles sold.

<sup>4</sup> *Sir Jamsetji Jijibhai v. Sonabai* (1845) 2 Bom. H. C. R. 133. See also *Ebrahimibai v. Fulbai* (1902) 26 Bom. 577; and *Manoharshankar Narishwala v. Ardeshtir Narishwala* (1908) 10 Bom. L. R. 1209, 1217, reversed on appeal, (1912) 12 Bom. L. R. 53.

<sup>5</sup> (1888) 13 Bom. 352.

## SECTION 392.

(1) Possession of Immovable Property.

Possession of  
immovable  
property  
transferred by  
vacating.

Lease from  
donee.

**392.** In order to complete a gift, the subject of which consists of immovable property, in the occupation of the donor, he must<sup>1</sup> vacate<sup>2</sup> it, and cease, after the gift, to exercise any rights over its subject,<sup>3</sup> and then must place the donee in such a position that he can take possession if he chooses.<sup>2</sup> The donor may, for completing the gift, take a lease of the property from the donee, paying rent for its occupation.<sup>1</sup>

## Illustration.

D is living in a mansion, and purports to make a gift of it to R, saying, "take possession," or "I have delivered." The gift is not valid. It would be the same if instead of D, his people, or his goods, were in the mansion,<sup>5</sup>—*sed quare*.<sup>6</sup> The inference to be drawn seems to be that the gift of a house in which there are goods of the donor is invalid if the continued occupation of the house with the goods was of right, and not by the licence of the donee.<sup>7</sup>

See comment to s. 383, above.

## Customary conveyance.

The following is a translation from a work on the Shiah law, but is of general applicability:—"It (delivery of possession) is the transfer

<sup>1</sup> The word *must* has been used in s. 392 in contradistinction to *may* in the next following sections. S. 392 represents the net result that has to be brought about. The sections following s. 392 refer to what, in law, amounts to a compliance with the requirements of s. 392. The first sentence of this section contemplates the simplest and most primitive condition of utilizing property—where the donor is directly in occupation of it, and the donee is expected to derive the benefit of it by making an equally direct use of it.

<sup>2</sup> On the meaning of "vacating property" see comment to s. 383, above. Cf. *Zohoorooddeen Sirdar v. Baharoolah Sircar* (1864) W. R. 185; *Amna Bibi v. Khatifa Bibi* (1864) 1 Bom. H. C. R. 157; *Gulam Jafar v. Mastudin* (1890) 5 Bom. 238, 248 (par. 4).

<sup>3</sup> A Keeping any article whatsoever, "even a straw," belonging to the donor, in the subject of gift, technically infringes the rule of completely vacating the property, but this rule is not enforced rigidly, especially where the donee is a near relation of the donor: (*Bibi*) *Sultan Khaver v. Bibi Rukhia* (1905) 25 Bom. 468.

<sup>4</sup> *Rajabai v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (O.C.) 27, 31-33, (per Sargent, J.) No lease was proved; but it was assumed that possession could be given in this manner. In (*Bibi*)

*Sultan Khaver Begum v. (Bibi) Rukhia Sultan* (1905) 25 Bom. 468, 6 Bom. L. R. 983; 7 Bom. L. R. 448, the donor paid to the donee after the gift, Rs. 30 for her board and lodging; *Humera Bibi v. Najimunnissa* (1906) 28 All. 147; *Kandath v. Musaliam* (1907) 30 Mad. 305.

<sup>5</sup> *Bail. I.* 520 (H. 1-4). But see *Bail. I.* 530, H. 2-4, showing that this does not apply to minors. See also Macn., 231, Precedent xxii. on Gifts. *Contra*, (*Shahid*) *Ibrahim v. (Shahid) Sulman* (1884) 9 Bom. 140, 150; (*Bibi*) *Khaver Sultan v. (Bibi) Rukhia* (1905) 29 Bom. 468; 7 Bom. L. R. 443; upholding *Chandavarkar J.* (1904) 6 Bom. L. R. 983; *Mithar Sahib v. Hossain Sahib* (1912) 23 Mad. L. J. 734, (where the authorities are collected). *Danoo Darjee v. Momtazjoodi Bhuz* (1909) 17 Cal. L. J. 85.

<sup>6</sup> In *Mithar Sahib v. Hossain Sahib* (1910) 23 Mad. L. J. 734, 737, (to which *Abdur Rahim J.* was a party) it is said that the statement which is represented by the Illustration to s. 392, and which is itself based on the authority of the Kazi Khan's Fatwa is cited with disapproval in some later collections of Fatwas or opinions of jurists and commentaries. See also the comment and the cases cited in the last footnote.

<sup>7</sup> *Mithar Sahib v. Hossain Sahib* (1910) 23 Mad. L. J. 734, 737.

of the customary ('urfiya')<sup>1</sup> control over the thing, from the transferor SECTION 392. to the transferee,—equally whether the transferee obtains the legal control permanently (by a contract like sale or the like), or not (as in the case of 'waqf' and gift<sup>2</sup> and the like.) There is no doubt as to its (i.e., possession) being transferred by vacating, with reference to Vacating. immovables, in the sense of removing all obstacles in the way of the transferee, and by the transferor raising his hand,<sup>3</sup> and giving him permission—this is necessary in order to place him (the transferee) in the same position as the transferor.

"Hence it is not necessary for the transferee to get to the subject Taking Possession. of the transfer either by himself or through an agent, or that he should use it. Even the lapse of time is not necessary, although the object may be at a distance from the transferee."<sup>4</sup>

"'Takhliat' or vacating (a property) means giving up all dealings 'Takhliat' or vacating ex- with it, and leaving it entirely at the disposal of the purchaser or the donee, without (leaving) any obstacle in the way of his using it . . . . Know that the Shahid Sani said that 'takhliat' (vacating) is the removal of an obstacle, if there is any, in the way of the purchaser entering into possession, coupled with permission to take possession of it; and the author of the 'Kifaya' criticises this, stating that in the case of 'hiba' and 'waqf' and the like, this (necessity for permission) may hold, but in the case of a sale it is not practicable, inasmuch as the object may go out of possession without his intending it; but in my opinion Shahid Sani means by permission, intimation that no obstacle exists in the way of his occupying it."<sup>5</sup>

**393.** Where the subject of the gift consists of immov- Attornment by tenants able property occupied by tenants, the donor may<sup>6</sup> transfer transferees possession.

<sup>1</sup> From 'urf' custom, see introductory chapter; cf., "It never was imagined . . . that delivery of a mere symbol in name of the thing would be sufficient to take it out of that statute: yet notwithstanding, delivery of the key of bulky goods . . . has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing: and, therefore, the key is not a symbol, and would not do," per Lord Hardwicke, *Ward v. Turner* (1751) 2 Vss. Sen. 431, 442.

<sup>2</sup> Gift being revocable, the "legal control" arising from gift, is distinguished from a transfer permanently conferring the legal control.

<sup>3</sup> "Raising the hand" is apparently analogous to the English "hands off."

<sup>4</sup> *Jauhar-ul-Kalam - Kitabul-Tijarat*, 136.

<sup>5</sup> *Jame-us-Shariat*, 128, 129.

<sup>6</sup> Note that the expression used is *may* be transferred. The mode in which the transfer would be most completely transferred is referred to in the section. If the donor has endeavoured honestly to transfer possession in another way it may be equally efficacious though perhaps more difficult of proof. In every case, the question will (it is submitted) depend on the result of the act or acts by which possession is purported to be transferred—whether or not the result has been that the donee has derived the benefit of the subject of gift (i.e. its produce, or income) after the gift.

**SECTION 393.** possession by requiring the tenants to attorn to the donee.<sup>1</sup>

A tenant in common may be considered as holding exclusive possession of a house which is owned by him in common with other co-tenants, where there is a lease from the other co-tenants to him.<sup>2</sup>

Receipt of  
appropriate  
portion of rent by

**393A.** Where the subject of the gift consists of shares in Zamindari villages and parcels of land, in the case of which physical possession is impossible, receipt of the appropriate portion of the rent or income issuing out of, or derived from, them, is the only form that the necessary transfer of possession can assume.<sup>3</sup>

Notice to  
mortgagee.

**393B.** *Semble*, where the subject of the gift consists of immovable property in the possession of a mortgagee, the donor may<sup>4</sup> transfer possession of the equity of redemption by giving to the mortgagee notice of his having conveyed to the donee the property subject to the mortgage, and by permitting the donee to exercise all acts of ownership that may be exercised by the owner of the equity of redemption.<sup>5</sup>

Where subject  
of gift is  
incorporeal

**394.** Where the subject of the gift is incorporeal (other than an actionable claim<sup>6</sup>) it may<sup>4</sup> be validly transferred by the donor transferring to the donee all the possession that the nature of the property forming the subject of gift permits, and divesting himself of all his rights in the said property.<sup>7</sup>

Transferring and  
endorsing  
Government  
promissory  
notes.

So where a gift is made of Government promissory notes, it can be

<sup>1</sup> (*Shaik*) *Ibrahim v. (Shaik) Sulaiman* (1884) 9 Bom. 146, 150 (par. 3) *Sharifu Bibi v. Gulam Mahomed Dastagir Khan* (1892) 16 Mad. 43, 48; *Amina Bibi v. Khatifa Bibi* (1864) 1 Bom. H. C. R. 157, 162 (par. 2); *Mullik v. Muleka* (1884) 10 Cal. 1112, 1124; cf. *Khafooroonissa v. Rooshan Jehan* (1876) 2 Cal. 184, 197 (H. 17-18) (P.C.); *Sajjad Ahmad Khan v. Kadri Begum* (1895) 13 All. 1; *Mathar Sahib v. Hossain Sahib* (1910) 23 Mad. L. J. 734, 737.

<sup>2</sup> *Leigh v. Dickson* (1884) 15 Q. B. D. 60, 66.

<sup>3</sup> This is taken almost verbatim from *Sadik Hussain Khan v. Hashim Ali Khan* (1916) 38 All. 627, 646 (P.C.) per Lord Atkinson.

<sup>4</sup> See the footnotes to the word "must" in s. 392, above, and "may" in s. 393, above.

<sup>5</sup> See s. 370, above.

<sup>6</sup> As to which see the Transfer of Property Act, ss. 130, & seq.

<sup>7</sup> See comment. Cf. *Nizamuddin v. (Mussumat) Zabeeda Bibi* (1874) 6 N. W. 338, 341; *Rukim Bekhal v. Muhammad Hasan* (1888) 11 All. 1, 9 (par. 2), 10 (par. 2); *Shahzadee Hanara v. Khair Hossein Ali Khan* (1869) 12 W. R. 498; *Mathar Sahib v. Hossain Sahib* (1910) 23 Mad. L. J. 734.

perfected by transferring and endorsing the notes to the donee; <sup>1</sup> a gift SECTION 394. of zamindari rights, held directly under Government, which are in the occupation of tenants, may be perfected by requesting the tenants to pay the rents to the donee, accompanied with the mutation of names in the books of the Collector. <sup>2</sup> Similarly, if the donor dismisses her servants employed on the property forming the subject of gift, and after the date of the gift, the 'tahsildars' are employed and paid for by the donees, and they collect rent for the donees, the gift is perfected. <sup>3</sup> On the other hand, where money is deposited in a bank, and the deposit receipt is marked "not transferable," mere delivery of the receipt does not operate as a gift; <sup>4</sup> nor does a book entry. See s. 390, above.

(b) *Substitutes for Physical Possession.*

(i) *Symbolical or Constructive Possession.*

**395.** The donor may complete the gift by transferring the symbolical <sup>5</sup> or constructive possession of the subject of the gift to the donee. <sup>6</sup>

"The Muhammadan law requires that the donor should be in actual, or, at least, constructive, possession, and that he should give actual or at least constructive possession of this property to the donee." <sup>7</sup> This was an 'obiter dictum,' as it was held that even constructive possession was not given, and that the gift was revoked.

Similarly, it was said by Sausse, C.J., that "handing over symbolical possession of a house or property by keys, etc.," <sup>8</sup> is a sufficient transfer of possession, though this was also 'obiter,' as the donor was the husband

<sup>1</sup> *(Naseeb) Unajad Ally Khan v. (Musummat) Mohummed Begum* (1867) 11 Moo. I. A. 16; 10 W. R. (P.C.) 25; *Nahibunnessa v. Hahza Bibi* (1887) 9 All. 213, (pension under Act XXIII. of 1871).

<sup>2</sup> *Sajjad Ahmad Khan v. Kadri Begum* (1895) 18 All. 1; cf. *Ameer Begum v. Nizamuddin* (1896) 21 All. 165.

<sup>3</sup> *Mullick Abdool Gaffoor v. Mutka* (1884) 10 Cal. 1112. The subject of the gift consisted of zamindaris and shares of zamindaris, let out to tenants and ryots; a good many lakheraj properties, also let out to tenants; several malikanas rights of some value; and a variety of house property in Patna and elsewhere consisting of houses, sheds, roads, gardens, etc.

<sup>4</sup> *Aga Mahomed Jaffer Bindanum v. Koolsoom Bibee* (1897) 25 Cal. 9; 24 I. A. 196.

<sup>5</sup> The symbolical method of obtaining possession by sticking up a bamboo in some promi-

nent place, accompanied by beat of drum or some sort of proclamation is referred to in connection with the Transfer of Property Act, s. 54, by Prinsep, J., in a dissenting judgment, *Sarna, Chander Chuckerbutty v. Dattaram Roy* (1882) 8 Cal. 597, 605.

<sup>6</sup> *Ismael v. Ramji Sambhaji* (1899) 23 Bom. 682; *Rahim Jan Bibi v. Imam Jan* (1912) 17 Cal. L. J. 173.

<sup>7</sup> *Ismael v. Ramji* (1899) 23 Bom. 682 citing *Mohannuddin v. Mancherah* (1882) 9 Bom. 650 (F.B.); *(Shah) Ibrahim v. (Shah) Suleman* (1884) 9 Bom. 146; *Meherali v. Tajudin* (1888) 13 Bom. 159.

<sup>8</sup> *Amina Bibi v. Khatija Bibi* (1884) 1 Bom. H. C. R. 157, 160, 161 (par. 3, 4). Cf. comment to s. 25 and *Ameer Ali*, I. 60: "according to the Shaikh and the authors of *Sarair, Husnia*, etc. seisin may be either actual or constructive."

SECTION 395. and he actually went out of the house before witnesses. See also *Moosabhai v. Yacobhai*.<sup>1</sup>

It is necessary to point out that constructive or symbolical transfer of possession can in reality be only evidence of a real transfer of possession. For transfer of possession means (to adapt the language of the author of the '*Jawahir-ul-Kalam*') transfer of the "customary control" of the subject of gift. If, for instance, the donor handed over the key of the gate of an unenclosed pasture-land to the donee, but continued to take his cattle on to the land and exercised the same customary control or the acts of ownerships usually exercised over it as before, the handing over of the key would hardly be symbolical of any transfer of possession, but the case might be quite different if the land were vacant building site completely surrounded by a boundary wall and there were no means of entering it except through one gate; and no object in entering the land except for purposes of building upon it there being no control customarily exercised over it except holding the key. The real object of symbolical or constructive possession is to indicate a transfer when no other direct physical act can indicate it. Where there is any immediate benefit to be derived from possession the reaping of that benefit is taking possession; and though symbols may be useful to fix the exact point of time, they cannot take the place of actually deriving the benefit from the subject of the gift; nor of exercising acts of ownership over it.

Intention to transfer possession unequivocally manifested.

396. Where the intention of the donor to transfer possession of the subject of the gift has been unequivocally manifested, effect will, as far as possible, be given to his purpose.<sup>2</sup> In particular, where the subject of the gift consists of a house, part of which was, prior to the gift, occupied by the donee, and part by the donor,<sup>3</sup> and the part occupied by the donee is in immediate connection with that which was in the occupation of the donor,—the unequivocal manifestation by the donor, of an intention<sup>2a</sup> to transfer complete and exclusive possession of the whole house,<sup>4</sup> may put the donor out of possession, and the donee into possession, of the whole,—notwithstanding that

<sup>1</sup> (1904) 29 Bom. 267; 7 Bom. L. R. 43.

<sup>2</sup> Cf. Bell. II. 204, n. 8.

<sup>3</sup> Cf. s. 401; and s. 389, *ibid.*

<sup>4</sup> "An appropriate intention" are the words

of West, J., in *Ibrahim v. Suleman* (1884) 9 Bom. 146, which presumably means an intention appropriate to the transaction, i. e., the intention to transfer complete and exclusive possession.

there is (on the part of the donor) no actual physical departure, and (on the part of the donee) no formal entry into exclusive possession of the whole.<sup>1</sup> One of the questions in such a case is, whether the residence of the donor along with the donee, is sufficient to detract from the value of the evidence that there was an intention to complete the gift by transfer of possession: the subsequent residence of the donor with the donee, may be explained by their relation and may not be inconsistent with the view that possession of the whole of the property actually passed.<sup>2</sup>

In the leading case<sup>3</sup> on the point involved in s. 396, West, J., observed:—"As to the delivery of the house, the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed, puts him into possession.<sup>4</sup> He occupies certain part, and this occupation becoming actual possession, by the will of the parties, extends to the whole which is in immediate connection with such part, where the possession is rightfully though not where it is wrongfully taken—'ex parte Fletcher.'<sup>5</sup> An appropriate intention, where two are present on the same premises, may put the one out of, as well as the other into, possession, without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner whose intention to transfer has been unequivocally manifested."<sup>6</sup> With reference to this judgment Jenkins, C. J., said:<sup>7</sup> "This decision has now stood in the authorized reports for over 20 years, and it has never, as far as I can find, been questioned. On the contrary, it has since been referred to as containing true exposition of the law in '*Ismal v. Ramji Sambhaji*,'<sup>8</sup> to which Tyabji, J., was a party, while in '*Rahim Bakhsh v. Muhammad Hasan*,'<sup>9</sup> Mahmood, J., in delivering the judgment of the Court, expressly distinguishes the case then before him from so much of the decision in '*Shaikh Ibrahim v. Shaikh Suleman*'<sup>10</sup> as related to

When donor and donee both on the premises.

*Ibrahim v. Suleman.*

<sup>1</sup> (*Shaikh Ibrahim v. (Shaikh) Suleman* (1884) 9 Bom. 146, 150, 151; followed in (*Bibi Khacer Sultan v. Bibi Rukhsia Sultan* (1905) 29 Bom. 468; *Humera Bibi v. Najimunnissa Bibi* (1905) 28 All. 147; cf. *Rahim Bakhsh v. Muhammad Hasan* (1888) 11 All. 1, 12; *Mathar Sahab v. Hossain Sahab* (1912) 23 Mad. L. J. 734; *Danoo Darjee v. Momabajoddh Bhujia* (1909) 17 Cal. J. 85; *Alla Pichai Tharaganar v. Mahomed Moideen Tharaganar* (1914) 15 Mad. L. J. 216, 223; Ind. Cas. 620; *Musammam Munifa Bibi v. Futeh Ali*

(1914) 23 Ind. Cas. 453, 17 O. C. 60.

<sup>2</sup> *Kandath Vettil Bara v. Musaham Vetti Palruksuti* (1907) 30 Mad. 305; *Alla Pichai Tharagan alias Kadur Mira Sahab v. Mahomed Moideen Tharaganar* (1914) 15 Mad. L. T. 216.

<sup>3</sup> *Shaikh Ibrahim v. Shaikh Suleman* (1884) 9 Bom. 146.

<sup>4</sup> Domst., Civil Law, I., 863.

<sup>5</sup> L. R., 5 Ch. D., 809.

<sup>6</sup> (1899) 23 Bom. 682.

<sup>7</sup> (1888) 11 All. 1, 12.

**SECTION 396.** the house, without in any way suggesting that the law as laid down on this point was erroneous. The decision is also cited by Mutusami Ayyar, J., in 'Sharifa Bibi v. Gulam Mahomed Dastagir Khan.'<sup>1</sup> Here then, if anywhere, it is best 'stare decisis.'''<sup>2</sup>

According to the 'Shariya'-ul-Islam,<sup>3</sup> acknowledgment by the donor that he has transferred possession (though it has not really been transferred) may take the place of actual transfer of possession: s. 396, above, practically represents the same rule of law.<sup>3</sup> Kembball, J., has recorded a passage from the 'Tohfa' page 59 of volume IV.: "The declaration of the donor that he has given possession is sufficient to denote real possession."<sup>4</sup>

On the other hand, in interpreting the Transfer of Property Act, s. 54, Mookerjee and Holmewood, JJ., said: "The essence of a transfer by delivery of property is that possession is changed;"<sup>5</sup> so that there cannot be said to be any delivery under the Transfer of Property Act, when the vendee is already in possession. The possession that is required in Muhammadan law must therefore be taken to be a different notion, as the Muhammadan law is satisfied if the donee is already in possession before the gift is made.

### (3) Position of Parties as Affecting Transfer of Possession.

(a) *Special Rules applicable where Donees are not 'sui juris.'*

(i) *Persons who must take possession on behalf of Minor or Lunatic.*

Guardian  
taking possession  
for minor.

**397.** Subject to ss. 398-405, below, where the donee of a gift is a minor or lunatic, and the donor is neither the donee's father nor grandfather nor any other person entitled to be the guardian of the property of the donee, possession of the subject of gift must be taken on behalf of the donee by the guardian of his property.<sup>6</sup>

Illustrations.

(1) *W*, a minor, is the wife of *H*. A gift is made to *W*. Possession may be taken of the gift either by *W* or *H*<sup>7</sup> provided that *W* is old

<sup>1</sup> (1892) 16. Mad. 43.

<sup>2</sup> The case has again been followed in *Mathar Sahib v. Hossein Sahib* (1910) 23 Mad. 1. J. 734 (Abdur Rahim & Ayling, JJ.).

<sup>3</sup> Bail. II. 204 (par. 2); cf. s. to s. 403, below.

<sup>4</sup> *Mohinuddin v. Manchershah* (1882) 6 Bom. 650, 656.

<sup>5</sup> *Nibendra Pada v. Secretary of State* (1907) 34 Cal. 207.

<sup>6</sup> Ifed. 484. (col. ii, par. 2); Bail. I. 503 (H.

6-7); II. 204; Marn., 213; and see s. 398, below (referring to possession of *de facto* guardian); *Da'ayem-ul-Falem* (Notes); cf. *Mohinuddin v. Manchershah* (1882) 6 Bom. 650, 660 (par. 1), 662, (par. 2, last 2 sentences); *Jabedanesa v. Nagrba Islam* (1910) 15 Cal. W. N. 328.

<sup>7</sup> Bail. I. 530-531. The reason being that *H* is entitled to have custody of his wife after she is old enough to permit consummation; see s. 24 (1), above; Ifed. 484 (col. ii, par. 6).



enough to permit consummation of marriage; but if *W* is not old enough, SECTION 397. possession can only be validly taken for her by her husband, if she is *Illustrations*. in his custody; otherwise her guardian can alone do so.<sup>1</sup>

(2) *D* makes a gift to *R*, an infant, and gives possession to *GB*, the brother of *R*'s grandfather. The seisin of *GB* "will not be legally sufficient, unless *R* was living under the protection of *GB*."<sup>2</sup>

(3) *D* makes a gift to *R*, a boy whom she has in her custody, and has been treating as her adopted son. *D* continues to be in possession of the subject of gift: *held*, that the gift was valid, though possession was not transferred to the donee, or his 'de jure' guardian, and notwithstanding that the father of *R* was living,—on the ground that the possession of *D* was the possession of *R*.<sup>3</sup>

#### GIFTS TO MINORS OR LUNATICS.

The present section contains the general rule, as it would be in its strictness, were it not modified by ss. 398-405. below.

The sixth chapter of the Book on gifts in the 'Fatawa 'Alamgiri' is devoted to the special rules relating to gifts to minors. The translation of this chapter is numbered V. by Baillie. Unless the law as to the persons who are entitled to be guardians of the property of a minor or lunatic, is borne in mind, Baillie's translation is not quite easy to follow.

The chapter commences with a passage which is represented by s. 361 (2), above. Then follow the three main propositions given below and numbered I., II., III., respectively:—

I. A gift by a *father* to his minor child is complete by the contract. *Gift by father*. (Ordinarily the contract would mean the declaration and acceptance, but in this connection presumably it means the mere declaration).

(a) The above-mentioned proposition is subject to the property of which gift is made, being,  
(i) in the possession of the father, or  
(ii) in deposit with another.

(b) The gift, however, from the father to his minor son is not valid (by the mere declaration) if the subject of gift be in the hands of,—  
(i) an usurper,  
(ii) a pledgee, or  
(iii) a tenant who has hired it.

<sup>1</sup> See p. 446, n. 2.

<sup>2</sup> Macn. 213.

<sup>3</sup> (*Mussummaul*) *Banoo Beebee v. Fakhroo-deen Hoosin* (1816) 2 S. D. A. Cal. 180. *Amcer*

All. I. 75, says that though the Sudder Court "proceeded further" (than the strict law) the decision is correct in principle.

## SECTION 397.

II. Gift by mother

II. "In like manner as to gifts by a mother, when the thing given is in her own hands and the father is dead, without having appointed an executor."<sup>1</sup> [This proposition may be expanded as follows:—

"Where the father has died without having appointed an executor, (and the mother is consequently in charge of the minor's property, or the 'de facto' guardian of his property) a gift by the mother to her minor son is completed by the mere declaration, provided that the subject of gift is in the hands of the mother or in deposit with another; but not if it is in the possession of a usurper, or a pledgee or a tenant who has hired it."]

III. Gift by other than parents having custody of the minor.

III. "And so also as to gifts by every other person who has care of the child" [This proposition repeats as to a person other than the father and mother that which has already been said as to the parents.]

After these three propositions, the text proceeds in terms of which the following is a translation,—the examples and illustrations being given in footnotes for ensuring greater clearness:—

(Sunni law.)  
Possession to be taken by:—

1. Guardian (of property) whether minor in his custody or not.
2. Guardian of person (not being guardian of property) having custody of minor.
3. Stranger having custody when there is no relation.

Seems, if father present no one else can take possession.

"Where the donee is a minor, or of unsound mind, the authority to take possession on his behalf is in his guardian ('wali').<sup>2</sup> The rule is the same whether or not the minor [or lunatic] be living in the family of these persons. When the [guardian<sup>3</sup>] is absent at a distance without any communication, possession may be taken for a minor by any person who follows him next in guardianship. And with regard to persons other than the [guardian<sup>4</sup>], such as the brother,<sup>5</sup> paternal uncle,<sup>5</sup> mother,<sup>5</sup> and other relatives,<sup>5</sup> they have all<sup>6</sup> the authority to take possession of a gift for a minor, if he is in their family.<sup>7</sup> Similarly, when the minor is in the family<sup>7</sup> of the executors of the said persons, the executors may take possession.<sup>6</sup> And so when a stranger maintains an orphan,<sup>8</sup> who has no other (relation) the stranger also may effectually take possession of the gift.<sup>6</sup> In each of these cases it makes no difference whether or not the minor has sufficient intelligence to understand what taking possession implies. But in all cases it is assumed that the

<sup>1</sup> The significance of the restriction that the father has died without having appointed an executor, is that, if an executor has been appointed, *he* is the guardian of the property of the minor and *he* must take possession. Thus the rule has to provide for two points: (1) that the mother has such control over the property that she can make a gift of it, (2) that the mother is the person reasonably expected to be in charge of property transferred to the minor donee.

<sup>2</sup> I.e., "the guardian of the property," as is shown by the words immediately following, "who is first the father, then the father's executor, then his grandfather, then the executor of the executor, and then the Qazi, and then the

person appointed by the Qazi." See s. 257, above.

<sup>3</sup> In the original "the father or his executor, and the grandfather or his executor."

<sup>4</sup> In the original "the father or grandfather" —see the note to the word *wali*, above.

<sup>5</sup> I.e., who are guardians of the person but not of property.

<sup>6</sup> Each of these is said to be a rule of *imlāḥ*, "liberal construction," on which see index.

<sup>7</sup> *ʿaḥl*=family; *ʿaḥl* means custody and instead of saying "if he is in their family," the same might be better expressed by the words "if he is living in their custody."

<sup>8</sup> *Yatim* in the original.

father<sup>1</sup> is either dead, or if alive, is absent at such a distance that he cannot be communicated with. When, however, the father is living and present, and the minor is in the custody of the persons referred to,<sup>2</sup> the question arises whether it [*viz.*, possession taken by them] would be valid. No express mention has been made of this in the books, except that it is said that in the case where a stranger maintains an orphan who has no one else to maintain him, it would be valid for him to take possession of the gift on his behalf; and this provision implies that the taking possession by these persons would not be valid when the father is present—it being said in the case of the paternal grandfather also that he cannot take possession on behalf of the minor, in case the father is alive. There is no express provision dealing with the case where the minor is in his custody, and [*i.e.*, as distinguished from the case] where he is not. But from what is expressly stated, it is implied that it would not be valid [even where he is in the custody of the grandfather]; so it is in the ‘Zakhira.’ In the case where the minor is in the custody of his paternal uncle and in his family,<sup>3</sup> and a gift has been made to the minor, and the executor of the father is present, and the uncle has taken possession of the gift, it is said that his possession is not valid, and if the brother or the paternal uncle or the mother takes possession of it, while the minor is in the custody of a stranger, it would not be valid. But if the stranger in whose custody the minor is, takes possession of it, it would be valid. So it is in the ‘Fatawa Qazi Khan.’ ”<sup>4</sup>

apparently  
not even  
grandfather.

Father's  
executor  
prevents any  
one else taking  
possession  
except  
grandfather,  
unless that  
person has  
custody.

Turning to the Shiah law, it will be found, that in accordance with it, possession on behalf of a person who is not ‘sui juris’ must be taken by the father, or the grandfather, or “the legal guardian, or the judge.” It will be noticed that only those persons are referred to who have the right to be, or to appoint, guardians of the property.

(Shiah law.)  
Guardians of  
property must  
take possession.

**398.** Where the person legally entitled to act as the guardian<sup>5</sup> of the donee's property is absent,<sup>6</sup> possession may be taken on behalf of the said donee,—under Hanafi law<sup>7</sup> by any person who has custody of the donee; under Shiah law, as expounded in the ‘Sharaya-ul-Islam,’ possession must be “taken by the legal guardian, or the judge.”<sup>7</sup>

Transfers of  
possession to  
person who  
has custody,  
though not  
legally  
guardian of  
property.

<sup>1</sup> This must refer not only to the father but also to the grandfather, and the other persons referred to in the footnote to the word *wali* in the comment above.

<sup>2</sup> *I.e.*, not the father.

<sup>3</sup> See *n.* to the word *family* above.

<sup>4</sup> *Fatawa 'Adamiyati*, III. 793 (Naval Kishore).

<sup>5</sup> The absence of the father is insisted upon

quite definitely: Ball. I. 530 (*II.* 26-32); and the same would apply in the case of all legal guardians, as appears from the illustration.

<sup>6</sup> Absence “at a distance of 3 stages,” is said to be meant: Macn., 206-207 (case 9).

<sup>7</sup> Ball. I. 530-351; II. 204. See comment to *s.* 398A, below, which in the first edition formed part of *s.* 398.

## SECTION 398A.

**398A.** Where a Mussulman minor or lunatic is in the custody of some person who is not his legal guardian, *semble*, the said person may be presumed to be the agent of the legal guardian, impliedly authorised under s. 388, above, to take possession of gifts on behalf of the minor, whether or not the said guardian is present.<sup>1</sup>

Implied  
authority of  
guardian to  
take possession.

There is express mention in the 'Fatawa 'Alamgiri'<sup>2</sup> and 'Hidaya' of possession of a gift being taken, on behalf of a minor, by a person who is the guardian, not of the minor's property, but of his person; and, as an extension of this rule, anyone who has the actual care and custody of the person of a minor, is authorised to take possession of the subject of gift on behalf of his 'de facto' ward. The transfer of possession to such a person (who may be termed the 'de facto' guardian) is, however, said to be valid only in case the father is absent. But, it would appear, that where the father (or other legal guardian) of a minor or lunatic is present, and allows the ward to be in the custody of another, such person would be taken to be impliedly authorised as the agent of the legal guardian to take possession of gifts. Such an implied authority is expressly referred to in the 'Hidaya': "It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she have been sent from her father's house to his; because she is held by implication to have resigned the management of her concerns to the husband." The next two sentences, it is true, restrict the case to the husband alone, and do not place even the mother in the same category.<sup>3</sup>

Quære,  
whether  
custody implies  
(or includes)  
such authority.

So again, in Shiah law only the father and grandfather and their executors can be guardians whether of property or of the person, and the law is stated in much stricter terms by the Shiah lawyers.<sup>4</sup>

In the converse case where the minor's property is dealt with,

<sup>1</sup> See *ibid.* (3) to s. 397 above. It is submitted that the fact that the legal guardian permits another person to have the custody of the ward would justify the presumption. See *Marn*, 206-207 (case 9), where mother held entitled to take possession in absence of father—the gift being by herself.

<sup>2</sup> See comment to s. 397, above.

<sup>3</sup> Cf. also the rule about absence at a distance.

<sup>4</sup> Syed Ameer Ali says, however: "When a gift is made to a minor, according to Hanafī law, the possession of any person in whose protection the infant is living is sufficient. Among the Shiāhs, there are two divergent views. According to the Mohakkik, possession should be taken on behalf of a minor by a person legally authorised to do so, or by the judge. According to the

Shāikh and the 'Usulī jurists the possession of any person who is a guardian 'de facto' is sufficient. But even according to the 'Sharāya,' when possession has been obtained, and held on behalf of a minor, by a person other than the father or grandfather, (or their executors) who are the guardians 'de jure,' the Court will not allow the gifts to a minor to be invalidated." *Mahommedan Law*, I., 114. No authority is cited, but it is said in a footnote that "the point was decided in accordance with this rule by the Calcutta High Court;" no particulars of the decision are given. In (*Musst.*) *Banoo Bibi v. Fakhruddin Hasan*, (1816) 2 S. D. A. 180 a decision to this effect was given: see also s. 400A, below.

the law is no doubt much more stringent, and none but the authorized SECTION 398A. guardian can act on his behalf.<sup>1</sup> So that the guardian has no power even to make an 'iwaz' out of the minor's property, though that has the result of making the primary 'hiba' irrevocable.<sup>2</sup>

399. Where a minor or person of unsound mind has sufficient intelligence to take possession of the subject of gift, transference of possession to him will complete the gift.<sup>3</sup>

(h) *Transfer of Possession when Unnecessary.*

400. Where the father or grandfather [or any other person entitled to be the guardian of the property<sup>4</sup>] of a minor or person of unsound mind having a real and bonâ fide intention to make a gift,<sup>5</sup> makes a declaration of gift in favour of the said minor or person of unsound mind, and the subject of the said gift is (at the time of the declaration) in the possession of the said father or grandfather [or other guardian] or of some person on his behalf, the gift is complete without any transfer of the possession of the subject of the gift: the declaration of gift having in law the effect of transforming the possession of the donor on his own behalf into possession on behalf of the donee, as the guardian of the property of the donee.<sup>6</sup>

As their Lordships of the Privy Council said in 'Amceroonissa v. Abdoonissa,'<sup>7</sup> "Where there is on the part of the father or other guardian a real and bonâ fide intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor." But this, it will be observed, assumes that there is a bonâ fide intention to make an operative

<sup>1</sup> See ss. 269, 270, above.

<sup>2</sup> Ball. 535 (II. 4-90 par. 3). See p. 450, n. 4.

<sup>3</sup> Hed. 484 (col. II. par. 5); Bad. I. 531 (II. 7-11); Macn. 213.

<sup>4</sup> See comment.

<sup>5</sup> *Amceroonissa v. Abdoonissa* (1874-5) 2 I. A. 87, 104 (par. 4), which is cited in the comment to this section; cf. *Gulam Muhammad v. Muhammad Amin* (1882) 17 Fuzj. Rec. 251 (No. 80).

<sup>6</sup> Hed. 484 (col. I. par. 4); Ball. I. 145 (par. 2), 529, 530-531; II. 204; Macn., 212, R. 2; *Amceroonissa v. Abdoonissa* (1875) 2 I. A. 87; 15 Beng. L. R. 87, 78; 23 W. R. 208; *Moulvi Wajed Ali v. Moulvi Abdool Ali* [1864] W. R.

127; *Hussain v. (Shakk) Mirza* (1889) 13 Mad. 46, *Giyasooddeen Hydes v. Faisala Begum* (1866) 1 Agra 238, *Fatima Bibee v. Ahmad Baksh* (1903) 31 Cal. 319; affirmed (1907) 35 Cal. 271, (p.c.); *Narob Amruddaulah Muhammad Kakya Hussain Khan Bahadur v. Nabra Srinivas Charlu* (1871) 6 Mad. H. C. R. 356, 359; *Jahednessa v. Bibi v. Nazbal Islam Molla* (1910) 15 Cal. W. N. 328. See also (*Narob*) *Unjodally Khan v. (Mussamat) Muhammad Begum* (1867) 11 Moo. I. A. 517, referred to in *Amceroonissa v. Abdoonissa* (1874-5) 2 I. A. 87, at p. 98.

<sup>7</sup> (1875) 2 I. A. 87; 15 Beng. L. R., 67; 2 3, W. R. 208.

**SECTION 400.** transfer by way of gift, and to adopt the remarks of Sir Barnes Peacock in the course of the arguments in the same case: "The mode in which the father dealt with the profits would be important as regards the 'bonâ fides' and completeness of the gift as throwing light upon the intention."<sup>1</sup>

Mode of dealing with profits.

Possession of guardian is possession of ward.

This section is the same in principle<sup>2</sup> as s. 388, above, "because seizin by the guardian is seizin on his (the minor's) part; hence, at the time of the declaration, the minor may be taken to be already in possession of the subject of the gift, which consequently need not be retransferred to him formally." The reasoning, of course, does not apply when the son is not a minor,<sup>3</sup> or where the father purports to make a gift to his son, and there is no real change in the nature of the enjoyment.<sup>4</sup> See also ss. 404-405, below.

*Seemingly*, the rule applies to all guardians, and not restricted to father or grandfather.

The books generally mention the rule in such a form as if it were restricted to the case where the father or grandfather were the donor: but, on principle,<sup>5</sup> it must extend to all persons who are the guardians of the ward's property. Then, again, "Gifts by a mother, when (the thing given is in her own hands, and) the father is dead, without appointing an executor," are valid "in like manner." The only inference from the restriction is that where the father has appointed an executor, the executor being the guardian of the property,<sup>6</sup> the mother has no authority to take possession of the subject of gift. And this supports what on general principles, the rule might be expected to be.

Shiah law

The Shiah law is stated as follows: "If any other than the father or grandfather of the child should make him a gift, the donor's possession would not be sufficient, whether he have power over [*i.e.*, custody of] the child or not, and the legal guardian must obtain power over the gift in order to complete the right of the child."<sup>7</sup> But the general rule that possession may be taken by an agent on behalf of the donee must apply equally to the guardian;<sup>8</sup> and where the person legally entitled to be the guardian of a minor allows his rights to be exercised by another, would he not be considered to have authorised that other to take possession of gifts made to the ward? See s. 398A, above.

It is stated in the 'Fatawa 'Alamgiri,' that "If the father makes a gift of a house to his minor child, and has not defined the boundaries and rights appertaining to it, and if the house is, at the time of the gift,

<sup>1</sup> L. R. 2 L. A. 87, 98.

<sup>2</sup> The principle is explained in *Rahman v. Mohamed Fattun* (1914) 15 Mad L. T. 315.

<sup>3</sup> Ind. Cas. 651; see also the cases cited in p. 458, n. 1, below.

<sup>4</sup> As seems to have been the case in *Munoo Bibee v. Jehandur Khan* (1866) 1 Agra 250. See also s. 404, below, and comment thereto.

<sup>5</sup> *Munoo Bibee v. Jehandur Khan* (1866) 1

Agra 250. *Khadar Hussain Sahib v. Hussain Begum Sahiba* (1869) 5 Mad H. C. R. 114, 119.

<sup>6</sup> See ss. 385, 388, 397, above.

<sup>7</sup> See ss. 257-259, above.

<sup>8</sup> Bail II 201 (para. 5, H. 24-28), (*i.e.* the possession on behalf of *waqf* property. Bail. II 218 ("fourth," last 6 lines).

<sup>9</sup> See s. 398, above.

entrusted<sup>1</sup> to some one, and the person to whom it is entrusted is living SECTION 400.  
in the house, then the minor will become the owner of the house by the contract of gift; and in this regard 'sadaqa' is also similar to 'hiba.'<sup>2</sup>

In an earlier chapter<sup>3</sup> of the same work it is said that the gift of a father to his infant child "is completed by the contract, and it makes no difference whether the subject of the gift be in his own hands or in deposit with another; but that if it be in the hands of a usurper (i.e. when the father cannot exercise any control over it at all), or of a plodgee (see s. 370) or of a tenant (see s. 393) the gift is not lawful (viz. by the mere declaration),—for want of possession."<sup>4</sup>

**400A.** It has been held<sup>5</sup> that the rule contained in s. 'De facto' 400, above,<sup>6</sup> is applicable also to cases where a declaration guardian's  
gift to minor. of gift in favour of a minor donee is made by a person who is not legally entitled to be the guardian of the minor's property; but who, as a matter of fact, has been acting as such guardian, and who intimates that the gift is made, and possession of the subject of gift is continued to be held by himself on behalf of the minor in that capacity. In such cases the Courts, it is submitted, will be even more careful<sup>6</sup> than in cases falling under s. 400 to see that the declaration of gift is made in good faith and intended to have effect; and in particular that it is not intended to defraud creditors.<sup>7</sup>

<sup>1</sup> In the original *awli'at* = "a deposit, trust, whatever is committed to another's charge." (Richardson's Dictionary).

<sup>2</sup> *Fatawa 'Alamgiri, Hiba*, ch. XI, last sentence, citing the *Jawahir Akhlaki*, cf. Hed. 484 (vol. I. par. 4).

<sup>3</sup> Bail. I. 529; (par. 2), ch. VI. of original. (Cf. *Rohun Baksh v. Muhammad Hasan* [1888] 11 All. 1, following Macn., 201 (case 6); *Chandhri Mehra Hasan v. Muhammad Hasan* (1905) 28 All. 439, 33 I. A. 68, 75.

<sup>4</sup> *Fakir Niswar Muhammad Roether v. Kandaswamy Kulathur Vandan* (1909) 35 Mad. 120 (Abdur Rahim, J.). This case came before the courts on nine occasions: It came once before the Munsiff, and 4 times before the District Court, first at the hearing of the appeal from the District Munsiff, and then on 3 other occasions for findings required by the High Court: It was before the High Court on each of these four occasions. The original suit was of 1901; it came in second appeal to the High Court for the first hearing in 1909, and the final Judgment was delivered in 1911 (after having been sent back three times for findings).

<sup>5</sup> See s. 630 is concerned with cases where the donor is the father or grandfather or other person legally entitled to be in possession of the property of the minor. Section 400A extends the rule to 'de facto' guardians.

<sup>6</sup> One reason for greater caution is, that, when the law empowers a person to act as guardian of the property, and, therefore, casts upon him the duty of acting as such, that person must of necessity be in possession of the minor's property (including the subject of gift), where, however, there is no such right, and no corresponding duty, the donor must first explain why he purports to be in possession of the minor's property, even though he is not legally entitled to be in such possession, and though, possibly, some other person is so entitled.

<sup>7</sup> See s. 359, above. One matter to which attention must be specially directed is whether the benefit of the subject of gift has been given to the minor donee after the declaration of gift, viz., whether the produce or other income has been put to the use of the minor or continued to be applied to the use of the donor.

**SECTION 400A.** The grandmother of a minor purported to make a gift to him, and

*Illustration.*

stated in the deed of gift that she would remain in possession of the property as guardian of the donee, and on his behalf; *held*, that it was necessary to have a finding on the question whether the donor was at the time of the gift in possession of the subject of the gift; for, if she was in possession, then the character of her possession would be altered and become possession on behalf of the minor; if, on the other hand, she had no possession then the gift would be invalid; and, on its being found that the grandmother was not in possession at the time of the gift, it was *held* that the gift was void.<sup>1</sup>

(III) Where Parties are Husband and Wife (or Others) Living together in the Subject of Gift.

**401.** Where a husband or wife makes to the other <sup>2</sup> a gift of a house in which they have been living together, it is not necessary, for completing the gift, that the donor should vacate the house, by either departing from it, or removing his or her property from it.<sup>2</sup> *Quære*, whether the same rule applies in the case of relations other than husband and wife, who are living together.

Husband need not vacate in favour of wife and 'vice versa.'

Macnaghten also mentions the case of the father and minor children as on the same footing. But that is hardly a new instance, as the father is the legal guardian of his minor child, and the father's possession is not only the possession of the child, but the father alone can properly take possession on behalf of the minor. It is submitted, that, subject to s. 396, above, this rule cannot, on principle, be extended <sup>3</sup> to the case of any other except the wife and husband: except, of course, in cases where the donee is not 'sui juris,' and then the rules stated in ss. 397-400 apply.

<sup>1</sup> See p. 453, n. 3.

<sup>2</sup> Macn., 214; *Amina Bibi v. Khatija Bibi* (1864) 1 B. H. C. R. 157; "It is remarkable that the . . . books . . . do not contain any express . . . reference to this point, viz., to a gift from husband to wife. The converse . . . case, viz., that of a gift from wife to husband, of the house in which they were residing and in which they continued to reside, is mentioned as one of the exceptions," per Saurse, C. J., *ib.* 162. *Azmita Nasut Begum v. Dale* (1868) 6 M. H. C. R. 455; *Emudat v. Hajrat* (1888), 13 Bom. 352; *Ibrahimbai v. Fulbai* (1902) 26 Bom. 577, 596. In *Naz Begum v. Mangor Ahmad Khan* (1911) 8 All. L. J. 580, a distinction is made between gift by husband to wife, and vice versa

and it is stated (*per* Karamat Husain, J.), that the pre-emption holds only in the case of a gift from a wife to a husband on the ground that a husband has possession of the wife's property, but not vice versa.

<sup>3</sup> *Bura Saib v. Mahomed* (1896) 19 Mad. 343. Mr. Mulla in his useful book appears to extend the rule to every case where the donor and donee are living together: "Mahomedan Law," s. 115 (3), p. 81. The rule was held not to apply between aunt and nephew: *Bura Saib v. Mahomed* (1896) 19 Mad. 343; nor between a lady and one described as her foster-son, but "who was no real relation to her": *Fahimullah Saib v. Bayazai Nayayya* (1907) 30 Mad. 519, L. 522. See s. 396, above, and notes thereto.



In connection with s. 401, the question, in whose possession goods SECTION 401. may be considered to be when they are placed in the conjugal domicile of the husband and wife, may be referred to.<sup>1</sup> It does not follow, of course, that the goods are in the apparent possession of the husband, when the husband and wife are living together and the goods are in the house occupied by both.<sup>2</sup>

#### (4) Proof of Possession: Presumptions.

402. The onus lies on the person claiming to be the donee, ONUS ON DONEE. to prove that possession has been given to him;<sup>3</sup> with the exception that where the intention of a father<sup>4</sup> to make a gift to his minor child is proved, the onus lies on the father to show that the subsequent possession was not held by him on behalf of the minor.<sup>5</sup> EXCEPTION.

D admits that he made a declaration of gift in favour of R, saying, ILLUSTRATION. "I gave but did not put him in possession," the "word is with the donor" (but the donee may demand his oath, if he insists that possession was given)<sup>6</sup>

In 'Ismail Mahomed v. Hurbai,'<sup>7</sup> Farran, C.J., and Candy, J., held that the onus of proving the transference of possession was on the donee. They did so on the authority of a passage in a Privy Council decision<sup>8</sup> dealing with the onus of proof in cases in which the gift has the effect of defeating the policy of the Hanafi law, that the course of the devolution of property amongst the heirs must not be interfered with by wills. Similarly, though gifts to relatives and especially to children are considered in Shiah law to be "highly proper and becoming,"<sup>9</sup> it is considered abominable to make unequal gifts to them.<sup>10</sup>

403. Where the donor has acknowledged that he has ACKNOWLEDGMENT. made a gift, and that he has delivered possession of the

<sup>1</sup> See *Ramsay v. Margaret* [1804] 2 Q. B. 18, 25, 27, 28 (per Lord Esher, M. R., & Davey, L. J.).

<sup>2</sup> *Shepard v. Pulbrook* (1887) 4 T. L. R. 642, 643, (per Lindley, L. J.).

<sup>3</sup> See *id.*, and comment.

<sup>4</sup> Cf. ss. 400, 400A, above. The case may be different where creditors' interests are concerned.

<sup>5</sup> *Moulvie Wajed Ali v. Moulvie Abdool Ali* [1864] W. R. 121, 123, 124. *Ameeroonissa Khatoon v. Aboodonissa Khatoon* (1875) 2 I. A. 87; 15 Beng. L. R. 87; 23 W. R. 208; *Fatima Dides v. Ahmad Bakh* (1909) 31 Cal. 319, 330.

<sup>6</sup> Ball. II. 208 (third). The illustration which is immersed in the adjective law followed by the *Qazis* (see the footnotes to the comment to s. 59, above), may be paraphrased as follows: the presumption is in favour of the donor; if the donee, however, produces evidence, the presumption may shift.

<sup>7</sup> [1898] Printed Judgments (Bombay) p. 10.

<sup>8</sup> *Khajooroonissa v. Roushan Jehan* (1876) 2 Cal. 184, 197; 3 I. A. 291, 307.

<sup>9</sup> Ball. II. 205 (par. 4).

<sup>10</sup> See s. 361, above; and *id.* to s. 402. But under Shiah *Ithna 'ashari* law, bequests to heirs are valid without the consent of the other heirs;

**SECTION 403.** subject of gift to the donee, it may be presumed that the gift was completed as acknowledged.<sup>1</sup>

*Illustrations.*

(1) If D makes a declaration of gift to R, and R accepts it, but before possession is given, or acknowledged to be given, D dies, the gift is inoperative.<sup>2</sup>

(2) "The subject of gift is in the possession of D, and R claims it, saying 'a gift of it was made by D, who gave me possession,' which D denies. R proves that D had acknowledged that he had made the gift, and that he had given, and that R had taken, possession. Abu Hanifa had at first held that this evidence would not be accepted, but later he altered his view and the two disciples agree with the latter view."<sup>3</sup>

Acknowledgment of possession. Withdrawal of it.

The extract which is given as *ill.* (2) above, continues as follows: "And the same rule prevails when a similar dispute arises in 'rahn' and 'sadaqa.' And if the testimony of the two witnesses conflicts in this regard, that one witness bears testimony to actual possession, and another to the donor merely acknowledging that possession was given, then without any difference of opinion the testimony cannot be accepted. And if the slave (the subject of gift) be in the possession of the donee, and the witnesses depose to the donor having acknowledged to have given possession to the donee, then the testimony is valid according to both the earlier and the latter views expressed by the great Imam [Abu Hanifa]. This is in the 'Zakhira.' And if the donor acknowledges before the 'Qazi,' then though the slave is at the time in the possession of the donor he will be taken from the donor, and given over to the donee<sup>4</sup>. . . This is from the 'Muhit.'"

It has been held, that no gift was proved where a Mussulman did not execute any formal transfer of a property to his wife, but caused

<sup>1</sup> See *ill.* and comment, for Hanafi law; and *Bail. II.* 204 (*ll.* 4-8), from which it would appear as if the presumption were conclusive. But that passage no doubt refers to acknowledgements in Court; and possibly has reference to a proceeding similar to the fines and recoveries of English feudal law. The distinction between conclusive and other presumptions appears from the last sentence of the passage translated from the *Fatawa 'Alamgiri* in the comment to s. 403. Cf. also Transfer of Property Act, s. 122, and see s. 403, *ill.* (2); and cf. (*Shari'*) *Ikhram v. (Shari') Suleman* (1884) 9 Bom. 140; 150 (par. 3 l. 8); "A declaration of the person previously possessed puts him into possession"; *Humera Bibi v. Najmaunnissa Bibi* (1905) 28 All. 147, 150, 151, (donor in reply to interrogatories administered to her, 6 or 7 months after gift, admitted that she had given possession; she was not believed when she gave evidence, 14 years after, that

possession was not given) See also *Amina Bibi v. Khatija Bibi* (1864) 1 Bom. H C R. 157, 161, 162; *Jehannara Bibi v. Nazibat Islam Mulla* (1910) 15 Cal. W. N. 328; *Mohammad v. Manjerahah* (1882) 6 Bom. 650, 656. In *Namdar Khan v. Muhammad Siddiq* (1913) 11 All. L. J. 726, the principle of s. 403 is alluded to, but the judgment seems to proceed on what is submitted to be a misapprehension of the rule that possession must be transferred only so far as a transfer is possible. See the footnotes to s. 383, above.

<sup>2</sup> *Bail. II.* 204, *ll.* 4-8; cf. *Humera Bibi v. Najmaunnissa* (1905) 28 All. 147, 152; acknowledgment that possession was given may, of course, operate as an admission; Indian Evidence Act ss. 17, *et seq.*

<sup>3</sup> *Fatawa 'Alamgiri*, *Habsh* ch. IX., *ad init.*

<sup>4</sup> This is something like the procedure of fines and recoveries in England.

mutation of names in her favour, and presented a petition to the revenue SECTION 403. court, stating that he had transferred his rights and interests to his wife, and made her his 'locum tenens,' but that she had no power to transfer the property in any way, but that she would continue to hold and possess the share for her life.<sup>1</sup>

**404.** Acts of ownership exercised by the donee over the subject of gift, may be adduced as evidence that possession was transferred to him.<sup>2</sup> Acts of ownership evidence of possession.

D declares orally in the presence of seven witnesses that he gives Illustration. to R, his wife, all his revenue-paying lands. The gift is stated to be in lieu of dower. R subsequently pays the Government dues and obtains a decree of ejectment against a tenant. *Ibid.* that whether the dower was due or not, the acts referred to showed that there was a transfer of possession, and the gift was valid and complete.<sup>4</sup>

"Ownership," said Baron Parke, "may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself."<sup>4</sup> The significance of the word *only* in a dictum of so great and cautious a judge, should not be overlooked. Acts of ownership the only evidence.

The acts of ownership exercised by the donee must, it is plain, be of a nature which he could not, or at least did not, exercise before the gift.<sup>5</sup> Nature of such acts.

Thus, on the one hand, where the husband made the gift of a house to his wife, and continued recovering the rents and spending them on the family expenses, but had accounts prepared 10 or 11 years after the date of the gift in the name of the wife, the circumstances were held to afford sufficient evidence of possession having been given.<sup>6</sup> But on the other hand even a grandfather's ostensible gift to a grandson has been held (and it is submitted, rightly held) to be impugnable "by showing that the proceeding by which the grandfather professed to dispose of this property in his grandson's favor was merely a nominal one, followed by no change in the real nature of the enjoyment of the property, which remained his, and under his control, just as much

<sup>1</sup> *Mumtaz-unissa v. Tufail Ahmad* (1905) 28 All. 264. Cf. *Ibrahim v. Isa* (1916) 41 Bom. 5, (which requires reconsideration).

<sup>2</sup> *Jones v. Williams* (1837) 2 M. & W. 326-327; *Barnes v. Mason* (1813) M. & S. 77; *University College v. Oxford Corporation* (1904) 20 T. L. R. 637; *Ferrand v. Milligan* (1845) 7 Q. B. 730. See also *Bhagwanising v. Secretary of State* (1906) 10 Bom. L. R. 571, and the authorities therein referred to by Baty, J.; *Sharifa Bibi v. Gulam Mahomed Dastagir Khan* (1892) 16 Mad 43; *Rafabai v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (o.c.J.) 27, 31-33 (donee giving lease to

donor); *Gulam Jafar v. Maszudin* (1880) 5 Bom 238, 242, 243. Cf. *Mathar Sahib v. Hossain Sahib* (1910) 23 Mad. L. J. 734, 736

<sup>3</sup> *Karnarunissa v. Husaini* (1880) 3 All 266 (p.c.)

<sup>4</sup> *Jones v. Williams* (1837) 2 M. & W. 326, 331. The whole of Parke, B.'s judgment is very suggestive.

<sup>5</sup> Cf. *Valayat Hossain v. Maniban* (1879) 5 Cal. L. R. 91.

<sup>6</sup> *Emnabai v. Hajarabai*, (1888) 13 Bom. 352; cf. s. 101, above.

**SECTION 404.** after as before the date of the deed; and that its object was . . . to carry into effect a collusive arrangement whereby the claim of Munnoo Bebee (if not of other persons creditors of Ameer Khan) might be evaded."<sup>1</sup> A similar decision was given where it was shown that "in fact the produce of the shares was applied during the life time of the donor after the gift just as it had been before."<sup>2</sup>

Analogy  
of 'waqf'.

Similarly in regard to 'waqf' when the public are allowed to pray in a building erected for serving as a 'masjid' this is held to be equivalent to transfer of possession (and the 'waqf' is completed);<sup>3</sup> and the 'waqf' is also completed when an aqueduct is built and people have used it, or occupied a caravansary, or inn, or buried a corpse in a cemetery,<sup>4</sup> or a road is dedicated to Mussulmans, and one Mussulman has passed over it, or a bridge made, and people have crossed it.<sup>5</sup>

The converse of what is stated in s. 404, viz., that where the donee does not exercise any acts of ownership over the subject of gift, it may be deemed that possession has not been transferred to him, is well exemplified by a recent decision of the Privy Council, in which the question was whether a deed under which a husband purported to transfer to his wife certain properties, was operative as a deed of gift.<sup>6</sup> Their Lordships referred expressly to the subsequent treatment of, and dealings with, the subject of the alleged gift.<sup>6</sup>

The same case illustrates also the analogy between the case of gifts and 'waqfs' which has been referred to above.<sup>6</sup>

Purchase by  
father in  
name of son.

**405.** From the fact that a Muslim purchases property in the name of his son or wife, no presumption arises, in India, that a gift of the property was intended to be made to the son or wife.<sup>7</sup>

Cf. Indian Trusts Act, 1882, s. 82,<sup>8</sup> and comment to s. 346, above.

'Benami' or  
'farzi'  
purchase.

"The presumption of a 'benami' or 'farzi' purchase may of course

<sup>1</sup> *Munnoo Bebee v. Jehandar Khan* (1860) 1 Agra 250. See also *Alamanayakuniigari Nahi Sab v. Murkuti Papiiah* (1915) 29 Mad. L. J. 733; *Muhammad Sulfalia v. Yajihuddin* [1915] Mad. W. N. 876; <sup>2</sup> L. W. 1018, *Hakman Bi v. Mahomed Fatima Bi* (1915) Mad. W. N. 430; 15 Mad. L. T. 345.

<sup>3</sup> *Khadir Husain Sahib v. Husain Begum Sahiba* (1860) 5 Mad. H. C. R. 114, 119.

<sup>4</sup> Bail. I. 604; s. 514, below.

<sup>5</sup> Bail. I. 600; s. 462 *id.* (3) below.

<sup>6</sup> Bail. I. 610, (par. 2).

<sup>7</sup> *Sadik Husain Khan v. Hashim Ali Khan* (1910) 38 All. 627, 643 (par. 3), 647, 648, 657.

<sup>8</sup> *(Moulie) Sayyud Uzhur Ali v. (Munmat Dibee Alaf Fatima)* (1860) 13 Moo. I. A. 232, 247;

4 Beng. L. R. 1, following *Gopalkrishn Gosain v. Gungaprasad Gosain* (1854) 6 Moo. I. A. 53; *Nagindhai v. Abdulla* (1882) 6 Bom. 717. See cases cited in the comment.

<sup>8</sup> Which is in the following terms: "Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration." (Sales in execution of decrees and for arrears of revenue are expressly excepted from falling within s. 82 of the Indian Trusts Act).

be removed by circumstances<sup>1</sup> showing that the property was intended to be transferred to the son, but evidence of acts of ostensible ownership prove (*sic*) nothing.”<sup>2</sup> See s. 404, above. Under the English law, on the other hand, when a purchase or transfer is made in the name of the wife, child or adopted child of the man paying the purchase money or making the transfer, there is a presumption that the gift was intended,<sup>3</sup> but the presumption may be rebutted by an unmistakable act of possession, or by formal possession taken by the donor.<sup>4</sup>

Where Government securities were endorsed and delivered by a father to his son in the presence of the local Treasury Officer, the question arose<sup>5</sup> whether this was intended as a transfer of ownership (as held by the first court) or was a ‘benami’ transaction (as held by the High Court in Appeal), the Privy Council pointed out that the father was old, and that the son had been appointed his attorney (p. 701): “old age may be a good cause for transferring such dominion as enables the transferee to deal with others, but whether it would induce the General (*i.e.*, the donor) to strip himself bare, and to leave himself and the rest of his family at the mercy of his eldest son is another consideration.”<sup>5</sup> Then they point out that immediately after the endorsement, the General set about making a will (the endorsement was on 5th March, the will was signed on the 15th July). Though the will was quite invalid, the legacies and annuities contained in it were referred to as showing that the father could not have looked on the son as the owner of the notes. This was strengthened by the fact that the father continued to pay out sums from their income as before. The Subordinate Judge had held that the father gave the corpus, reserving the income to himself. The High Court and Privy Council held that this was a mere theory of the Subordinate Judge, the son’s case being quite different. In another case where the defendant had for 9½ years been in possession of a house purchased in his name by the plaintiff, without being made to account for the rents or profits, and it was shown that the defendant had rendered to the plaintiff great and very valuable services sufficient to establish a claim on the plaintiff’s generosity, the circumstances were held to be decisive in favour of holding that a gift was intended.<sup>6</sup>

In a case decided by the Privy Council on 13th July 1915 the facts

<sup>1</sup> *Gulam Jafar v. Mastudin* (1880) 5 Bom 238; cf. also s. 400, above.

<sup>2</sup> See p. 458, n. 10.

<sup>3</sup> Halsbury, “Laws of England,” XV. 415, n. 824.

<sup>4</sup> *Stock v. McAvoy* (1872) L.R. 15 Eq. 55, Cf.

Halsbury, “Laws of England,” XV., 417, s. 827.

<sup>5</sup> (*Nasab*) *Ibrahim Khan v. Ummat-ul-Zuhra* (1896) 19 All. 267, 271, 274; 24 I. A. 1.

<sup>6</sup> *Paundt Ram Narain v. Maulvi Muhammad Hadi* (1898) 26 I. A. 38; 26 Cal. 227.

**SECTION 405.** were as follows: A Rajput Taluqdar of Oudh had purchased a bungalow in the name of his Muhammadan mistress; he had the sole use and enjoyment of it for himself and his two Hindu wives during his own life, he spent moneys on it; the Muhammadan mistress was never in the bungalow during his life-time; the bungalow was inappropriate for making a provision for her, the net income being very small; it was not clear when or how she got possession of it. The Privy Council held that the purchase was 'benami' for the Taluqdar, reversing the decree of the High Court of Allahabad and restoring that of the Subordinate Judge.<sup>1</sup>

### § 6.—'Iwaz' or Return for Gift.

#### (1). 'Iwaz' of Two Kinds.

(a) Where 'Iwaz' not Stipulated for: 'Hiba bil 'Iwaz.'

'Hiba bil  
'iwaz  
defined.

**406.** Where the donee of a gift (which is referred to in this context as "the original gift," cognate expressions having cognate meanings) makes a reciprocal gift to the original donor, and signifies <sup>2</sup> that the said reciprocal gift is in return for the original gift received by himself," the said reciprocal gift is called an 'iwaz' or "return" for the original gift. After a return has been so made, the original gift is called a 'hiba bil 'iwaz' (or a gift with return).<sup>3</sup>

*Illustration* *see*.

(1) D makes a gift to R of a horse. R then makes a gift of a camel to D, and states that the gift of the camel is a return for the original gift, (*viz.*, of the horse) made to R by D. The gift of the camel is the "return" or 'iwaz' for the original gift, and after the camel has been given to D and accepted by him, the gift of the horse by D to R is called a 'hiba bil 'iwaz.'

(2) MH died, leaving as his heirs his widow, W, and his brother, FA. The estate of MH was kept joint, and managed by FA, who made an annual allowance of money and grain to W for maintenance.

<sup>1</sup> (*Mussumat Bibee Khatun v. Deering Rajput Singh* (1915) 31 Times Law Report, 562, p. v. The case has not yet been reported in India, but will, no doubt, appear in the All India Series, and in all the non-official reports).

<sup>2</sup> Ball, I. 532 (II 11-13), where the following forms are given: "this is the 'iwaz or the *balad*," or "in place of thy gift," or "I have made a donation of this for thy gift." If the reciprocal gifts are made without saying "in 'iwaz of thy gift, or using some other of the forms of expression,

above-mentioned, the second gift would not be an exchange for the first, but a new gift, and each of the parties would have the right to revoke," (II 15-21).

<sup>3</sup> Cf. *Usul Ali Khan v. (Mussumat) Oluf Breche* (1868) 3 Agre, 237: "the deed of gift must distinctly and specifically bestow the property in lieu of something received."

<sup>4</sup> *Rasool Bee v. Gulam Kasim Sahib* (1914) 1 L. W. 506; 23 Ind. Cas. 802. See also the table following s. 345.

On the 1st of January 1867, FA passed an instrument which was SECTION 406. construed as a deed of gift of certain property in favour of W. On *Illustrations.* 3rd January 1867, W passed a writing in favour of FA by which she relinquished to FA her rights in the estate of her husband, M H. *Held*, that the two deeds amounted to a ‘hiba bil ‘iwaz.’<sup>1</sup>

(3) D purported to make, on 18th November 1839, a deed of gift, in which it was set forth that, in consideration of a payment of Rs. 10,000, D gave to his son, R, a one-third share of D's moiety of a certain zamindari. On the same date D executed a will referring to the said deed of gift. In May 1841, R applied for mutation of name in respect of the said one-third share; D resisted this claim, saying he had not received the consideration. On 19th November 1841, a petition was presented to the Collector dated 14th November 1841 purporting to proceed from D, in which D admitted the gift, and consented to mutation of names. D had died on 15th November 1841. The Collector declined to act on this petition. *Held*, that no real consideration was passed, that there was no intention on the part of D to part with the property at once to R; but that both D and R were endeavouring to evade the Muhammadan law by representing that to be a present transfer of property which was intended only to operate after D's death, and consequently that there was no valid gift.<sup>2</sup>

Baillie pointed out in 1865 that the expression ‘hiba bil ‘iwaz’ is, Wrong use of the term hiba bil ‘iwaz’ or was at the time he wrote, frequently used inaccurately in India, and applied to transactions which would really be denominated sales, alike by Muslim and English lawyers.<sup>3</sup> It need hardly be said that the popular misapplication of technical terms of law cannot affect the law as it is laid down in texts of authority, which are expressed in precise language, which were written long before the inaccurate use of the terms in question came into vogue, and which moreover were written, as a rule, in countries sufficiently distant from India to be free from the taint of Indian malappropriation (if the expression may be allowed) of Arabic words.<sup>4</sup> No doubt, popular misuse of such terms may have to

<sup>1</sup> *Muhammad Faz Ahmad Khan v. Ghulam Ahmad Khan* (1881) 3 All. 490; 8 I. A. 25. In the illustration, W stands for Waliunnissa, M H for Muhammad Hussin Khan; FA for Faz Ahmad Khan.

<sup>2</sup> *Khajoorunnisa v. Rowshan Jehan* (1876) 2 Cal. 184, 197, 198; 3 I. A. 291. It is stated in the headnote to this case that when consideration for a gift is actually paid, transfer of possession is not necessary to validate the gift. This proposition seems to be referred to by their

Lordships of the P. C. merely as part of the appellant's contention, and not as an exposition of the law by themselves; see s. 411, below, and *Rasool Bee v. Madari Mahabdar Gulam Karam Sahib* (1914) 1 L. W. 505, 23 Ind. C.S. 802 (Mad. H. Ct.).

<sup>3</sup> Bail 1 122, 532 n.

<sup>4</sup> Sir R. Wilson points out that what Macnaghten and Ameer Ali “mean by *hiba bil ‘iwaz*,” simply is Baillie's “Indian form” which “resembles sale in all its legal incidents.” “Except

**SECTION 406.** be borne in mind when documents inartificially expressed have to be construed, and it must be remembered that many of the decisions<sup>1</sup> given by the Sadr Diwani 'Adalat Courts, on which the earlier English books on Muhammadan law are mostly based, consisted of the interpretations of documents of this nature. To this must be added that prior to the passing of the Indian Contract Act, the Muhammadan law of sale was applicable in India.<sup>2</sup>

Under these circumstances we must in the first instance define with precision the real nature of the different classes of transactions and state precisely what the Muslim writers of authority mean when they speak of 'hiba bil 'iwaz' and 'hiba ba shart ul'iwaz.' After this is done it will be possible and necessary<sup>1</sup> to consider which of the transactions contemplated by the said writers are of such a nature that they would, in accordance with the language of the Indian legislature, fall on the one hand within the category of gifts (and be therefore governed by the Muhammadan law), and on the other hand of contracts (and be governed by the Indian Contract Act).<sup>3</sup>

The chief characteristic of a gift, as it is understood in modern systems, is that it is a transfer without consideration.<sup>4</sup> At the time when the rules about 'hiba bil 'iwaz' (literally a gift with a return) and 'hiba ba shart ul 'iwaz' (gift with a stipulation for return) arose in Muhammadan law, it seems to have been more common than it is now-a-days for persons to enter into transactions that can be best described as lying midway between gifts strictly so called, and barter.<sup>5</sup> A 'hiba bil 'iwaz' consists of two separate acts of donation, i.e., of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee.<sup>6</sup> The notion underlying a 'hiba bil 'iwaz' was something of the following nature: D makes a gift to R, and R spontaneously (but out of the feeling of regard stimulated by the gift

They lie midway between gift and barter or sale.

through some such explanation, certain statements in Macnaghten seem to be incapable of being supported. With reference to Syed Ameer Ali's book, however, there seems to be a misapprehension in Sir R. Wilson's mind. Ameer Ali no doubt says a *hiba bil 'iwaz* is a sale in all its legal incidents ("Mahomedan Law," I. 101), but this must be read with what precedes and follows: "When the exchange takes place subsequently to the gift the *'iwaz* is regarded as a gift *ab initio*." *Ibid* I. 98, and cf. *ibid*. I. 102 (par. 1) which clearly shows that the author is referring to the case where an *'iwaz* has been given for a gift already made, in which case all the stages of the *hiba bil 'iwaz* are completed.

<sup>1</sup> E.g. Macn., p. 32: "A *hiba bil 'iwaz* resembles

a sale in all its properties; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary," APPX. Dig. of Cases, Deed, 2, Gift, 11.

<sup>2</sup> *Sadik Hussain Khan v. Hashim Alkhan* (1916) 38 All. 627, 643 (par. 3), 647, 648, 657.

<sup>3</sup> *Rajabji v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (O. C. J.) 27.

<sup>4</sup> *Basl. I.* 507, (*H.* 1-3), II. 203, (*I.* 3); *Hed.* 483, are to the same effect.

<sup>5</sup> *Rajabji v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (O. C. J.) 27; *Salah Bibee v. Keerun Bibee* (1871) 16 W. R. 175; cf. also *Mahammadunissa Begum v. J. C. Batchelor*, (1905) 29 Bom. 428.

<sup>6</sup> *Rahim Bakhsh v. Muhammad Hasan* (1888) 11 All. 1 (Mahmood J.).



that he has just received) makes a gift, in his turn, to D, saying that SECTION 406. his gift is a return for the gift that D had made him. In modern society R would probably desist from making such a statement, and would defer his gift till some suitable occasion arose, supplying a pretext for the gift. But it will be observed that the mutual gifts of modern times are in essence the same as the 'hiba bil'iwaz' of the Muslim lawyers. A person who receives a present, in most instances feels himself under a social obligation to give a present in return.<sup>1</sup> When, however, the reciprocal gifts have been completed, under Muhammadan law, a new legal incident arises, viz. that each of the said gifts becomes irrevocable, gifts being in the theory of Muhammadan law normally revocable; though the exceptions to this rule are so numerous that few gifts retain their revocability, even where no 'iwaz' is given.

Considered from this point of view, the law may be stated in the following terms: "The donee of any gift may make the said gift irrevocable by giving a gift in his turn to the donor, stating that it is in return for the said gift; provided that the donor of the said gift accepts the return as such. The return for a gift so made is called the 'iwaz' and the original gift is then called 'hiba bil'iwaz.'" The distinction between a reciprocal gift made with this intention, and an article given in a contract of exchange or barter is obvious.

This seems to be the proper place to refer to '*Jainabai v. R. D. Sethna*,'<sup>2</sup> which contains a suggestive judgment, but apparently, on many of the points discussed by the learned judge, he was supplied with only fragmentary materials, and his 'obiter dicta' (for such they are) must therefore be considered with those limitations. Thus it appears as if his Lordship were led to believe that "a private gift 'inter vivos' to be legal and valid, must be free from all pious or religious purposes" (pp. 609-610), which is not correct if it is meant that a religious motive annexed to a private gift affects its validity in any way;<sup>3</sup> he, however, recognises that, by one and the same act, part of the property may be given with a religious motive, and part without it, though he seems to consider this as enunciating a new principle. Again, (p. 611) it seems to be overlooked that the order of the Court is necessary merely for the completion of the revocation; the remarks on pp. 612-613 proceed on the basis that the creation of limited interests is governed by the rules

<sup>1</sup> Contrast Tacitus's description of the Germans: "Habitually careless of the future, the Germans were gratified both in giving and receiving presents, but without any idea that they thereby either imposed or contracted

an obligation." Tacit. Germ. 21, 26.

<sup>2</sup> (1910) 34 Bom. 604.

<sup>3</sup> See the rules relating to *sadaqa*; s. 437 below.

SECTION 406. of 'hiba'; on p. 614 Muhammadan law is described "as the extremely crude and simple notions of primitive people."<sup>1</sup> On the same page when it is said that "the addition of descendants would protract the first gift and postpone its reversion to the donor," the learned judge did not have the authorities before him showing that the descendants do not inherit from their ancestors, but take it under the grant from the donor. The question of trusts in Muhammadan law to which he refers (p. 616) is dealt with under s. 387, above, and elsewhere.

(b) Where 'iwaz' stipulated for: 'Hiba ba shart ul 'iwaz.'

'Hiba ba shart  
ul 'iwaz'  
defined.

407. Where a gift is made with a stipulation for a return, it is termed a 'hiba ba shart ul 'iwaz.'<sup>2</sup> The return stipulated for may be specified or unspecified.

The distinction between a 'hiba bil 'iwaz' and a 'hiba ba shart ul 'iwaz' in their inception is that the intention to make an 'iwaz' is an afterthought in the former; in the latter the two "go hand in hand not one before the other."

'iwaz'  
compared with  
consideration  
in a contract.

It must be noted that the fact that a "return" is stipulated for in a 'hiba ba shart ul 'iwaz' does not take away the original nature of the transaction: 'ex hypothesi,' there is originally a gift, i.e., there was no consideration for the transfer of the subject of the gift, and the stipulation for return cannot be taken to be consideration, otherwise there would not be a gift. Consequently the original gift and the stipulation are not reciprocal promises forming the consideration for each other under the Indian Contract Act, s. 2, (f), but each is an independent gift.<sup>3</sup> It may be admitted at once that such transactions are very peculiar, and that in India we should expect either a gift to be made without any stipulation, or otherwise a contract in clear terms. But inasmuch as the law had its origin not in our times, nor in the country where it has to be applied, there should be nothing surprising in it if transactions are referred to, and provided for, which are unfamiliar to us.<sup>4</sup>

<sup>1</sup> In *Moosa Adam v. Ismail* (1909) 12 Bom. L. R. 169, 183, the same learned judge says that "at the time the Mahomedan law was codified or reduced, at any rate to learned treatises, the society for the regulation of whose rights and conduct it was enacted was still very largely in the nomadic state." See however the passage from *Tajba v. Mowla Khan* (1917), 41 Bom. 485, cited in the last paragraph of the comment to s. 355, above.

<sup>2</sup> Bail. I. 534; II. 208; *Rassool Bee v. Gulam Karim Sahib* (1914) 1. L. W. 505; 23 Ind. Cas. 802. See also the table following s. 345; cf.

*Mogulsha v. Muhammad* (1897) 11 Bom. 517.

<sup>3</sup> Cf. *Rohina Bakesh v. Muhammad Hassan* (1888) 11 All. 1.

<sup>4</sup> A gratuity given to an attendant is a gift when it is made; still, there is frequently a tacit, or sometimes an express, understanding for a "return" to be made by the donee in the shape of some service to be rendered. But if the attendant does not render the service, the donor does not consider himself in the same position as he would, if he had banded to a shopkeeper the price of an article, and the shopkeeper had refused to hand over the article to the purchaser.

THE LAW RELATING TO ‘HIBA BIL’IWAZ’ AND ‘HIBA BA SHART UL’IWAZ.’ SECTION 407.

The nature of the original gift and the return is clearly explained in the ‘Fatawa ‘Alamgiri.’ The relevant passages may be literally translated as follows (the numbers and letters and new paragraphs are added for greater clearness; the rules of law are stated in *Italics*, for which the present author is responsible).

I. “Where the ‘iwaz’ follows the gift, *it is a gift ‘ab initio’*—there “‘IWAZ’ is no difference of view on this point amongst our doctors. . . All the <sup>“not stipulated or, like gift</sup> conditions which apply to a gift, apply equally to the return following a gift, e.g., possession,<sup>1</sup> and joining together or dividing. This is stated in the ‘Khazanat-ul-Muftiin.’ . . .

II. “As to the second kind of ‘iwaz,’ viz. such an ‘iwaz’ as is <sup>“if ‘iwaz’ stipulated for,—</sup> stipulated for in the declaration and acceptance<sup>2</sup> of the gift, if the gift is with a stipulation for a return, then,—

(1) “In its inception the same conditions apply to it which apply to <sup>in its inception it is a gift.</sup> a gift, so that,—

(a) “if it is an undivided thing, but capable of division, then it will not be valid, and,—

(b) “property (or right of ownership) will not be established in it prior to transference of possession; and,—

(c) “neither will have the option to refuse to take delivery.<sup>3</sup> But,—

(2) “After possession has been taken by each [viz., by the donee of the gift, and by the donor of the return] it will be governed by the law of sale; so that—

(a) “neither will have the liberty to take back what belonged to him, but—

(b) “rights of pre-emption will arise, and,—

(c) “each will have the option to give back the thing of which he has taken possession, on the ground of there being a defect in it.

III. “And a ‘sadaqa’ with a stipulation for return, is reckoned <sup>“Sadaqa,”</sup> as a ‘hiba ba shart ul’iwaz.’

“These rules are laid down on the principle of ‘ihtisān,’<sup>4</sup> for analogy would require that a ‘hiba ba shart ul’iwaz’ should be considered a sale both in its inception and after completion: so it is stated in the ‘Fatawa Qazi Khan.’

“If a gift is made of a house to two men for the ‘iwaz’ of 1,000

<sup>1</sup> These words are omitted in Ball. I. 534 (*II.* 16-17).

<sup>2</sup> *Agd-ul-hiba*, i.e., agreement for the *hiba*.

<sup>3</sup> I.e. on the ground that there is some defect

in the subject of the gift, or of the return. Ball. I. 534 (par. 3, l. 7) seems to be a mistranslation.

<sup>4</sup> See the Introductory Chapter.

SECTION 407. 'dirhams,' after possession has been taken mutually, this gift will be considered a lawful sale, i.e., the gift will be converted into a lawful sale; this is stated in the 'Qunia.'"<sup>1</sup>

From these passages it is clear that in whatsoever mode the words may be applied in India, neither a 'hiba bil 'iwaz' nor a 'hiba ba shart ul 'iwaz' is complete without each side taking possession of the subjects of gift and return respectively.

So that 'hiba bil 'iwaz' may after completion almost be said to be merely a form of barter.

It would be difficult in India to prove a 'hiba ba shart ul 'iwaz' which would not be a contract;<sup>2</sup> for it would mean proving that though the donor stipulated for a return at the time he was making a declaration of gift, the stipulation did not form consideration for the gift. But when a transaction once comes within the category of a 'hiba bil 'iwaz' or a 'hiba ba shart ul 'iwaz' it is submitted that there is no warrant for stating that transfer of possession can be dispensed with in regard to its completion.

#### (2) Subject of 'Iwaz' or Return.

What may be the subject of 'iwaz.'

408. (1) Whatever may validly form the subject of gift may validly form the subject of an 'iwaz' or return; and doing or abstaining from doing something may operate as an 'iwaz,' whether such act or abstention has been antecedently stipulated for, or accepted as a return subsequently to the original gift.<sup>3</sup>

Part of subject of gift.

(2) According to Shiah law part of the subject of the original gift may validly form the subject of return or 'iwaz.'<sup>4</sup> According to Sunni law the 'iwaz' in a 'hiba bil 'iwaz' cannot consist of a part of the subject of the original gift<sup>5</sup> (unless such a change has taken place in the latter, that the original gift has become irrevocable).<sup>6</sup> *Quaere*, whether according to Hanafi law in a 'hiba ba shart ul 'iwaz' a return may be stipulated for which consists of a part of the subject of the original gift.<sup>4</sup>

<sup>1</sup> *Fatawa Alamgiri, Hiba*, Ch. VII., corresponding to Bail. I. 534, 535. Cf. table following s. 345, above.

<sup>2</sup> Cf. *Rajabai v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (O. C.) 27; *Mirza Nerber v. Toala Nerber* (1829) 4 S. D. A. Cal. 425.

<sup>3</sup> *E.g., mahr. Mahomed Fazl Ahmed v. Ghulam Ahmed Khan* (1881) 3 All. 490; 8 F. A. 25;

*Muhammad Eruph Ravutan v. Pallames Ammal* (1890) 23 Mad. 70. But not past services, nor natural love and affection: *Rahim Bakhsh v. Muhammed Hameed* (1888) 11 All. 1, 5 (par. 2), 6 (par. 2, 3).

<sup>4</sup> See comment.

<sup>5</sup> Bail. I. 532-533. See also s. 411, (4).

**Explanation.**—The produce of the subject of gift does SECTION 408, not form part of the subject of gift.<sup>1</sup>

(1) A gift is purported to be made and accepted with a stipulation *Illustrations.* that the donee shall give over to the donor the income or proceeds of the subject of gift; and possession of the subject of gift is transferred to the donee. The gift is valid;<sup>2</sup> and the donee's undertaking to give over the income or proceeds to the donor is also valid and enforceable in the Courts of British India as a trust.<sup>3</sup>

(2) Government promissory notes were purported to be transferred, coupled with the condition that the donee was to receive only the interest during her life, and that after her death the notes were to be held in trust for all her heirs. The Privy Council did not decide whether the condition was void and the gift absolute as it was unnecessary in the case before them.<sup>3</sup>

(3) D makes a gift to K on condition that K should return a part of the subject of gift as an 'iwaz.' Under Sunni law the condition is unenforceable,<sup>4</sup> and the gift absolute. Under Shia law both the gift and the condition are valid.<sup>5</sup>

(4) "If the donee convert a portion of the gift to another substance, and give it in exchange, it would be a good 'iwaz.' If a person make a gift of one thousand 'dirhams' to A, who gives in exchange out of the same one 'dirham,' this is not a good 'iwaz' according to 'us' (i.e., the Hanafis) though Zafar differs."<sup>6</sup>

(5) "The Jurist Muhammed Baqar Majlisi in reply to a question gave the following response: Being asked, 'If a man makes the gift of a property or a garden to his wife in lieu of her dower, does it come under the category of a gift with a return, so that unless one of them retracts, the other cannot retract?' he answered, 'Yes, it is a gift with a return.'"<sup>7</sup>

The next two paragraphs are taken from a Shia authority:—

<sup>1</sup> *(Nawab) Umjad Ally v. (Musamat) Mohamdee Begum* (1867) 11 Moo. L. A. 517; 10 W. R. (P.C.) 25. See s. 352, *et seq.*, above. So that according to either system of Muhammadan law a stipulation (*shart*) may be lawfully made (in a *hiba* *ba shart al-'iwaz*) for the return of the produce of the subject of gift. But be it remembered that according to strict Muhammadan law such a stipulation would not be enforceable, but depend on the mere will of the donee. *Smble.*, the produce of the subject may also form the subject of 'iwaz in a *hiba bil-'iwaz*. See comment to s. 408, above; *Laligan v. Mahomed Shafi Khan* (1912) 34 All. 478; 9 All. L. J. 798.

<sup>2</sup> *(Nawab) Umjad Ally Khan v. Musamat Mahamdee Begum* (1867) 11 Moo. L. A. 517; 10

W. R. (P.C.) 25; *Kasim Hussein v. Sharifunnissa* (1883) 5 All. 285; *Laligan v. Mahomed Shafi Khan* (1912) 34 All. 478, 9 All. L. J. 798; *Pasandabets v. Indipat Begum* (1910) 11 Bom. 372, 798; *Tahmasin Be v. Mahomed Fatima* (1914) 15 Mad. L. T. 345; 23 Ind. Cas. 651.

<sup>3</sup> *Saleman Kadr v. Dorab Ali Khan* (1881) 8 Cal. 1, 7, 8 L. A. 117, 11 (Nawab) Ibrahim Ali Khan v. I'zzat-ul-Zohra (1896) 19 All. 267; 24 L. A. 1.

<sup>4</sup> Bail. I. 538; see, however, s. 352, above.

<sup>5</sup> See comment.

<sup>6</sup> *Amcer Ali*, I. 101, citing *Fatawai Qazi Khan*.

<sup>7</sup> *Jamsh-ush-Shilat*, 392. See the footnote to s. 408 (1) for other cases relating to *iwaz*.

## SECTION 408.

A contract may  
be the subject  
of 'iwaz.'

"Anything that is capable of being given as a return, is sufficient (to form an 'iwaz'). It may be in the form of a contract, such as a letting and hiring, and the like, which requires a declaration and acceptance, and forms a separate transaction by itself; or it may consist of (a promise to do) some work, such as sewing a certain piece of cloth, which does not require a separate contract; and, by such sewing, it becomes a gift with return ('hiba mu'awwaza'); or it may be the release of a claim against the donor, or some other person. Although in the treatises of the jurists there is no express provision dealing with this matter, yet the generality of their statements includes all; and with reference to 'sadaqa' it has been cited in evidence of its being irrevocable, that as a return from God is also an 'iwaz,' so it falls under the head of ('hiba mu'awwaza')—gift with a return . . . and the learned doctor Aga Muhammad Baqar Behbahani in a Persian treatise has expressly asserted the principle in such general terms."<sup>1</sup>

(Shiah law,  
part of the  
subject of gift  
as 'iwaz.'

"In the case of a gift with a stipulation for a return, there is no distinction whether the return that is made consists of a part of the subject of gift, or of anything else; for when it (the return) is not specified, the fact that it has come into the donee's possession in consequence of the gift makes no difference; hence a part of the subject of gift may be given in return for the whole."<sup>1</sup>

The words enclosed in parentheses in s. 408 (2) may seem to be of little effect, inasmuch as in Muhammadan law, as contemplated by its original exponents, the main, if not the sole, effect of an 'iwaz' is to make the gift irrevocable; and where the gift has become irrevocable without any 'iwaz,' it may import little whether or not the 'iwaz' is valid as such. But if the 'iwaz' is valid as such, it is irrevocable, whereas if it takes effect as an independent gift, it is revocable; moreover, the provision may have an important bearing on conditional gifts, and limited estates through trusts, in which direction the law of gifts must expand in British India.

## THE BEARING OF THE RULE ON LIMITED ESTATES.

Effect of the  
rule on life-  
interests.

It may be of interest to advert to the fact that just as a thing may be physically divided up, so the full dominium over it may be split up; the difference might graphically be represented by dividing a figure vertically to represent the one and horizontally to represent the other. Considered in this light, it may be stated, that, just as a part of the subject of gift cannot be a valid 'iwaz' in Sunni law, so the reversionary interest

<sup>1</sup> *Jami'ush-Shatat*, 302 (a Shiah text).

in the subject of gift cannot be the subject of return, i.e., the donor could not have given merely a life-interest in the subject of 'hiba,'—apart from the difficulties of giving immediate possession of any future property.<sup>1</sup> On the other hand, in Shiah law part of the subject of gift may be the 'iwaz'; and similarly a life-interest may be created under Shiah law,—even if the theory be accepted that a life-interest consists of a gift of the dominium, with a stipulation that the reversionary interest in the subject of gift will be returned to the donor,<sup>2</sup> the reversionary interest being considered as a part of the subject of gift

These remarks must, however, be considered in the light of the changed conditions in India, and especially with reference to the decisions of the Courts; particularly with reference to 'Umjad Ally v. Mohumdee Begum.'<sup>3</sup>

#### OPERATION OF RULES OF 'IWAZ' ON FUTURE PRODUCE.

The adoption by the Privy Council<sup>4</sup> of the argument that the 'corpus' and the produce are distinct from each other, (though their observations were made when considering whether the gift in question was either incomplete, or vitiated by having annexed to it a condition that had reference to its subject) must have its bearing on other parts of the law; for, as has already been observed, (i) the principle underlying the rule that when a part alone of any property is the subject of a gift, the donor must (as far as possible) separate that part from the rest of the property,—is the same as (ii) the reason for the other rule that no conditions imposed on the donee can be enforced by the donor. What, therefore, is sufficient to give rise to an exception to the first rule, cannot be said to be irrelevant to the operation of the second rule, since both of them have their origin in the same general principle. If, therefore, in regard to the first rule, the 'corpus' of the gift is to be considered as distinct from its produce, the same must hold in the case of the second rule, unless there is some distinctive feature in the one rule that is absent from the other, preventing analogy of reasoning with reference to the two.

In other words, if it is established that 'corpus' and produce are distinguishable when the question is whether or not a gift has been completed, and if it is possible for a gift to be completed as regards the 'corpus' of its subject, notwithstanding that it may not be completed

Effect of ruling that produce distinct from and no part of 'corpus.'

'Prima facie,' if the distinction between 'corpus' and produce may support an exception to the theory of 'nausha,' it may also support an exception to the rule against conditional gifts.

<sup>1</sup> Ball. I. 509, but see s. 444, below.

<sup>2</sup> *Jam'ush-Shilat*, 392; cf. s. 408 (1) n.

<sup>3</sup> See s. 408, explanation, and *id.* (2); cf. also s. 352, comment.

<sup>4</sup> *Nasab Umjad Ally v. (Musummat) Mohumdee Begum* (1867) 11 Moo. I. A. 517 10 W. R. (r.o.) 25.

SECTION 408. with regard to its produce, namely, if possession of the subject of the gift may be complete, notwithstanding that possession of its produce is not transferred to the donee—notwithstanding that the donee is given no right to take or retain possession of the produce—then, by parity of reasoning, where the donor of the ‘corpus’ purports to impose conditions relating to the produce, such conditions will not *prima facie* be considered as affecting the voluntary nature of the gift of the ‘corpus;’ but only affecting something that is not part of the subject of gift.

‘*Hiba ba shart ul ‘iwaz*’ with stipulation relating to produce.

It is improbable that there should be no authority, in the vast stores of Muslim jurisprudence, referring to the point whether conditions may be imposed by the donor relating to the produce of the subject of gift.<sup>1</sup> Failing anything to throw direct light on the point, it may be said that the conclusion at which the Privy Council have arrived seems (subject to the considerations mentioned below) to be opposed to the trend of Hanafi though not of Shiah law. Thus we find that in Shiah law the stipulation for an ‘*iwaz*’ or return consisting of a part of the subject of gift is valid, whereas in Hanafi law it is not valid; and (as pointed out by Sir R. Wilson) produce would ordinarily be considered as part of the ‘corpus.’ However that may be, the conclusion of the Privy Council is based on a Hanafi authority, and it must therefore, presumably, be taken that a stipulation for an ‘*iwaz*’ or return, when its subject consists of the produce of that property which is the subject of the gift, would not be an infringement of the rule of Hanafi law, which does not permit a stipulation to be made for the return of what consists of a part of the subject of gift, or in any way having reference to it.

This result may now be considered from two points of view, only the first of which is alluded to by their Lordships. But they are both intimately connected with each other.

Conditions raising a trust.

First, that part of the Privy Council judgment in which their Lordships say that the arrangement is enforceable as an agreement raising a trust, must be frankly recognised as the introduction of a new and important principle into the Muhammadan law of gifts: for the only head of strict Muhammadan law under which a gift with an arrangement between the donor and donee may be brought, *viz.* a ‘*hiba ba shart ul ‘iwaz*’<sup>2</sup> is rigorously considered as a voluntary transaction to the last moment, so that until it is completed by both the donor and the donee

<sup>1</sup> Cf. “A gift by A to B of a certain property without any restriction on the power of disposition, but subject to the condition that B should pay periodically to A, or A and his heirs, a part of the usufruct of the property. In such a case both the gift and the condition would be valid.”

(citing *Nasreddin* without giving any more detailed reference). “And if B should alienate the property the assignee would take it subject to the condition”: *Ameer Ali*, I, 76.

<sup>2</sup> Not a *hiba-bil-‘iwaz*, for in that there is no arrangement *ab initio*.



performing their respective parts, neither can be required (accord- SECTION 408.  
ing to the Muhammadan law in its strictness) to perform what he has  
agreed to : the donor may rescind by revoking his gift, or the donee refuse  
to do what he stipulated to do. (The fact that after both parties  
have done what was arranged, the transaction is considered as a sale<sup>1</sup>  
is irrelevant to the present discussion, though it is a fruitful cause of  
misapprehension.)

Secondly, an agreement to return the produce of that which forms future produce  
the subject of gift can hardly be considered in the same light as a 'shart' cannot be sub-  
or stipulation in a 'hiba ba shart ul 'iwaz,' for the reason that according<sup>2</sup> it cannot  
to Muhammadan law that alone can be the subject of 'iwaz' which be subject of  
can be the subject of gift. Now future produce has no existence, and  
cannot form the subject of gift, and consequently under strict Muham-  
madan law it cannot form the subject of 'iwaz.' But it might be argued  
that, since the produce of the subject of gift has been held not to form  
part of the subject of a gift of the 'corpus,' therefore, the donor (in a gift  
of the kind referred to) parts with the whole of one thing (the 'corpus')  
reserving to himself quite another thing (the produce), and that such  
a reservation cannot be governed by the rules relating to stipulations  
for 'iwaz,' on the ground that those rules refer to the donee giving  
something from himself to the donor, whereas this is the case of the  
donor reserving or retaining something with the possession of which he  
never parts. Such an argument does not meet the difficulty : for the  
produce being something which will arise in future, and which in the  
nature of things will in the first instance be in the possession of the donee,  
the donor cannot come by it by purporting merely to "reserve" the  
right to the produce ; he can only obtain it if the donee gives it to him,  
or allows him to take it. So that whether or not the produce is technical-  
ly part of the 'corpus,' and whether we consider that the gift is a condi-  
tional one, or that the donor merely reserves his rights over one object  
while he gives away another, still the difficulty of applying the strict  
rules of Muhammadan law remains. But this difficulty can be con-  
sidered insuperable only if it is ignored that in British India new avenues  
for development are open to the Muhammadan law.

In considering what may form the subject of the 'iwaz' in the  
two transactions under consideration, it must be borne in mind (1) that  
in a 'hiba bil 'iwaz' though the 'iwaz' proceeds from the donee of the  
original gift, the original donor has the option of refusing to accept the  
Distinction  
between incidents  
of 'iwaz' when  
it has been  
stipulated for  
and when not.

<sup>1</sup> The expression that a completed *hiba ba shart ul 'iwaz* is considered as a sale may be practically paraphrased as follows : After a *hiba*

*ba shart ul 'iwaz* is completed, for the purposes of pre-emption, etc., the same results follow as on a sale.

SECTION 408. proffered 'iwaz' whatever it be, so that it may appear reasonable that if the original donor chooses to accept part of the subject of gift as 'iwaz' he should be permitted to do so. On the other hand (2) while in a 'hiba ba shart ul 'iwaz' the original donor is bound to accept the stipulated 'iwaz,'<sup>1</sup> (3) yet he has taken the initiative in proposing what should be the 'iwaz' for the 'shart,' and he of his own accord, at the very time of making the gift, stipulates that a part of the subject of gift should be returned to him. These conflicting reasons seem to be equally balanced, in regard to both kinds of gifts with return.

Natural love and affection or services cannot be the subject of 'iwaz,' any more than they can of gift.\* See ss. 373, 351, above.

Strict Shiah law.

Under Shiah Muhammadan law (apart from the Privy Council decision) the effect of D making a gift to R, on condition that R should give to D the income, would, it seems, strictly be as follows: (1) D would not be bound to transfer the subject of the intended gift to R, even after the arrangement, nor (2) R to accept possession of it; and in the case, (i) either of D not offering to transfer it, or (ii) R not accepting it, the whole transaction would fall through, without any legal results arising; (3) if D transferred the subject to R, R might even after accepting the gift on the 'shart' (or stipulation) of giving to D the produce, refuse to perform the 'shart,' and he could not be obliged to do so, but (4) if he did not perform it, D might revoke his gift (unless, *semble*, the gift is or has become irrevocable; and apparently the same rules apply to the revocability of such a gift as to ordinary gifts).

Conclusion.

But in spite of these difficulties in applying and giving effect to the ruling of the Privy Council, consistently with the form in which the rules of Muhammadan law are stated in the original texts the Courts must take the law to be as laid down in the decision; and as that decision has a liberalising effect and brings the law into nearer conformity with the needs of modern times, it cannot, it is submitted, be objected to. It may also be remarked that where (as in British India) the parties are familiar with stipulations in the nature of trusts annexed to gifts, and the donor transfers property to the donee on a mutual understanding that such stipulations will be given effect to, those Courts which enforce the Muhammadan law of gifts as justice, equity, and good conscience, would hardly enforce it in such a manner as to allow a fraud to be committed by permitting the donee to contend that he is not bound by

Disregard of stipulation may amount to fraud.

<sup>1</sup> Though this is not quite clear.

(1868), 3 Agra, 237.

<sup>2</sup> *Usud Ah Khan v. (Musamat) Olul Berbee*

the stipulations.<sup>1</sup> The Shiah lawyers give wide extension to the rules SECTION 408. of 'iwaz' and to grants of limited estates on the authority of the Quran, where it is laid down that—

"It is of no avail that ye turn your faces [in prayer] towards <sup>Quran enjoin</sup> the East and the West, but righteousness is in . . . those who <sup>fulfilment of</sup> promises. perform their engagement<sup>2</sup> in which they have engaged . . . these are the true and these are the pious."<sup>3</sup>— Quran, II., 172.

This verse of the Quran binds all Muslims equally. The Bombay High Court has accordingly accepted the argument contained in the present section and held that where a gift is made of immovable property with a stipulation that the donee should give to the donor a fixed sum out of the rents and profits annually, the stipulation is binding.<sup>4</sup> The circumstances that must necessarily cause a development (not to term it a transformation) in the Muhammadan law of gift enforceable in British India, may again be noted here. (1) the totally novel conditions of life in modern British India as compared to those contemplated by the text-writers of several centuries ago; (2) the fact that the law of contracts strictly so called is now entirely drawn away from the sphere of Muhammadan law, (though the law of gifts forms a part of the law of 'aqd' or contract in Muslim jurisprudence), and (3) the fact that Muslims have dealings with non-Muslims, who are governed by rules, some of which are entirely foreign to Muhammadan law, and must by their clashing occasionally produce illuminating sparks out of the conflict of laws.

409. A gift to a bride by the mother of the bride- <sup>Marriage</sup> groom in contemplation of the intended marriage <sup>as 'iwaz.'</sup> has been held to be a 'hiba bil 'iwaz,' the intended marriage being apparently considered as a valid subject of 'iwaz.'<sup>5</sup>

<sup>1</sup> The following words of Lord Macnaghten with reference to the assignment of future property, are not directly applicable, but the principles underlying them must have even greater force where the "agreement" is not merely executed, but the consideration is entirely unilateral (i.e., where it consists of a gift completed on certain conditions): "Even in an executory contract," said Lord Macnaghten, "I apprehend it is not competent for the vendor to say, 'I cannot give you all I promised, so you shall have nothing.' The purchaser is entitled to take what the vendor can give him, and, as a general rule, he is also entitled to a corresponding abatement in the price. But where the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a

rule which should lay down that a man who has had the benefit of the contract may escape from its burthen, merely because he has promised what he can perform and something more too; and promised it all in one breath and in the most compendious language"; *Tailby v. Official Receiver* (1888) 13 App. Cas., 523, 551.

<sup>2</sup> "A had in the original, and sometimes translated "covenant."

<sup>3</sup> See the last portion of the comment to s. 417, below, and the passage from the *Jasashir-ul-Kalam*, IV., 619, cited in the comment to s. 447, below.

<sup>4</sup> *Tasalkabai v. Imtraz Bibi* (1916) 41 Bom. 372.

<sup>5</sup> (*Bibee Kulsoom v. Bibee Amecrunnessa* (1863) 1 Hyde, 150 (Wells, J.).

**SECTION 409.** The judgment referred to does not seem to carry much weight, but is noted as having some interest. Though it is difficult to agree with the learned judge that the transaction was a 'Hebabil Ewaz,' the transaction might have been supported on grounds similar to those recently taken by the Privy Council who held that a bride may sue on an agreement by which her intended father-in-law promised her father that she would be paid Rs. 500 as soon as she was received in her husband's house.<sup>1</sup>

### (3) Legal Incidents of 'Iwaz' or Return.

'Iwaz' subsequent to gift, i.e., in 'hiba hui 'iwaz'

**410.** The law applicable to a return which is made subsequently to the completion of the original gift, is (subject to ss. 417-420, below) the same as the law applicable to gifts generally.<sup>2</sup>

Declaration, acceptance and possession necessary to transfer subject of 'iwaz.' Acceptance may be implied

The following is a translation of an extract from a Shiah text<sup>3</sup>:—"In order that the 'iwaz' which has been stipulated for should be binding (i.e., transferred irrevocably to the original donor) there must be a declaration, acceptance, and possession on both sides (i.e., of the subject of the gift and return, respectively) so that the mere declaration, acceptance and possession of the original gift does not make it irrevocable, so long as the second gift (i.e., return) is not completed by possession being given of it. Just as acceptance of the declaration of a gift is necessary in order that it may be completed, so also offering and giving (of the return is necessary). . . Yet if the donor says, 'I give you this with the stipulation that you should sew this piece of cloth which I place before you;' or 'that you should make a ring out of this silver that is before you,' and if the donee, without the knowledge of the donor, sews, or makes a ring, then in this case it is true that a return has been completed, and the donor cannot change his mind (i.e., revoke his gift) nor is there any need for acceptance (on the part of the donor). Hence, what is meant, is, that where the return needs the usual declaration and acceptance (as in the case of a return consisting of a fresh gift, or another transaction), the offer of a return on the part of the donee is not sufficient (to make the original gift irrevocable) unless the donor accepts it, but where it does not need a declaration and

or it may be unnecessary as  
1. Where the proposal comes from the donor;  
2. In the case of a release which requires no acceptance

<sup>1</sup> (*Nasab*) *Kheaja Muhammad v. (Nasab) Hussain Begum* (1910) 32 All. 410, 37 L. A. 152; and cf. ss. 104, 105, above.

<sup>2</sup> Hall, L. 334 (par. 2). See *Rahim Baksh v. Muhammad Hanu* (1888), 11 All. 1, 5 (par. 3), 6

<sup>3</sup> par. 1, 7 (par. 2), (*per* Mahmood, J., Straight, J., concurring). *Rasool Bee v. Madari Mahaldar Gulam Karim Sahib* (1914) 1 L. W. 505; 23 Ind. Cas. 802 (Madras High Court).

<sup>4</sup> *Jami-us-Shariat*, 392.

acceptance (such as a release, and doing some work like sewing a piece of cloth, or forging silver) if the donor should change his mind, and become aware before that is done, then he is at liberty not to accept it, and may reject the sewing or the forging. It is the prevalent and well-known opinion of the learned, that a release requires no acceptance in cases other than this, viz., where it serves as a return for a thing, as is evident."<sup>1</sup>

Much misapprehension of the law,<sup>2</sup> may perhaps be traced to Macnaghten,<sup>3</sup> who refers to the statement in the texts in the following terms: "They say that a 'hiba bil 'iwaz' is a sale in every sense of the word." But it must be remembered that a transaction is called a 'hiba bil 'iwaz' only after it has been completed by possession being taken both of the 'hiba' and the 'iwaz.' For, in the first instance, in a 'hiba bil 'iwaz' we start with a gift; and at the time of the gift there is no mention of a return (or consideration), so if there is, it is a 'hiba ba shart ul 'iwaz.' Therefore, as regards the first gift it is a gift pure and simple, and there is no question that that should be completed by possession. Again the 'iwaz' is purely voluntary on the part of the donee, and it must be completed like any other gift. When this has been mutually done, then the first gift becomes a 'hiba bil 'iwaz.' The question is still doubtful whether the 'iwaz' may be given and completed as an 'iwaz' though the original donor has not completed the original gift by transfer of possession. On principle it would seem that if the original donor does not give possession the only remedy to the original donee is to revoke the gift of the 'iwaz.'

The Madras High Court has, however, held<sup>4</sup> that the 'hiba bil 'iwaz' may be completed without transfer of the possession of the subject of the original gift—provided that the "consideration agreed to be given" is proved to have actually passed.<sup>5</sup> As to this decision, it may be said,

<sup>1</sup> *Jami'-ush-Shatat*, 392.

<sup>2</sup> *E.g.*, Mulla, "Muhammadan Law" (3rd Ed.) p. 88, says: "A 'hiba bil 'iwaz' is a sale in all respects and delivery of possession is not necessary to validate the transaction." In the 5th Edition of his valuable work Mr. Mulla says: "a 'hiba-bil-'iwaz' " as distinguished from a *hiba* or simple gift is a gift for a consideration." The notions of gift and consideration seem to me to be irreconcilable. Where there is consideration the transaction must be governed by the Indian Contract Act and the Transfer of Property Act; in other words what appears, or is spoken of as a *hiba bil 'iwaz*, is, in that case, a contract with a valid consideration: cf. *Mahammadunnissa Begum v. J. C. Batchelor* (1905), 20 Bom. 428. The *mahr*

may be the consideration: *Muhammad Saugh v. Pattanas Annal* (1889) 23 Mad. 70; *Moyulsha v. Mahamad Sahib* (1887) 11 Bom. 517. This misapprehension is alluded to: *Rajabai v. Ismail Ahmed* (1870) 7 Bom. H. C. R. (O. C. J.) 27, 32.

<sup>3</sup> "Muhammadan Law," 209 n. (case 15), (i) also table on p. 257.

<sup>4</sup> *Muhammad Saugh Batulan v. Pattanas Annal* (1899) 23 Mad. 70, 73, citing (but misapprehending, see comment to a 410) (*Ramer Khajoorunnissa v. Musammat Roushan Jehan* (1870) 3 I. A. 291 2 Cal. 184, *Rahim Jan Bibi v. Imam Jan* (1912) 17 Cal. L. J. 173; 15 Ind. Cas. 708, seems to have been decided on the same erroneous view of the law.

'Hiba bil 'iwaz' not a sale. Through after it is completed the result is that the property of one person is exchanged for that of another, i.e., there is a barter.

'Hiba bil 'iwaz' not complete without transfer of possession.

SECTION 410. with all deference, that though the result could not have been otherwise, the judgment confuses notions that are absolutely distinct. Thus for instance, how can there be a "consideration agreed to be given" in a 'hiba bil 'iwaz'? That can only be in a 'hiba ba shart ul 'iwaz.' As to the case itself, it seems perfectly clear that there was a contract—the consideration consisting on the one hand of the release of the 'mahr' by the wife, and the deed of settlement on the other. Alternatively it may be termed either a compounding or a release of the 'mahr.'<sup>1</sup>

<sup>1</sup> *Khujooroonissa v. Roushun Jehan.*

This confusion of ideas and the statement based on it that in a 'hiba bil 'iwaz' possession is not required, are further sought to be supported by a passage in a judgment of the Privy Council,<sup>2</sup> which on examination will be found to be merely a reference to the contention of the appellant, a contention which in the first place was not upheld by the Privy Council, and which in the second place could have had reference only to a 'hiba ba shart ul 'iwaz.' Though their Lordships mention neither a 'hiba bil 'iwaz' nor a 'hiba ba shart ul 'iwaz' in express terms, they do state that, according to the appellants' contention, it was assumed that the donor had the intention to divest himself of the property; as it was proved that the donor had no such intention, they had no occasion to consider whether if such intention had been proved to exist, the mere intention, not carried completely into effect, nor followed by the actual payment of the consideration, could make the two transactions irrevocable as a 'hiba bil 'iwaz' or 'hiba ba shart ul 'iwaz' (as the case may be), and 'iwaz' respectively. They certainly did not purport to decide to that effect.

<sup>2</sup> *Doe v. Edgewood v. Jeenut.*

The report of 'Doe, dem. Ramtonoo Mookerjee v. Bibee Jeenut' <sup>3</sup> seems to exemplify all the matters above referred to: (1) 'Though the judgment does not allude to 'hiba bil 'iwaz,' the headnote is that a 'hiba bil 'iwaz' is valid without a tender of possession to the donee; (2) the judgment however does speak of the transaction as a gift and yet states that its validity "must be construed according to the rules affecting the laws of sale;" this misdescription of the transaction may perhaps be explained by the fact that "the deed of gift recited that the wife was in possession and that the gift was made as a 'hiba bil 'iwaz' or gift in lieu of her marriage portion." Having fallen into the double error

<sup>1</sup> See above, ss. 99, 100, above.

<sup>2</sup> (*Rames*) *Khujooroonissa v. (Mussamat) Roushun Jehan* (1876) 3 L. A. 291, 307, 308; 2 Cal. 184, 197 (par. 2): "But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the considera-

tion on the part of the donee, and a bona-fide intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee." See *Rasool Bee v. Madari Mohaladar Gulam Karim Sahib* (1914), L. W. 505; 23 Ind. Cas. 802 (Madras High Court).

<sup>3</sup> (1843) Fulton 152, 154.

(a) of calling that a gift which was a contract for consideration (for the husband in consideration of the 'mahr' due to the wife agreed to transfer part of the property to the wife, and the wife in consideration of the transfer agreed to release her right to claim 'mahr,') and (b) of considering that even if it were a gift no transfer of possession would be necessary, the result at which they arrived was by a happy chance correct: the one error counteracting the other. (3) The fallacy that because a completed 'hiba ba shart ul 'iwaz' has in Muhammadan law the same legal incidents as a completed sale, therefore, the same rules apply for completing a 'hiba bil 'iwaz,' as for completing a sale is also illustrated

**411.** *Quære*, whether a return may be validly made before the original gift has been completed; and whether, if a return is so made and accepted, the original gift is complete without possession being given of its subject.

In the case of 'Moosa Adam Patel v. Ismail Moosa'<sup>1</sup> it is said that possession of the consideration, i.e., return in a 'hiba bil 'iwaz,' is necessary, but not of the subject of the gift itself. It is submitted that the latter proposition is quite opposed to the theory of a 'hiba bil 'iwaz.' The 'iwaz' or return, or what has been called consideration in the judgment, arises as an after-thought on the part of the donee, after the primary gift is completed, and both the primary gift and the return are governed by the same rules as to completion as are contained in s. 346 above: moreover the 'return' cannot operate as such (for the purpose of making the primary gift irrevocable) unless it be distinctly opposed to the prior gift by words clearly expressive of such opposition as, for instance, by saying 'this is the 'iwaz' or the 'budul,' or in place of the gift.'<sup>2</sup>

**412.** An 'iwaz' or return may be made by a person other than the donee of the original gift; and it may be made by such other person without being directed to do so by the said donee.<sup>3</sup>

**413.** The return must be made to the donor of the

<sup>1</sup> (1909) 12 Bom. L. R. 169; on p. 186, it is said that "this is the law by the common consent of all authorities,"—which are, however, not referred to; but on p. 189 reference is made to *Chaudhri Mahdi Hasan v. Muhammad Hasan* (1905) 33 I. A. 68; 8 Bom. L. R. 387, and it is said that in the judgment of their Lordships of the Privy Council there is some confusion between the two forms of gifts

It is submitted that there is no such confusion on the part of their Lordships.

<sup>2</sup> Bail. I. 532. See *Rasool Bee v. Madari Mohabdar Gulam Kasim Sahib* (1914) 1 L. W. 505; 23 Ind. Cas. 802, and a. 410, above, and comment thereto.

<sup>3</sup> Bail. I. 535, H. 9-13; 534, H. 13-16; Hod. 486.

Return before completion of gift.

Whether possession of subject of return enough without that of subject of gift.

'Iwaz' by party other than donee.

'Iwaz' cannot be to other than donor.

**SECTION 412.** original gift ; where its subject is purported to be given to a person other than the donor, it does not operate as a return, and does not make the original gift irrevocable, unless it has been stipulated that the return should be made to such other person.<sup>1</sup>

This section is based on a Shiah text<sup>2</sup> which may be translated as follows: "The return should go to the donor, and not to any other; so also it appears from the response of 'Abdullah ibn Suran, where he (Al Sadq) is reported to have said, 'When the donor gets a return, it is not permissible for him to revoke it,' from which it is inferred that when the return is made to any person other than the donor, he may revoke it (the original gift.)"<sup>3</sup> In the second case it is so (i.e., the gift becomes irrevocable) because a stipulation is equivalent<sup>4</sup> to a price. Hence such a stipulation of a gift to another person (by way of return) which has been mentioned in the agreement of the original gift, operates as a return of the subject of the original gift, which then becomes a gift with a return, and is rendered obligatory, except that the original donor may revoke the first gift (i.e., may not complete it, or may retract it before it becomes irrevocable by the acceptance of the return) and the donee may (similarly) revoke the second gift."<sup>5</sup>

Where there was an agreement between the fathers of the parties to the marriage that the bridegroom should pay to the bride (who was a minor) Rs. 500 as soon as she was received into her husband's house, the Privy Council held<sup>6</sup> that the bride could sue on the agreement and that the principle of *'Tweddle v. Atkinson'*<sup>6</sup> had no application to the suit.<sup>5</sup>

'Iwaz' as to part of gift

**414.** An 'iwaz' or return may be made as to only a part of the subject of the original gift.<sup>7</sup>

(4) *Legal Effects of 'Iwaz' and 'Hiba' on each other.*

Donee not bound to make a return.

**415.** (1) The donee is under no obligation to make any return, except as provided in ss. 351 and 352, above, notwithstanding that the original gift is made with a

<sup>1</sup> See comment.

<sup>2</sup> *Jami'ush-Shifhat*, 392.

<sup>3</sup> *Id.*, it does not operate as a return at all.

<sup>4</sup> To be quite accurate, the author should have said "potentially equivalent."

<sup>5</sup> (*Nawab*) *Khwaja Muhammad v. (Nawab)*

*Hussain Begum* (1910) 32 All. 410; 37 I. A., 152

<sup>6</sup> (1861) 1 B. & S. 393; viz., that a person who is not a party to an agreement cannot sue on it.

<sup>7</sup> *Ibid* I. 335 (H. 5-8); 487 Hed. (col. 1).



stipulation for a return (and notwithstanding that the SECTION 415. return is specified).<sup>1</sup>

(2) The original donor is under no obligation to accept anything that the donee may offer to give by way of return or 'iwaz' [notwithstanding any stipulation that a specified thing should be given as a return, and notwithstanding that the donee offers to give that thing as a return].<sup>2</sup>

The following are translations of excerpts from Shiah texts:—

" 'When<sup>3</sup> a person has made a gift in general terms,<sup>4</sup> there is no condition or obligation on the part of the donee to give any gratuity in return,' and the rule is the same whether it be from an equal, an inferior, or a superior. There is no difference of opinion about it. It appears from the writings of jurists that its being binding<sup>5</sup> depends on the return being made. But if, for instance, it is a gift on a relation, it is binding without a return.<sup>6</sup> True, it is said in the 'Kali' that a present from an inferior to a superior requires a return of an equal value, and that the donee is not allowed to deal with it before making any return or expressing an intention to do so. 'Still, if he should do so the donor would thereby be barred from retracting the gift,' if the return is accepted by the donor. Ho (the donor) is not bound to accept it, for it is like a new gift, which he is not bound to accept, the more so as it cancels his (the donor's) right to revoke (the original gift)."<sup>7</sup> [See also comment to s. 416, below.]

"Ishaq ibn Ammar says: 'I asked, "A man makes a present to me with a view to get something that I have, in return; I take it, but I do not give anything in return. Is this valid?"' He (Abi'Abdulla Imam Ja'far-us-Sadiq) said, "Yes, you may do so, but you ought not to neglect making the return."'"

"The result of an examination of the authorities brings us to the view adopted by Muhaqqiq<sup>8</sup> and other learned jurists: the words of Muhaqqiq are as follows: 'The donee cannot be compelled to make the stipulated

<sup>1</sup> Dall. I. 535, II. 208.

<sup>2</sup> The clause in [ ] seems to result from the passages translated from the *Jawahir-ul-Kalam* and *Jami'ush-Shittat* in the comment to ss. 416 and 417, below; but the point is very doubtful. It is of little but academical interest. In the table on p. 257 I have assumed that the donor would be bound to accept the stipulated return.

<sup>3</sup> *Jawahir-ul-Kalam*, IV. 635, the words in single inverted commas are from the *Sharayn-ul-Islam*, on which the *Jawahir* is a commentary. See Dall. II. 208.

<sup>4</sup> I.e. made a simple 'hiba'.

<sup>5</sup> I.e. irrevocable, see comment to s. 420, below.

<sup>6</sup> See s. 424; (It will be remembered that the present extract deals with Shiah law).

<sup>7</sup> *Jawahir-ul-Kalam*, IV. 636; i.e., there is no legal, but only a moral obligation to make the expected return. Note that there does not seem to be any actual stipulation for the return, but the donee knows that the donor makes the gift in expectation of a specific return and yet accepts the gift.

<sup>8</sup> I.e. the author of the *Sharayn-ul-Islam*.

**SECTION 415.** return, but he has the option,'—by which he means to say that the donee can elect either to make the stipulated return, or to give back the subject of the gift itself. . . At any rate it is the approved and prevalent opinion that so long as he (the donee) has not fulfilled the stipulation, and acceptance and possession [of the return] by the [original] donor have not taken place, the donee has the option of either fulfilling the stipulation, or returning the gift."<sup>1</sup>

'Hiba bil-'iwaz,'  
'Hiba ba-shart  
ul-'iwaz' both  
irrevocable.

**416.** After a 'hiba' and its 'iwaz' have both been completed by possession of the subject of each being given respectively to the original donee and the original donor, neither the 'hiba' nor the 'iwaz' can be revoked. Where the 'iwaz' or return is made as to part only of the subject of the gift, the gift is irrevocable only as to the said part of the subject of the gift.<sup>2</sup>

*Illustrations.*

(1) D makes a gift of a house to R, a stranger, and puts R in possession; and R gives a horse as a return or 'iwaz' for D's gift, which D accepts. Then D purports to sell to a third person the house referred to. The sale is invalid.<sup>3</sup>

(2) In illustration (1) if R had not given to D the 'iwaz,' the sale would have been valid, provided that D had previously revoked his gift, but not otherwise.<sup>4</sup>

The rule is the same whether the 'iwaz' has been stipulated for or not; in other words, whether it is a 'hiba bil-'iwaz' or 'hiba ba-shart ul-'iwaz.'

The following translation of an extract from a Shiah text shows how difficult it is to adhere to the theory that a 'hiba ba-shart ul-'iwaz' is a gift and not a sale: that it continues to be a gift and a voluntary transaction, until the subject of gift and of the return are respectively transferred: and that then it "turns into" a sale. Many of the rules, it is clear, are of merely moral obligation:—

Return and  
revocability  
of gift.

"The details relating to revocation may be stated thus: (1) with a stipulation that a return will not be made, there is no question that the gift is not obligatory [*i.e.*, it is revocable]<sup>5</sup>, (2) with a stipulation for a return, what is stipulated for is absolutely obligatory<sup>6</sup>; (3) again, where

<sup>1</sup> *Jami'-ush-Shittat*, 382.

<sup>2</sup> *Hed.* 487 (col. 1); *Ball* I. 538 (*II.* 5-8); *II.* 295 (*II.* 18-19), 297 (*II.* 4-5).

<sup>3</sup> *Ball* II. 207.

<sup>4</sup> Compare repugnant clauses in a will. The first juristic act is valid, and the second one is assumed to be done inadvertently.

<sup>5</sup> *I.e.*, (a) it is not necessary that it should be completed, (b) it is revocable. See comment to s. 415 (2), above; and to s. 420, below.

<sup>6</sup> *I.e.*, if no return is made, the donor may revoke the original gift. See clause (3) of this passage. The donor has no power to enforce specific performance. See s. 415, above.

the stipulation specifies the return, the specific return is obligatory, that SECTION 416. is to say, the donee must make the stipulated return, otherwise the donor has the option of breaking off the transaction<sup>1</sup>; (4) where the stipulation does not specify the return, the fulfilment of the stipulation is not the less obligatory, but if the parties agree upon the subject (lit., amount) of the return that is sufficient; (5) where they do not (so agree) it is necessary to make a return of the same value, whether it consists of another article, or of the value (in money) of the subject of the original gift: it is not obligatory on the donee to make a return of greater value than the subject of gift. Yet the donor may demand it,<sup>2</sup> just as the donor cannot be compelled to accept the first.<sup>3</sup> The value of the gift must be taken to be what it is at the time of the transfer of possession: if it is transferred subsequently to the declaration, or it may be fixed at the time of making the return.<sup>4</sup>

417. Where a return is stipulated for, and it is in fact made and accepted,<sup>4</sup> the original gift and the return (after possession of their subjects is transferred) mutually operate in Muhammadan law as reciprocal considerations, and the two together constitute a sale.<sup>5</sup> *Seemle*, subject to s. 351, above, the whole transaction is governed in British India by the Muhammadan law of sale;<sup>6</sup> and not by the Indian Contract Act or the Transfer of Property Act.<sup>7</sup>

H purports to transfer the whole of his property to his wife, W, in lieu of dower, but does not put her into possession, and thereafter H executes a deed purporting to convey the same property to another person.

<sup>1</sup> *Apt* or agreement, cf. s. to s. 18 (3) above.

<sup>2</sup> *I.e.*, he may threaten to revoke the gift unless a return of higher value is made. An instance is given in the *Jawahir-ul-Kalam* on the same page (IV. 636) of a person who made a gift to the Prophet of a camel (apparently of extraordinary value) and was not satisfied though he was offered three camels in return, nor with six; at last nine were offered, and he was satisfied. This was nothing but a sale; but according to the social ideas of the time, it was a method of forcing the hand of persons from whom a favour, or dealings, were sought. The present writer had an experience with a Turkish gentleman who made a gift of a Quran to him, and expected in return to be paid his passage to Constantinople; the history of the rest of the transactions (this work not being a treatise on diplomacy) is not relevant.

<sup>3</sup> *Jawahir-ul-Kalam*, IV. 636.

<sup>4</sup> But not until it is made. See comment.

<sup>5</sup> *E.g.*, for purposes of pre-emption, in regard to the three days' option of revocation under Muhammadan law, and in similar matters, the transaction is considered as a sale and not a gift. Cf. *Glulam Mustafa v. Hurmat* (1880) 2 All. 854; *Rajibai v. Farnal Ahmad* (1870) 7 Bom. H. C. R. (6, C.) 27; *Bahar Choudhry v. Abdunnasir Bibi* (1914) 42 Cal. 361.

<sup>6</sup> That law is not superseded for all purposes in British India, *e.g.*, not for pre-emption; cf. *Fida v. Muzaffar* (1882) 5 All. 65; *Amjad v. Mushtaq* (1895) 17 All. 454.

<sup>7</sup> When s. 351, above, is inapplicable, there would be no little difficulty in considering the transaction as satisfying the preliminary requirements for the formation of a contract. The point, however, is not likely to arise: it would only be of importance if it arose with regard to some matter in which the Indian Contract Act and the Muhammadan law are in conflict.

Hiba ba shart ul 'iwaz' when completed, operates as sale.

**SECTION 417.** If the transfer to *W* was made as her dower, it is a contract with a valid consideration, and enforceable without possession being given to the donee. But if it was a mere gift, then possession would be required to perfect it.<sup>1</sup>

*Illustration.*

Where return stipulated for,

The following is translated from a Shiah text:—"The donor may stipulate either" (1) that no return should be made,<sup>2</sup> or (2) that a return should be made; or (3) he may make an absolute gift without reference to any return.

"(1) As regards the first case, no difficulty arises in concluding that the donee is not required to make any return; and if the gift is not made to a relative, nor with the intention of approach (to God) etc., the donor may revoke it so long as its subject continues to exist. (2) Where the donor stipulates for a return, it is evident that no question can arise as to its validity; in such a case he may either (a) specify the return that has to be made, or (b) leave it unspecified.

It need not be made, but if made, it will cause the original gift to be irrevocable.

"If it is specified, the stipulated return must be made; with the result that if the donee gives the stipulated return, and the donor receives it, the gift becomes irrevocable; but if the donee does not make the stipulated return, the donor has the option of revoking his gift. Thus, what is meant by saying that 'the stipulated return must be made,' is this, that if the donee desires that the gift should take effect (irrevocably), he must make the stipulated return, and not that there is any absolute obligation on the donee to make the return. In other words, the donee is not bound to make the return; namely, if he chooses, he has the option of giving back the subject of gift itself, and making no return. It is evident from this that when the donee makes a return, it is not binding so long as the donor does not accept it. For the return is like a fresh gift. Traditions are in general terms, to the effect that revocation is valid until a return is made, and that the donor is under no obligation to accept it; nay, even if he accepts or agrees to the return, so long as he has not taken possession of its subject, he has the option of revoking it (his original gift); and inasmuch as there is no authority to the effect that this is one of those transactions which can become obligatory (irrevocable)<sup>3</sup> before acceptance and possession, no such inference (in favour of its being irrevocable) can be drawn from (the ordinance contained in the Quran) 'fulfil covenants,'<sup>4</sup> being in general terms, as some have supposed; so also no such inference can be drawn from traditions

Return like a fresh gift.

<sup>1</sup> Maen. 216-219 (case 15); *Ghulam Mustafa v. Hurmat* (1880) 2 All. 854; *Khamrunnissa alias Bibi Janbi v. Shah Hazrat Saib* (1911) Mad. L. J. 958.

<sup>2</sup> This seems supererogatory; but the donor

<sup>3</sup> See comment to \* 420, below.

<sup>4</sup> Referring to Quran, II, 172, cited in the Introductory Chapter. See also comment to s. 408, *ad fin.*, and the extract translated from the *Jawahir-ul-Kalam*, IV, 619, in the comment

(authentic though they be) as the one in which Abdullah ibn Sinan SECTION 417 reports: 'He (Imam J'afar-us-Sadiq) said: "The gift is valid (i.e. irrevocable) for relatives, and for one who has given a return for his gift, and in others revocation is allowed.'"<sup>1</sup>

**418.** Where a 'hiba ba shart ul 'iwaz' or a gift with a stipulation for a return is made, and the stipulation is unlawful, both the gift and the stipulation are void.<sup>2</sup> Unlawful stipula-  
tion avoids gift.

This section is based on the following from a Shiah authority: "Now as to the stipulations which are unlawful: (these are) such as may be 'muqtaza-i-aql' (unreasonable), for instance, the donor says: I give this to you, and make a condition that you should not sell it, and you should not make a gift of it to others,' in such a case the stipulation is invalid: regarding the validity of the original contract (gift) there are two ways (of considering it), or rather two opinions, and the better opinion is that it is invalid."<sup>3</sup>

With this should be compared the rule of Hanafi law, that the condition is always void, and the gift valid. Just as the Hanafi jurists consider the use of the word 'hiba' conclusive to show that the whole 'dominium' has been transferred, and neglect all other words in the declarations of gift, and the Shiahs look at the whole of the declaration, and see whether the meaning gathered from the whole of it can be given effect to, so, similarly, if the condition is illegal, the Shiah lawyers do not merely reject it, and give effect to an absolute gift, but avoid both the gift and the stipulation if the two are inseparably connected with each other. The rule obviously cannot apply where the 'iwaz' is not stipulated for—i.e., in a 'hiba bil 'iwaz.'

See illustration (3) to s. 393, and illustration (2) to s. 387, above.

**419.** Where the original gift or the return is, or becomes, void wholly or in part, the return<sup>4</sup> or original<sup>5</sup> gift respectively may be revoked, wholly or in part,<sup>6</sup> provided that (1) the original gift cannot be revoked in circumstances in which it would have become irrevocable without a return having been made;<sup>7</sup> and (2) the return may be revoked even though it has increased or diminished in value.<sup>8</sup> When either the gift or the return is void the other may be revoked.

<sup>1</sup> *Jami'ush-Shitat*, 382.

<sup>2</sup> See comment.

<sup>3</sup> *Jami'ush-Shitat*, 381.

<sup>4</sup> *Bail* I. 533 (H. 27-32).

<sup>5</sup> *Bail* I. 533 (3rd); *Ibid.* 487.

<sup>6</sup> *Bail* I. 534 (H. 1-2).

<sup>7</sup> *Bail* I. 533 (H. 14-17). See ss. 424, *et seq.*, below.

<sup>8</sup> *Bail* I. 533 (H. 32-34). See ss. 424, *et seq.*, below.

## SECTION 419.

*Illustrations.*

(1) If the father purports to make a gift out of the property belonging to his minor child, and receives a return or 'iwaz' for such a gift from the donee, the original gift is void, and both the original gift and the 'iwaz' may be revoked.<sup>1</sup>

(2) A person makes a gift to a minor, and the father of the minor purports to make a return for the gift out of the minor's property,—“the exchanging is not lawful, though the gift were made on condition of an 'iwaz.'” Both the original gift and the 'iwaz' may therefore be revoked.<sup>2</sup>

(3) D in his death illness, purports to make a gift to R of the whole of his property valued at Rs. 600, for which R makes a return. If the value of the return is Rs. 400 or more (i.e., two-thirds of D's estate) the original gift and 'iwaz' are both valid.<sup>3</sup>

(4) In *ill.* (3) if the value of the return is Rs. 300, then the gift is invalid as to Rs. 100, i.e., one-sixth of it. The donee may, in such a case, either pay Rs. 100 to the heirs, in which event the gift and return both become irrevocable, or he may return the gift and demand back the return which he had made.<sup>3</sup>

§ 8.—*Revocation of Gift.*(1) *Normal Revocability of Gift.*

Gifts are  
revocable.

**420.** Subject to ss. 422—429, below, the donor may revoke the gift,<sup>1</sup> even where he has purported to waive his right of revocation at the time of or after the declaration of gift; provided that where he has accepted something in return for the waiver, he cannot revoke the gift.<sup>2</sup>

*Illustrations.*

(1) The following are valid forms of revocation: “I have revoked the gift,” or, “I have restored it to my own property,” or, “I have annulled or dissolved the gift,” or, “I have retracted, or taken back my gift,” or, “I demand the restitution of my gift.”<sup>3</sup>

(2) But a mere resumption of the subject of gift is not a valid revoca-

<sup>1</sup> Bail I. 535 (par. 3).

<sup>2</sup> Bail I. 535 (par. 4). See s. 600, below.

<sup>3</sup> Bail I. 536, 537 (*ill.* 20-25).

<sup>4</sup> *Casuarilla v. Carrumbhar* (1911) Bom. 211.

<sup>5</sup> Bail I. 508 (*ill.* 30), 529, 528 (par. 2), 11 205, (*ill.* 13-15), *lled.* 186 (*col.* 1). The gift was held to be revoked in *Ismael v. Ramji Sambar* (1899) 23 Bom. 622. Cf. Transfer of Property Act, s. 126, which does not allow gifts to be revoked unless made revocable by agreement, and a gift revocable at the mere will of the donor is declared to be void. On the other hand, a

thing lent gratuitously, even if for a specific period, may be demanded back within the period under the Indian Contract Act, s. 159. For Roman law see Justin., II. 7, 2. “If those that receive the boon prove ungrateful, we have by our constitution given leave to revoke the gifts on certain fixed grounds,” gifts between husband and wife and from child to parent were subject to some complicated restrictions (see Digest, XXIV. Tit. 1).

<sup>6</sup> Bail I. 521; 11. 205 n. 10. See s. 50, above.

tion, nor does a sale purported to be made of the gift property, operate SECTION 420. as such.<sup>1</sup>

Revocability is one of the main characteristics of a "voluntary" <sup>voluntary</sup> transaction in the eye of Muhammadan lawyers; an "obligatory" <sup>therefore</sup> transaction being frequently opposed to a "revocable" one.<sup>2</sup>

The following words of Lord Coke relating to English wills are not inapplicable to the Muhammadan law of gifts:—"If a man make his testament and last will irrevocably, yet he may revoke it, for his acts or his words cannot alter the judgment of the law, to make that irrevocable which of its own nature is revocable."<sup>3</sup> But of course, the right of revocation may be validly parted with for consideration.

**421.** A gift may be revoked as to only a part of the <sup>Partial revocation</sup> subject thereof; and where the cause making a gift irrevocable applies to only a part of the subject of gift, the gift may be revoked as to the other part of the subject.<sup>4</sup> <sup>valid.</sup>

**422.** A conditional revocation of gift is not valid; nor <sup>Conditional</sup> if it is referred to a future time.<sup>5</sup> <sup>revocation invalid.</sup>

If the donor says "when the beginning of this month comes, I have revoked," the revocation would not be valid, because it can neither be suspended on a condition nor referred to a future time.<sup>6</sup>

## (2) Revocation how completed.

**423.** (1) According to Hanafi law, the revocation of a gift is completed either by an order of the Court cancelling the gift,<sup>1</sup> or by the donee consenting to the revocation of the gift; and,<sup>2</sup> in either event, the subject of the gift reverts in the donor without taking his possession.<sup>7</sup> Where there is neither a decree of the Court, nor the mutual consent of the donor and the donee to revoke the gift, the revo-

1. HANAFI LAW:  
Revocation not  
complete unless—  
(a) Order of court  
or  
(b) Consent of  
parties.

<sup>1</sup> Ball. I. 524; II. 207.

<sup>2</sup> Cf. Ball. I. 508, (par. 3), 540 (l. 6), 550 (ll. 3, 20-25), II. 211 (ll. 9-11), 212 (par. 2), 226 (par. 2), 227 (ll. 4-15).

<sup>3</sup> *Vynor's Case* [1009] 8 Rep. 806, cited in *In re Hays Walker v. Gaskill* (1914) 30 Times L. R. 637, (per Evans, J.) (Probate Division).

<sup>4</sup> Ball. I. 526 (ll. 17-18); Hed. 486 (col. II), 487 (col. I).

<sup>5</sup> Ball. I. 524.

<sup>6</sup> Hed. 486 (col. I), 487; Ball. I. 527, (par. 3),

524 (ll. 10-12); *Ennet Hossein v. Khoobunnissa* (1889) 11 W. R. 320; *Shah Jettoo v. Mt. Budun* (1837) 63 S. D. A. Rep. 189.

<sup>7</sup> Ball. I. 527 (ll. 22-25). In ll. 14-16 it is stated that there is some doubt whether a revocation by mutual consent amounts to a "cancellation"; "the tenor of precedents is (l. 17) stated to be in favour of its being considered a cancellation, and the effects of cancellation are stated (ll. 22-25) to the same effect as a. 423, above.

**SECTION 423.** cation is not complete unless and until the donor takes possession of the subject of the gift.<sup>1</sup>

2. SHIAH and  
SHAFF'I LAW :  
Order of Court  
not necessary.

(2) According to Shiah<sup>2</sup> [and Shafi'i]<sup>3</sup> law the revocation of a gift is complete without any decree of the Court.<sup>2</sup>

*Explanation.*—Neither mere re-assumption of the subject of the gift by the donor,<sup>2</sup> nor his purporting to alienate it,<sup>3</sup> constitutes a revocation of the gift.

"Should the donor die without affording any other proof of his intention to retract the gift"—than mere re-assumption of the gift from the donee—"it is still, although found in the donor's possession, the lawful property of the donee."<sup>2</sup>

Can the donor come to the Court for revocation of his declaration of gift when it has not been completed by transfer of possession? It has been held that he cannot.<sup>5</sup> In the case referred to, the donee was a niece of the donor's so the gift could not have been revoked.

### (3) *Gifts that Cannot be Revoked.*

Irrevocability  
from—  
(a) relation  
between parties  
(i) consan-  
guinity

**424.** According to Hanafi law gifts in favour of relations<sup>6</sup> within the prohibited degrees cannot be revoked.<sup>7</sup> According to Shiah law a gift to any relation by consanguinity is irrevocable.<sup>8</sup> According to Shafi'i law a gift may be revoked when it is from a father or other paternal ancestor, to a child or other descendant;<sup>9</sup> but gifts between all other relations by consanguinity are irrevocable.<sup>9</sup>

<sup>1</sup> Bail II, 527 (H. 28-35); Hed 187. Where the donee gives back possession of the gift, he must consent impliedly. It is added that the donee has no power to revoke his consent to the donor taking back the subject of gift.

<sup>2</sup> Bail, II, 205 n. 10, citing the *Tahzir-ul-Ahkam* from Viss of the translator of the *Lumnaee Digest*, vol. I. *Semble* this would be matter for application of evidence as to whether there was any intention to revoke.

<sup>3</sup> The *Mudaw-wat-Talibin* and its comment do not seem to mention any decree of the Court; it would therefore seem that the Shafi'i law agrees with the Shiah law on this point as on so many others; though see s. 424, below.

<sup>4</sup> <sup>5</sup> Bail, II, 207, (H. 5-10). "Others maintain that it (viz. the alienation) would be valid, because he has 'power of retraction'; but the first opinion (which is given above) is best supported."

<sup>6</sup> *Lumna Bahr's Jan Ali Shah* (1898) 20 All. 165. See s. 363, above.

<sup>7</sup> Hed 186 (col. ii), Bail II, 521, 525 (8th), Macn., 213, Bail II, 205 (H. 9-13), 207 (H. 4). Some Shiah authorities hold that when the gift is to others than parents, it may be revoked, Macn., 202-203 (case 6) mentions the revocation of a gift to a son's daughter, and says "there is a special exemption in the case of a donation from a father to a son or grand-son, the resumption of which is declared allowable." This is clearly erroneous, unless the parties were governed by Shafi'i law, see comment.

<sup>8</sup> "According to the *Khasrat-ul-Muflin* relationship arising from fosterage or affinity does not bar revocation." Anwer Ali, I, 94.

<sup>9</sup> *Jawahir-ul-Kalam*, IV, 630.

<sup>9</sup> Hed, 485 (col. ii.); *Mishaj*, 235. The Maliki law is said to be the same: Anwer Ali, I, 89.



The plaintiff made a gift to her husband's nephew of the whole **SECTION 424.** of her property on the 15th September 1908. She then sued to have *Illustration.* the gift revoked. *Held* that the fact that a village comprised in the gift had been partitioned at the instance of the donee before the institution of the suit, did not amount to such a substantial alteration in the subject of the gift as to make the gift irrevocable.<sup>1</sup>

The following is from the 'Jawahir-ul-Kalam' (a Shiah text): " 'Rahm' or consanguinity in this connection means any relation whatsoever by blood, known as 'nasab,' however distant the kinship be, and even though it be such as does not establish prohibition to marry. But as regards what is related from some jurists to the effect that the term is limited to those who are prohibited from intermarriage, it is a rare opinion, and open to be refuted from what you have already learnt."<sup>3</sup> Cf. the passage from the 'Sharh-i-l-uma' in the comment to s. 425, below, which refers to "near" relatives.

It will be observed that under Shafi'i law the only instance in which a gift between relations by consanguinity is revocable, is where the donor is the father or other paternal ancestor of the donee. Under systems other than that of Shafi'i the gift to a descendant cannot be revoked in any case, being to a person within the prohibited degrees. The explanation of this strange contradiction between the schools of Shafi'i and others is interesting: Shafi'i bases his rule on a tradition that the Prophet said, "Refract not gifts." This is taken by the other exponents of the law to be merely recommendatory, and not a positive injunction with legal force. On the other hand, Shafi'i gives it legal force and deduces therefrom a general rule that gifts are not revocable; at the same time he bases the exception to his general rule and permits revocation of gifts to descendants, on the ground that the father and other ascendants have "power" over the property of their descendants. See s. 290, above, from which it will appear that all the schools are agreed that the father has a right to apply the child's property to the maintenance of himself and of the child; but Shafi'i alone draws from this rule the conclusion that the father has such a 'patria potestas' as to entitle him to deal with the property of his children, even though they be adults, and, accordingly that he has the power to deal with property which the descendant has derived from him. See s. 348, above and comment thereto, on causes of irrevocability.

**425.** (1) According to Hanafi law a gift cannot be

(U) Affinity  
between  
parties,

<sup>1</sup> *Maqbul Hussain v. Ghafur-un-Nissa* (1914) 36 All. 333.

**SECTION 425.** revoked where the donor and donee are husband and wife, or 'vice versa.'<sup>1</sup>

(Shiah law).  
Revocation of gifts  
in favour of  
husband or wife  
permissible, but  
abominable.

(2) The Shiah authorities are not unanimous on the point whether it is permissible to revoke a gift in favour of a husband or wife. All Shiah authorities are agreed that to revoke such a gift is abominable, but the better opinion is that it is not unlawful.<sup>2</sup>

*Explanation.*—The rule above referred to applies in cases when the relation exists at the time of the gift; and a marriage contracted subsequently to the gift does not make the prior gift irrevocable, nor does a gift made during marriage become revocable on a dissolution of the marriage.<sup>1</sup>

The following is from a Shiah book of authority: "Irrevocability may arise from the fact of his (the donor's) being a near relative, even one with whom marriage is not prohibited; or (according to the better opinion) from the fact of their being husband and wife."<sup>3</sup> The author of the 'Da'ayam-ul-Islam' (an authority binding on the Daudi and Sulaimnani Shiahs), it is laid down that gifts between husband and wife are not revocable.<sup>4</sup>

(b) death.

**426.** A gift cannot be revoked after the death of the donor or of the donee.<sup>5</sup>

(c) change in  
subject of  
gift, or its  
transfer.

**427.** (1) According to Hanafi law a gift cannot be revoked after the subject of the gift has (a) perished;<sup>6</sup> or (b) been so changed as to lose its identity;<sup>7</sup> or (c) been alienated, or transferred<sup>8</sup> by the donee;<sup>9</sup> or (d) increased in value,<sup>9</sup>

<sup>1</sup> Bail. I. 525 (7th); Hed. 496; *Shah Mahmud Bekhah v. Lutf Ali* (1834) 5 S. D. A. Rep. 355; Morley, Dig., I. 269, s. 60.

<sup>2</sup> Bail. II. 205, 206. The *Lum'a* considers the better opinion to be the other way; see comment. Syed Amcer Ali I. 89-90, states that the author of the 'Mabut' referred to as the 'Shalkh' takes the same view; and expresses the view that the law as laid down in the *Shara'ya-ul-Islam* is not very different, "considering how much the moral is mixed up in the 'Shara'ya' with the legal." The author of the *Shara'ya-ul-Islam*, however, frequently draws attention to the distinction between moral and legal obligation; see s. 5D, above.

<sup>3</sup> *Sharh-i-Lum'a*, I. 232.

<sup>4</sup> *Da'ayam-ul-Islam* (Notes).

<sup>5</sup> Bail. I. 525 (2nd and 3rd); Hed. 486 (col. 1); Macn. 212 (II. 1-2); Macn. 215.

<sup>6</sup> Bail. I. 524 (par. 3), "for there is no means of having recourse for its value, since the contract was not for value. Bail. II. 25, II. 14-16.

<sup>7</sup> See Bail. I. 525 (6th); as grinding wheat, baking flour, and churning milk into butter, Hed. 486 (col. 1.) makes the gift of the wheat, flour or milk irrevocable. Turning a bath into a dwelling house, without making any addition to the building, does not make it irrevocable, *not vice versa*: Bail. I. 526 (II. 5-7).

<sup>8</sup> Bail. I. 525 (2nd).

<sup>9</sup> *Shah Mahmud Bekhah v. Lutf Ali* (1834) 5 S. D. A. Rep. 355.

owing to some accession thereto which is inseparable from SECTION 427. it,<sup>1</sup> or owing to its being moved from one place to another.<sup>2</sup>

(2) According to Shiah<sup>3</sup> and Shafi'i law a gift becomes irrevocable under clauses (a) (b) and (c), above. The Shiah authorities are divided as to whether a gift can be revoked after the donee has caused any increase or profit to accrue to the subject of the gift.<sup>3</sup> (Shiah and Shafi'i law)

I. "It is said in 'Al Murasim,' that a gift to a stranger is of two kinds, (1) what can be consumed and (2) what cannot be. (1) If it be such as can be consumed, like measureable articles, and it is consumed, then there is no revocation. (2) What is not such is of two kinds: (a) one for which there is a return, and (b) one for which there is no return. (a) In the former case there is no revocation, and (b) in the latter revocation is allowed. II. In 'Al Ghunia,' the author places under the kind in which revocation is not allowed, (1) such in which return is stipulated for, and made; or (2) in favour of a relation, or (3) the person to whom the gift is made is such that by the gift having been made to him, approach to God is the result. Under the latter class he places all others."<sup>4</sup> Revocable and irrevocable gifts.

**428.** A gift cannot be revoked for which an 'iwaz' or return<sup>5</sup> has been given to the donor, either by the donee or by a third party.<sup>6</sup> (d) "iwaz."

**429.** A gift cannot be revoked the subject of which<sup>(e)</sup> has been transferred in any manner whatever from the donee to another person.<sup>7</sup> (e) transfer of subject.

#### (4) Gifts of which the Revocability Revives.

**430.** (1) Where a gift has become irrevocable (under Revocation of Second gift.

<sup>1</sup> Hed. 486 (col. 1); Bail. I. 525 (4th), e.g. plastering a house with mortar or clay; or shutting up a door in buildings, or repairing them.

<sup>2</sup> "According to Aboo Huneefa and Muhammad": Bail. I. 525 (l. 15). Some Shiah authorities go so far as to hold that mere use by the donee makes the gift irrevocable. But the opposite opinion is said to be more reasonable and approved by the *Shari'ah-ul-Islam*.

<sup>3</sup> Shiah law: absence of increase as a cause preventing revocation from Bail. II. 205 (par. 3), 208 (case 4), 209 (case 6); the difference of view is mentioned in Bail. II., 200.

<sup>4</sup> *Jawahir-ul-Kalam*, IV. 631. (Shiah Text.)

The numbers and letters are mine. "Where one person makes a gift of a horse, and the donee has it trained, there is no power of revocation on the part of the donor." Ameri III. I. 94.

<sup>5</sup> Bail. I. 525 (5th); II. 205. (ll. 16-19), 207 (ll. 7-7); Hed. 486 (col. 1).

<sup>6</sup> Hed. 486 (col. 1, par. 4).

<sup>7</sup> Bail. I. 525 (1st), whether by sale, gift or death; *Shah Mahmud Baksh v. Lutf Ali* (1834) 5 S. D. A. 355; Morley I. 209 s. 60; *Wajed Ali v. Abdul Ali* [1864] W. R. 121 (alienation by donee; though the gift was to a son and would have been irrevocable on that ground too).

**SECTION 430.** s. 429, above) by reason of the donee having made a second gift of its subject, to a second donee, and subsequently the said second gift is revoked, the first gift again becomes revocable.

(2) Save as provided in sub-section (1), above, a gift having become irrevocable under s. 429, above, does not again become revocable.<sup>1</sup>

*Illustrations.*

(1) In 1900 D makes a gift (referred to below as the first gift) of a horse to R, a stranger, without return. In 1901 R makes a gift (referred to below as the second gift) of the horse to RA. In 1903 R revokes the second gift and takes back the horse from RA. Between 1901 and 1903 the first gift cannot be revoked (by D); but it may be revoked after 1903 (or before 1901).

(2) The first gift referred to in the last illustration would have remained irrevocable in and after 1903, if R had got back the horse by purchase or had inherited it.<sup>1</sup>

*Addition  
perishing.*

**431.** Where the right of revoking a gift has been lost owing to an addition being made to its subject, the right revives on the addition perishing or being destroyed.<sup>2</sup>

*Diminution in  
value rise  
does not revive  
revocability*

**432.** Where the right of revoking a gift has been lost owing to the value of its subject having increased, the right does not revive on a subsequent diminution in its value.<sup>3</sup>

*(5) Effect of Revocation.*

*Not retrospective.*

**433.** Where a gift is revoked, the donor becomes entitled only to the future rights in the subject of the gift, and not to rights referring to prior transactions.<sup>4</sup>

*Illustration*

D makes a gift to R of a house. Another house adjacent to the subject of gift is sold, and then D revokes the gift, he has no right of pre-emption over the adjacent house.<sup>4</sup>

*On revocation  
donor not to be  
compensated for  
deterioration in  
subject of gift.*

**434.** Where a gift is revoked, the donor cannot claim any compensation from the donee for deterioration in

<sup>1</sup> Bail. I. 526 (par. 4), 527 (*Id.* 1-3, 18-21).

<sup>2</sup> Bail. I. 526 (*Id.* 11-13).

<sup>3</sup> Bail. I. 526 (*Id.* 18-20).

<sup>4</sup> Bail. I. 526 (*Id.* 30-36).

or damage to the subject of the gift that has taken place, SECTION 434. or been caused while it was in the possession of the donee.<sup>1</sup>

435. (1) According to Shiah and Shaff'i law, where a <sup>(Shiah Law.)</sup> gift is revoked, the donor is entitled to such increase <sup>increase which cannot be separated,—</sup> or profit accrued from the subject of the gift as cannot be separated from it, or as was formed, or in existence, at the time that the gift was made.<sup>2</sup>

(2) Where, as the result of the donee's act, any increase <sup>Donee to get half of increase,</sup> or profit has accrued from the subject of the gift, and then the donor purports to revoke the gift, then according to those Shiah authorities who consider the revocation valid, the donor is obliged to give to the donee by way of compensation half of the cost to the donee of bringing about the said increase or profit.<sup>3</sup>

*Explanation.*—The donee is entitled to such increase or profit as can be separated from the subject of gift, whether or not it was formed at the time of the gift.

D makes a gift of an orchard to R. D then revokes the gift. The *Illustration.* fruit belongs to D, if it was on the trees when the gift was made, otherwise it belongs to R.

Thus it will be seen that on a gift being retracted,—

1. When there has resulted any defect or deficiency in the subject of the gift, it must be borne by the original donor,

2. When there has resulted an accretion or increase in the property, or profit accrued from the gift, and it has not been caused by the donee, —

(a) If the increase or profit is united to the original gift and cannot be separated from it, it belongs to the donor,

(b) if the increase or profit is not so united and can be separated, it belongs—

(i) to the donee, if it came into being entirely after the gift,

(ii) to the donor if it was formed at the time of the gift.<sup>4</sup>

3. When there has resulted an accretion or increase in the subject of the gift caused by the donee's act, the donor must bear half the cost of

<sup>1</sup> Bail. II. 208 (*fourth*).

<sup>2</sup> Bail. II. 208 (*fourth*). Cf. Indian Contract Act, s. 163; and the Roman law of Specifications,

Justin., II. 1, 27-28; Gaus, II. 79

<sup>3</sup> Bail. II. 209

<sup>4</sup> Bail. II. 208

SECTION 435. the addition.<sup>1</sup> According to some authors, such a "use" of the subject would debar the donor from revoking.

Donee may use subject of gift until revocation complete—not after.

436. (1) Until (but not after) the revocation of a gift is completed in accordance with s. 423, above,<sup>2</sup> the donee may use and dispose of the subject of the gift.

On demand by donor revoked gift to be returned.

(2) The donee is not responsible for any loss to the subject of the gift while it lawfully remains in his possession after the revocation of the gift is complete, unless, after the revocation is complete, the donor has demanded restoration of its possession, and the donee has refused to restore it.<sup>3</sup>

### § 9—Voluntary Transfers other than 'Hiba.'

(1) 'Sadaqa,' or Gift with a Religious Motive.

'Sadaqa' is gift with religious motive: Irrevocable acceptance not necessary.

437. 'Sadaqa' is a transfer of property or rights in all respects like a gift,<sup>4</sup> save that a 'sadaqa' (a) is made out of a desire to obtain religious merit; <sup>4</sup> (b) it is irrevocable <sup>5</sup> whether made to a rich or a poor man:<sup>3</sup> (c) it need not be expressly accepted.<sup>6</sup>

'Sadaqa' is the word used in the 'Quran' for alms:

"A kind speech and forgiveness is better than alms ('sadaqa') followed by injury. God is rich, element." Sura II. 265.

'Sadaqa,'  
'hiba' and  
'hadiya'  
distinguished.

The 'Jawahir-ul-Kalam' (a Shiah text) refers to a tradition of Imam Ja'far us Sadiq having said:—"Sadaqa" is an innovation; at the time of the Prophet people used to give only as 'hiba' and 'nahala'. . . Hence in a quotation from 'Tai' it is said that when a reward (from God) and approach to God are intended in a gift, it is termed a 'sadaqa,' and so a distinction arises between it and a 'hiba' or a 'hadiya' . . . If one adds (to the declaration of gift) the words 'for the sake of God,' that is to say, he joins with the gift (the intention of) approach (to God) it is not proper to revoke it . . . 'Hiba' is thus more general than 'sadaqa,' because the latter has the condition of approach (to God), which does not accompany the former. 'Hadiya' is still more limited

<sup>1</sup> § 411, II. 209

<sup>2</sup> Bail I 527-528, refers directly only to cancellation by the Court; but it is presumed that the same rule would apply to revocation by mutual consent. Cf. Indian Contract Act, s. 161.

<sup>3</sup> Hed. 489; Bail. I. 545-574, 516 (H. 13-16);

Bail. II. 224.

See s. 5 D, above, *Minhaj*, 235.

<sup>4</sup> Bail. I. 545 (H. 4-5), cf. *Gulam Hussain Sarb v. Aji Ajum Tadalish Sarb*, and *vice versa* (1868), 4 Mad. II. C. R. 44, 47, which shows how closely *sadaqa* is allied to *wasq*.

<sup>6</sup> Bail. I. 545 (H. 17-19),

in meaning, because it requires the carriage of its subject from one place to another. So it cannot be said that one has made a 'hadia' of a house or of landed property, rather it should be said he has made a 'hiba' of it." <sup>1</sup>

"Reward from God is a return, and so it (*viz.*, a 'sadaqa') falls under the class of gifts for which there is a return" <sup>2</sup> (and as such is irrevocable).

A donation of ten 'dirhams' to two men may either be a gift or a 'sadaqa' and 'sadaqa.' Imam Abu Hanifa is reported to have held that if the donees are poor the donation becomes a 'sadaqa,' ('Hanifa has construed a gift into alms when the object is a poor man') and 'vice versa' <sup>3</sup>

It will be remembered that when a 'hiba' is made to two or more donees, and the subject of gift is not partitioned amongst them, Imam Abu Hanifa holds the gift void under the doctrine of 'musha', and the two disciples hold it valid. The two disciples would equally, therefore, hold it valid if it is a 'sadaqa.' Abu Hanifa's opinion is recorded in two ways. In the 'Jama Saghir,' it is stated to be that if it is a 'sadaqa' he holds it valid; but in the 'Mabsut' he is stated to have held it invalid even if it is a 'sadaqa.' <sup>4</sup>

### (2) Gift of a Debt or other Obligation.

**438.** Subject to ss. 439 and 440, below, the right to recover a debt or enforce an obligation may form the subject of a gift. <sup>5</sup>

Transfer of debt by way of gift.

This is in part covered by s. 366, above. See also s. 369, above. So a pension under the Pensions Act, XXIII of 1871, s. 7 (2), may form the subject of a gift, the decision being based on the Act, and not the Muhammadan law <sup>6</sup>; and rent may be remitted, the remission operating as a gift which becomes complete at the termination of the period when it becomes due <sup>7</sup>. See also 'Ebrahimibhai v Gulbai.'

**439.** (1) According to Shiah Ithna 'Ashari law a debt, or "what rests on the obligation of another," cannot

(Shiah Law) Debt can be released but not transferred

<sup>1</sup> *Jawahir-ul-Kalam*, IV 615

<sup>2</sup> *Jami'-'ush-Shittat*, 392 (Shiah text).

<sup>3</sup> *Ibid.* 485 (ed. L. & L.).

<sup>4</sup> *Bul.* I, 522-523, II 203 (par. 2), restricts it to a release of the debt or obligation. The authors of the *Alabani* and the *Jami'-'ush-Shittat* seem to agree with the Hanafi view. The law is

now governed, however, by the Transfer of Property Act

<sup>5</sup> *Sahibunnissa v Hafiz Bibi* (1887) 9 All 213

<sup>6</sup> *Ennet Hussein v Koobannassa* (1869) 11 W. R. 330.

<sup>7</sup> (1902) 26 Bom 577

**SECTION 439.** be the subject of a valid gift to any donee other than the debtor, or person on whom the obligation rests.<sup>1</sup>

Sunni Law  
otherwise

(2) According to Sunni law the gift of a debt to a donee other than the debtor is also valid, provided that the donee is asked to take possession of the debt.<sup>2</sup> The Shiah Ismaili law seems to be to the same effect.<sup>3</sup>

Subject  
of gift  
actionable  
claim

(3) *Semble*, the Transfer of Property Act, Chapter VIII., now governs the gifts of debts and obligations made by Mussulmans in British India, and where the subject of gift consists of an actionable claim, the transfer can, in British India, be effected only by the execution of an instrument in writing, signed by the transferor or his duly authorized agent, and is complete and effectual upon the execution of such instrument.<sup>4</sup>

*Illustrations*

(1) D owes a debt to C, and S is a surety for its payment. C purports to release D. D is released notwithstanding that he does not accept the release, but under Muhammadan law S remains bound as surety.<sup>5</sup>

(2) D dies, owing a debt to C, who makes a gift of it to some of the heirs of C. The debt is extinguished against all the heirs of D.

(3) C, a creditor, dies and one of C's heirs releases his share in the debt to the debtor, it is valid without being impeachable on the ground of being a 'musha'.

(4) F contracts his son, S, in marriage to W, and pays the 'mahr,' on behalf of S. This is a gift of the 'mahr' from F to S, so that should half of the 'mahr' be repayable by W it will be received by S and not F. ("There is some room for doubt."<sup>6</sup>)

Applicability  
of Transfer  
of Property  
Act

The whole of the Transfer of Property Act applies to Mussulmans except Chapter VII. on gifts; and it is not provided anywhere in the Act that the rest of the Act has reference only to transactions for consideration, while it is clear from s. 5 of the Act that its scope is not confined to transfers for consideration. It would, therefore, seem that the transfer of an actionable claim can only be effected (even for the purposes

<sup>1</sup> Bail, II, 203. In Roman law "obligations, no matter how contracted, do not admit of any form of transfer," Gams, II, 38.

<sup>2</sup> Bail, I, 522. Such gifts are stated to be lawful only on a "liberal construction" (*dhik-sun*), Mas'n, 208-209.

<sup>3</sup> *Dir 'Aqam-ul-Islam* (Notes).

<sup>4</sup> Transfer of Property Act, Ch. VIII., s. 130 (1) as amended by Act II. of 1909, s. 4.

<sup>5</sup> Bail, I, 522. The law is altered by the Indian Contract Act, s. 134.

<sup>6</sup> Bail, II, 80-81.



of gifts by Muslims) in the manner laid down in Chapter VIII. of SECTION 439. the Act, and that the Muhammadan law on this point is repealed to that extent by the provisions contained in the said Chapter

**440.** Where a creditor purports to make a declaration of gift of the debt to his debtor, it operates as a release, and no acceptance is required by the debtor to complete the gift.<sup>1</sup>

**441.** The gift of a debt to a debtor is not revocable.<sup>2</sup>

(3) *Gift of 'Mahr.'*

**442.** Where a woman purports to make a gift of her 'mahr,' the rules relating to gifts are applicable except that, (a) the wife may lawfully make a conditional gift of her unpaid 'mahr' to her husband, and if the condition is not fulfilled she is entitled to demand payment of the 'mahr' from her husband;<sup>3</sup> (b) such a gift made to a dead husband is valid,<sup>4</sup> and operates to extinguish the right of the widow to claim the 'mahr.'<sup>5</sup>

(1) H says to his wife W, "Hast thou freed me from the dower that I may give thee this thing or take you to Mecca?" and W frees H; then H refuses to give her the thing, or to take her to Mecca, there is no release of the dower.<sup>6</sup>

(2) W tells her husband H, "You absent yourself much from me, but if you remain with me then the wall which is in such a house is a gift to you from me," whereupon H stays with W for a while and then divorces her. The case may present five aspects, (a) if W made a mere promise, and not a gift 'in praesenti' then the wall is not the husband's; (b) if W made a gift, and H promised, then the wall will be the husband's, provided that possession of it was given to him, but not otherwise; (c) if the gift is made with this stipulation that he should stay with W, and possession is given, even then the 'fatwa' is that the wall is not the husband's; <sup>7</sup> (d) if W says 'I have made a

<sup>1</sup> Bail. I. 522; II. 204 (H 1-4).

<sup>2</sup> Bail. I. 527 (par. 2).

<sup>3</sup> Bail. I. 120 (par. 1); cf. *Fatawa 'Alamgiri*, Vol. II, *Nisab*, ch. vi, *fad 10 (ad fin.)*; extract from the *Haz*, consisting of a *responsum* of Shaikh Rahmatullah; see *Illustrations* to s. 412.

<sup>4</sup> Bail. I. 120 (l. 6), 544 (last line); *Fatawa 'Alamgiri* (*Haba*, ch. XI) citing *Sirajia*.

<sup>5</sup> *Jyoti Begum Fakiroddin v. Umrao Begum*

(1908) 32 Bom 612, provided that the widow had attained majority under the Indian Majority Act; (*Abu Dhanassa v. Muhammad* (1917) 35 Mad. L. J. 468.

<sup>6</sup> Bail I. 538, 539.

<sup>7</sup> It is stated in the *Fatawa 'Alamgiri* that Shaikh Abul Qasim holds the contrary view; but the *fatawa* is as stated above.

**SECTION 442.** gift of this wall to you provided that you stay with me, <sup>1</sup> the wall is not the husband's; (c) if *W* compromised with *H* on the stipulation that he should stay with her, and the wall be a gift to him, then the wall is not his <sup>2</sup>

*Illustrations*

(3) *W* says to her husband *H*, who is ill, "If you die of this illness, you are released from my dower." This is void, being a contingent gift.<sup>3</sup>

(4) *W* is divorced by her husband *H*, and *H* agrees to re-marry *W* on condition that *W* should make a gift to him of the 'mahr' due on their first marriage. *W*'s consenting to do so does not affect her right to the first 'mahr,' whether they re-marry or not. "because *W* placed on herself, as a consideration for the marriage, her property ('mahr'), and no consideration is due from the wife to the husband in marriage"<sup>4</sup>

(5) *W* is divorced by her husband *H* while *W* is in her 'iddat.' *H* gives her maintenance, to induce her to marry him. afterwards *W* refuses to marry, then the *Sadr-us-Shahid* says that he can claim back the maintenance if the maintenance was given on the condition that she should marry him; 'Qazi Khan' has said that it can be claimed back whether she marries or not, because it was in the nature of a bribe.<sup>5</sup>

(Gift to dead person.

With reference to gifts to deceased persons, the following extract may be of interest: "On the death of a person, someone sends to the son of the deceased some cloth for his burial shroud, then does the son become the owner of the shroud, so that he may return the cloth, and bury his father in another shroud?—The law is that if the deceased was such a person that, owing to his learning and knowledge of the law or piety, people considered it auspicious to give a shroud to him, then the son will not be the owner of it; and in such a case if the son wraps up the corpse in another shroud, then he will be obliged to return that cloth to its owner; but if the case is not such, then the son may use the cloth as he likes."<sup>6</sup>

#### (4) 'Ariat' or Gratuitous Loan.

(Hanafi Law)  
'Ariat' gratuitous loan.

**443.** (1) According to Hanafi law 'ariat' is a gratuitous loan of an article by its owner to another who acquires the right to the profits of the subject of the 'ariat.'<sup>7</sup>

<sup>1</sup> "Here the gift is contingent."—Ball I. 539, n. 2.

<sup>2</sup> Ball. I. 539.

<sup>3</sup> Ball. I. 540.

<sup>4</sup> *Qazi Khan*, cited in '*Alamgiri*'; Ball. I. 540, 541. See n 92, above.

<sup>5</sup> *Fatawa 'Alamgiri* (*Hiba* ch. XL) citing *Qazi*

*Khan*.

<sup>6</sup> *Fatawa 'Alamgiri* (*Hiba* ch. XI., *ad fin.*).

<sup>7</sup> *Hed. 478; Mumtazunnissa v. Tofail Ahmad* (1905) 28 All. 264; *In the matter of the Petition of Khalil Ahmad* (1908) 30 All. 309, correcting an error in the first judgment.

(2) An 'ariat' may be made by a donor who has not attained puberty; and its subject may be the undivided part of anything; and it is not necessary that the donor should make a declaration of 'ariat' and the donee accept it.<sup>1</sup>

Neither puberty, division, declaration nor acceptance necessary.

(1) The following forms are given for 'ariat,' viz., by a man saying—

"I have made thee owner of the profits of this house for a month "

"I have made thee the owner of the profits of this house ;" or

"I lend thee this robe, thou mayest wear it for a day ;" or

"I lend thee this house that thou mayest live therein for a year ;" or

"I make this house of mine thy residence for one month," or "for my life-time ;" or

"My house is for thee a gift by way of residence." <sup>2</sup>

(2) D says to R " my house is for thee if thou survive me, and for me if I survive thee." <sup>3</sup> This may operate as an 'ariat.'

'Ruqba' and 'ariat.'

'Ariat' arises from a permission to use some property or to take its profits for a definite period, revocable at the will of the owner of the property ; and cannot be assigned by the person who has the permission,<sup>4</sup> nor does it devolve on his heirs,<sup>5</sup> in an 'ariat' it is not necessary that the donor should be of age, nor that the thing forming its subject should be divided if of 'musha,' nor is acceptance after proposal a condition.<sup>3</sup>

'Ariat' distinguished from 'hiba.'

Can 'ariat' be considered to be a transfer of property ?—The rules of Shiah law about similar transactions are very definite, and create rights capable of being transferred. But according to Hanafi law they do not seem to be capable of transfer. Cf. the Indian Contract Act, ss. 148, *et seq.*, and particularly s. 159.

### § 10.—Life-Interests and other Limited Estates.

(1) *Hanafi Law and Law of Trusts in British India.*

444. According to Hanafi law, where a person purports to make a 'hiba,'<sup>6</sup> and to restrict the donee's rights in the subject of 'hiba' for his life [or for any other limited period] the donee takes an absolute interest, and

(Sunni Law.)  
'Hiba' cannot be restricted to life of donee.

<sup>1</sup> *Muhammad Faiz Ahmad Khan v. Gulam Ahmad Khan*, (1881) 3 All. 490, 492, 502, 503; 8 I. A. 25; *Hed.* 478-482; *Ball.* I. 549.

<sup>2</sup> See *n.* to s. 445 (2).

<sup>3</sup> See s. 445, below, and *id.* (2), (3), *thereto*.

<sup>4</sup> *Mumtazunnissa v. Tufail Ahmad*, (1905), 25 All. 264. Certain expressions in the judgment liable to be misunderstood, were explained

when the case was brought on for review; *In re Khali* (1908) 30 All. 309.

<sup>5</sup> *Mahomed Faiz Ahmad Khan v. Ghulam Ahmad Khan*, (1881) 3 All. 490; 8 I. A. 25. See the learned judgment of the Subordinate Judge

<sup>6</sup> The word *hiba* is advisedly used in this section, see comment.

**SECTION 444.** the subject of 'hiba' <sup>1</sup> devolves upon the heirs of the donee after his death.<sup>2</sup> *Quære*, whether under the law applicable to Hanafi Muslims in British India, it is not possible for a life-interest or other limited estate to be transferred without consideration,<sup>3</sup> where the transferor is entitled to a larger interest in the property than he purports to transfer by way of gift.<sup>4</sup> It is generally assumed that it is not possible, but, *semble*, the question is not free from doubt.<sup>5</sup>

Scheme of  
this comment.

In the comment below the DECIDED CASES will *first* be considered, *secondly* the TEXTS of Hanafi law on which the rule depends, and the reasons why life-interests are not permitted, showing how it is that Shiah law permits them; *thirdly* and *fourthly*, the effect of the Indian TRUSTS ACT and the Indian CONTRACT ACT, s. 25, respectively, on life-interests created by persons subject to Hanafi law; and *fifthly*, the effect of the rules on BEQUESTS for limited periods.

#### I. DECIDED CASES.

I. The decisions of the British India Courts on the question whether a Mussulman governed by Hanafi law may create a life-interest appear at first sight to be conclusive. They deserve, however, a careful examination:—

##### 1. Unusual to create life-interests: transaction requires very clear proof.

1. In 1872 their lordships of the Privy Council said:<sup>6</sup> "Upon what grounds ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be a very clear proof of so unusual a transaction. The only grounds on which it can be inferred that the plaintiff was to take only a life-interest seems to be the expressions . . . <sup>7</sup> [which] may be explained on the supposition that they have been used to import that the property was to remain with the widow for the full term of her life; and that Ali Kureem, as her heir, would

<sup>1</sup> See p. 497, n. 6.

<sup>2</sup> Hed. 489; Bail. I. 509 (par. 2); *Nizamudin Gulam v. Abdul Gafur* (1888) 13 Bom. 304.

<sup>3</sup> A transfer of a life-interest for consideration was held valid: *Bibi Janbi v. Hazarath Sakib* (1910) 21 Mad. L. J. 358.

<sup>4</sup> Obviously a Hanafi Muslim may be a mere life tenant of a property, by having a life-interest transferred to him for consideration or otherwise, e.g., by gift from a Parsi or Christian. In such a case a Hanafi Muslim can, it has been held, make a gift of a life-interest, *viz.* of all the interest in the property which he possesses: see s. 366, *et seq.*, above.

<sup>5</sup> See comment.

<sup>6</sup> (*Mussamat Humeda v. (Mussamat) Budium* (1872) 17 W. R. 525, 527 (P.O.).

<sup>7</sup> The words omitted in the quotation above are as follows: "In the *foutenamah* and in the plaintiff's petition, recited in the proceeding for the mutation of names in the case of Mowzah Muzdum-pore Doomree. The judgment in that case finds generally that she is in possession of the entire property left by Mahomed Ali, 'in lieu of Den Mohr receivable by her,' without any qualification as to the extent of her interest. Their lordships conceive that the expressions in question may be explained," etc., as above.

succeded to them after her death. They are, at all events, of opinion that SECTION 444. these expressions, taken in connection with the rest of the evidence, are too weak to prove a transaction, so improbable amongst Mahomedans, as an alienation by the son for the life only of his mother (a transaction consistent with the case of neither party) and that the Zillah Judge came to the right conclusion when he found that the plaintiff took an absolute interest in the properties left by her husband." This case merely lays down that it was not proved that there was an attempt to create a life-interest; and that any attempt at "so unusual a transaction must be proved by very clear evidence." Their lordships' observation, that there ought to be very clear proof of a transaction "creating such a life-interest," implies that where there is such proof the transaction would be valid, and if the Courts in British India had not already taken a view of the texts to which attention will be directed below, against the recognition of life-interests, it is not unlikely that this obiter dictum might in itself have sufficed for laying the foundation of life-interests.

2. In '*Suleman Kadr v. Dorab Ali Khan*,'<sup>1</sup> Sir R. Collier delivering the opinion of the Privy Council said: "At the same time their lordships think it right to guard themselves against it being supposed that they assent to the proposition that, even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their lordships are by no means satisfied that the gift to this lady of these Government promissory notes, subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all his heirs to all time, is not, according to Mahomedan law, in its legal effect a gift to her absolutely, the condition being void. However, without determining a point which is not necessary for decision of the case they will humbly advise," etc. Here their lordships are by no means satisfied that if they had to determine a point not necessary for the decision of the case, their decision would not have been to a certain effect. Hence it would hardly be justifiable to say that there is even an obiter dictum of their lordships to the effect that life-interests are not permissible in Hanafi law.

3. However, in '*Nizamuddin Gulam v. Abdul Gafur*'<sup>2</sup> Parsons, J., said: "The creation of any life-estate at all appears quite inconsistent with the Mahomedan law. See '*Mussamut Hameeda v. Mussamut Budlun*.'"<sup>3</sup> It might be that by consent such an estate might be created

2 Gift with condition that donee to have mere life-interest may operate as absolute gift.

3. Life-interests "inconsistent with Mahomedan law."

<sup>1</sup> (1881) 8 Cal. 1, 7; 8 L. A. 117, 122.

<sup>2</sup> (1886) 13 Ind. 264, 276, per Birdwood

and Parsons, J.J.

<sup>3</sup> (1872) 17 W. R. 525 (P.C.).

SECTION 444. but as a general rule, the donee in such a case would take an absolute estate. 'All our masters are agreed that when one has made a gift and stipulated for a condition, that is 'fasid' or invalid, the gift is valid and the condition void [Bail., I., 537.] So in the 'Hodaya,' III. p. 308, [Hed. 489], it is said an 'amree' or life-grant is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition." <sup>1</sup> When this decision went up in appeal to the Privy Council, their lordships there said, "It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see 'Hunneeda and others v. Budlun and the Government),<sup>2</sup> but to make the fee devolve from one generation of his descendants to another, without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life-estate but a full owner, with a prohibition against alienation, which being void in law, could not affect either herself or her creditors. . . . They have not averred . . . that Tahirabibi gave such consent, and there is no evidence to show that she did . . . Besides, there was no issue on the point, and, therefore, no finding in fact upon which the High Court could proceed in a second appeal" <sup>3</sup> It is evident, therefore, (i) that in this case the question did not arise whether a life-interest could be created; (ii) that, in any event, the law is not carried any further than by the case to which both judgments refer (but the effect of which is somewhat inaccurately stated in the High Court Judgment) and the relevant portions of which have been already quoted; (iii) in so far as the Courts had to deal with the creation of a life or other limited interest created in testamentary dispositions they seem to have overlooked the special rules relating to wills, the texts relating to which are more fully considered under the fifth heading of the comment to this section: <sup>4</sup> (iv) the force of the sentence, "It may be that by consent such an estate might be created" is not easy to understand: whose consent is intended to be referred to? Not surely that of the donor and donee, both of whom must in every case consent to the gift, unless it be assumed that his Lordship allowed himself to conceive of a gift as being valid though it is thrust upon an unconsenting donee and as having peculiar force and efficacy owing to the hardship on the unconsenting donee, who is rewarded by having a life-interest enlarged into an estate of inheritance. Perhaps what was meant

"Life-rent—  
an estate  
which does  
not appear  
to be known  
to Mahome-  
dan law."

<sup>1</sup> (1888) 13 Bom. 264, 275.

<sup>2</sup> (1872) 17 W. R. 525 (F.C.).

<sup>3</sup> *Abdul Gajur v. Nizamuddin* (1892) 17 Bom.

1, 5; 19 I. A. 170, 178.

<sup>4</sup> Hed 694; Bail. I. 632 n.; 654 (par. 2).

was that if all persons concerned consent, then a life-estate may come into being: but, prior to the gift, the only person concerned is the donor, and at the time of the gift the only other person concerned is the donee. Are those persons meant who would be interested in the property as expectant heirs or perhaps possible donees? Or did his Lordship mean that if the parties before the Court consent to it an order or decree may provide for a life-interest in favour of one of them?

4. 'Abdul Karim v. Abdul Qayum'<sup>1</sup> proceeds broadly on the ground that "life-interests and contingent interests are unknown to Muhammadan law," yet in an earlier portion of the judgment it is stated that there was "'prima facie' . . . an absolute gift. But the will goes on to provide that no son shall have the right to alienate the property given to him, and that on his death without issue the widow of the son shall take no interest, but that the property of such son shall go to the surviving brothers or other heirs." The objection to this devise, it would appear, therefore, could not be on the ground that a life-interest was sought to be created, but that an absolute gift having been made the transferee was sought to be deprived of the power of alienation. Such a restriction is obviously illegal. The proposition that life-interest and contingent interests are unknown to Muhammadan law is quite incorrect in view of the most common-place provisions in 'wafqa'.

5. The proposition was stated in the same broad terms in 'Abdoolah v. Mahomed':<sup>2</sup> "The creation of a life-estate is inconsistent with Mahomedan law; see 'Nizamudin Gulam v. Abdul Gafur,' the cases there collected, and the observations of Lord Watson in the same case under appeal to the Privy Council. 'The general rule,' said Mr. Justice Parsons upon reviewing the authorities, 'is that when a life-estate is attempted to be created, the donee would take an absolute estate.' But this was a case between Khojas; and it ought to have been governed by Shiah law, under which it is admitted now that life-interests can be created.<sup>3</sup> No reference is made in 'Abdoolah's case' to the decision of the Privy Council in appeal from Parsons, J.'s judgment.

6. Again, in 'Mahomed Shah v. Official Trustee of Bengal'<sup>4</sup> it is simply stated: "The plaintiff by this deed takes a life-interest with

4. "Life-interest unknown to Mahomedan law."

"Life-interest inconsistent with Mahomedan law."

6. When life-interest with remainder over—the latter void.

<sup>1</sup> (1908) 28 All. 342 (Banerjee and Richards, JJ.).

<sup>2</sup> (1905) 7 Bom. L. R. 306, per Batchelor, J., (sitting alone).

<sup>3</sup> *Banoo Begam v. Mir Abid Ali* (1908) 3 Bom. 172. See, however, *Jasrabai v. Sethna* (1910) 34 Bom. 604, 612, 613; 12 Bom. L. R. 341, as modified in *Cassamally v. Currimbhui*

(1911), 13 Bom. L. R. 717, 767-768; *Mahmud Ibrahim v. Abdul Latif* (1912) 14 Bom. L. R. 987, 1003.

<sup>4</sup> (1900) 36 Cal. 431 (Stephen, J., singly); see also *Maramgani Routhier v. Nayur Meera Labhas* (1913) 24 Mad. L. J. 258, where the cases above referred to are merely cited and considered as express authorities on the point.

SECTION 444. remainder to certain other persons. It has been held that this is void under Mahomedan law. It has also been held under this deed that trusts declared after the life-interest are void as gifts to unborn persons." Three unreported cases are cited, but it is not stated what propositions are established by them respectively.

It will be observed from the above, that there is no distinct or binding pronouncement by the Privy Council. A bench of any of the High Courts in India would be free to examine the texts for itself and to give effect to the law as it may consider it to be. Nor is there any decision of the Madras or Allahabad High Courts which would hamper the exercise of a similar discretion even by a single judge. This opens the way for a closer examination of the original texts on Muhammadan law.

Meaning of  
'hiba.'

II. Before dealing with the texts, however, a preliminary matter ought to be mentioned. A great deal of confusion has arisen in the law of gifts by what seems to be a misapplication of terms. The word 'hiba' seems in its origin to be applicable only to cases where the donor having the absolute ownership ('tamlik') of the subject of gift, transfers it in its entirety to the donee. The term 'hiba' assumes the existence of two conditions of things which exist in primitive society, but which do not exist when human relations, and with them, modes of owning and transferring property, become more complex: for the term 'hiba,' as explained above, involves the assumptions (1) that there is no kind of ownership recognised except full ownership or dominium, (2) that if any person desires to transfer anything to another—with or without consideration.—then he desires to transfer the dominium over that thing. The second assumption is a corollary from the first. Prior to the period when society comes to recognise that there may be rights over objects short of full ownership, there can be no law in that society to deal with that notion. Nor, when no rights short of full ownership are known to the law, can it recognise or give effect to any attempt by any individual to create (by transfer) such rights.<sup>1</sup> When the authorities say that 'hiba' cannot be made conditionally, that proposition means necessarily only that 'hiba' is a term that implies not only that no consideration is received, but that the absolute property in its subject is transferred: so that when a person uses inconsistent language, saying, "I make a 'hiba,'" and at the same time purports

<sup>1</sup> The Hanafi law abhors the participation of the donee and the donor in the same property: the subject of gift must be partitioned off; and it may be considered that the same objections apply to the donor and donee participating to-

gether in the fee simple of the property by way of life-interest and reversion. The *musha'* doctrine, however, applies only where partition is possible, and in this case it obviously is not possible.



to impose conditions upon the grant, both parts of the proposition SECTION 444. cannot be given effect to; it is therefore assumed that the main word 'hiba' (which is a technical term of law) is used in its proper sense, and the conditions are not meant to be insisted upon. There is some ground for this assumption, inasmuch as where the donor wishes to part with less than the dominium, he has appropriate legal terminology available: as for instance 'ariat,' 'wida,' 'waqf,' 'hubs,' etc., in some of which the grantor reserves his ownership, and in others he does not.<sup>1</sup> This, it is submitted, is indicated by the context in which the Arabic text-writers introduce the passages on which the rule in question (*viz.*, that a gift for the life of the donee operates as an absolute gift) is rested in British India.

A translation of the relevant passage from the 'Fatawa 'Alamgiri' The 'Fatawa 'Alamgiri.' is given below.<sup>2</sup> The 'Fatawa 'Alamgiri' may be taken as typical of all the Hanafi texts of which indeed it is a digest. The rule, it will be observed, is introduced where the authors of the 'Fatawa 'Alamgiri' are dealing with "the words which have the effect of giving rise to 'hiba.'"

"The words which have the effect of giving rise to a 'hiba' are of three kinds: *first*, such words as effectuate a 'hiba' by force of their literal meaning; *secondly*, such as give rise to a 'hiba' by 'urf' <sup>3</sup> (or customary significance) or by 'kinaya' (or allegory); <sup>4</sup> and *thirdly*, such as may bear the meaning equally of 'hiba' and of 'ariat.'

1. INSTANCES of the *first* kind of words are such as it one says:—

- (i) I have made a 'hiba' of this thing to thee, *or*.
- (ii) I have made thee the proprietor of this article, *and*
- (iii) 'I have rendered this thing thine (*lit.* for or to thee), *or*
- (iv) this 'thing is for or to thee,' *or*
- (v) 'I have made a present or a gift of this to thee.'

All these are words of 'hiba.'

2. INSTANCES of the *second* kind of 'hiba' are as follows: if one says,—

- (i) 'I have clothed thee with this cloth,' *or*

1. Literal forms of 'hiba.'

2. Customary or allegorical forms of 'hiba.'

<sup>1</sup> "Technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense." The same rule has been applied to deeds and other documents by Lord Davey in delivering the opinion of the Privy Council: *Lal Mohan Singh v Chakken Lal Roy* (1897) 21 Cal, 834, 846.

<sup>2</sup> New paragraphs and figures are mine, cf. Bell I. 509 which is not as full nor as close to the original.

<sup>3</sup> Bell I. 509 translates this expression as follows:—"The words by which gifts are effected."

<sup>4</sup> See Introductory Chapter.

<sup>5</sup> Richardson explains *kinaya* as "calling anything by a significant name, a metaphor metonymy, nickname;" and Kazimirski: "surnom, sobriquet, metonymie."

## SECTION 444.

(ii) 'I have rendered thee a dweller of this house,' then it a 'hiba'; and similarly,—

(iii) if one says: 'this house is thine, during the whole of my life,' or 'while I live,' or 'while thou art living this house is thine, and when thou diest, the house will come back to me and will become mine again,' in that case also the 'hiba' takes effect, and the condition is void.<sup>1</sup>

3. Words equally  
of 'hiba'  
and 'ariat,'

And INSTANCES of the *third* class of words are such as if one says,—  
'This house is 'ruqba' or 'hubs' for you, and gives the house to the grantee, then (a) the great Imam and Imam Muhammad hold this to be an 'ariat,' and (b) Abu Yusuf construes it as a 'hiba.'<sup>2</sup> This is contained in the 'Muhit Surukhsi.'<sup>3</sup>

The 'Hidaya' explains the interpretation of the instances of the third class of words, given above, as follows:—

II. HANAFI  
TEXTS.  
Life inter-  
ests are  
gifts with  
unenforce-  
able condi-  
tions

"The meaning of 'amree'<sup>4</sup> is a gift of a house (for example) during the life of the donee on condition of its being returned upon his death. The conveyance of the house, therefore, is valid without any return, and the condition annexed is null . . . an 'amree,'<sup>4</sup> moreover, is nothing but a gift and a condition and the condition is invalid; but a gift is not rendered null by involving an invalid condition."<sup>5</sup>

Thus an 'amree'<sup>6</sup> is interpreted as a conditional gift, hence it is deemed to pass the absolute interest; a 'ruqba' is interpreted as a contingent gift, hence it is void.<sup>7</sup>

Reasoning  
of Hanafi text-  
writers.

The reasoning of the Hanafi authorities cited above may be paraphrased as follows: "The voluntary grant of a life-interest must be considered to be a 'hiba' with the 'shart' (or stipulation) that

<sup>1</sup> Bail. I. 509, translates: "If he had said, this mansion is to thee 'umri or *hayat*, i.e., for thy age or for thy life, and when thou diest it reverts to me, in which case the gift is lawful and the condition void." This is somewhat misleading, and yet it is this the passage on which the whole law seems to have been based in British India. The context from which this extract is taken, makes it extremely probable that it merely refers to the interpretation of the particular form of Arabic words used; Bail. I. 509. "Much of the voidableness of conditions," says Syed Amcer Ali, "arises from the character of the Arabic expressions." I. 86.

<sup>2</sup> It will be observed that the three jurists do not interpret the words of a conditional gift in the same way. In such a case the *Qazi* may adopt either the one view or the other. See s. 111, above, and footnotes thereto.

<sup>3</sup> *Fatawa 'Alamgiri*, *Hiba* ch. I. which is entitled: "On (1) the definition, (2) constitution, (3) condition, (4) kinds of *hiba*, and (5) on

the words which constitutes a *hiba*. The passage translated is the beginning of the portion dealing with the fifth head referred to. The rest of this part contains various examples, with which the chapter closes. See s. 50, above.

<sup>4</sup> See in Hed. 289 for '*umra*.'

<sup>5</sup> Hed. 489; cf. William's "Real Property" (19th Ed., 1901) 91; an estate tail was at first "called a *conditional gift* by reason of the condition implied in the donation, that if the donee died without such particular heirs, or in case of the failure of such heirs, at any future time, the land should revert to the donor. Bract. fo. 17b, 47a, 68b, 68a; Co. Lit. 290 b. n. (1) V. 1; 2 Black. Comm. 110." See also Pollock and Maitland's "History of English Law," II. 16-19.

<sup>6</sup> Hed. 489 (col. 1, par. 3); the second reason given in Hed. loc. cit., (viz. that a *ruqba* is a contingent gift) is overlooked by Bailie in I. 509, n. 3.

<sup>7</sup> See s. 415, below.

the subject of the gift will be returned to the donor or his heirs after the death of the donee; now in no case is there any obligation on the part of the donee of a 'hiba ba shart ul 'iwaz' to fulfil the 'shart': the 'shart' can never be enforced. Moreover, this particular stipulation is invalid in its inception, because it contravenes the rule of law that the 'shart' cannot validly refer to (part of) the subject of the gift. Thus where a life-interest is purported to be granted, the grantee takes the property without any means being available to the grantor to enforce the return of the subject of the grant after the death of the person to whose lifetime the grant purports to be restricted."

It may be argued in reply, that the voluntary transfer of a life-interest is not making a conditional gift: that the property of the donor remains vested in him, and the donor transfers merely the life-interest, absolutely parting with that which he transfers and that consequently the donee gets only that which is parted with: that the reversion never having been parted with, the donee can have no more claim against it than he can against any other part of the rest of the donor's property. This argument in reply is opposed to the historical development of English law in which too a life-interest was originally considered as a gift with a condition<sup>1</sup> On the other hand, under Muhammadan law the voluntary nature of a gift is pushed to its extreme limit, and the donor is compellable to do nothing that he ought to do but has left undone: similarly, though he may make stipulations with the donee (as in the case of a 'hiba ba shart ul 'iwaz') such stipulations are not enforceable in themselves, the only remedy with the donor is to revoke his own gift, and that remedy may be put an end to any moment by the donee himself. It is, therefore, rather anomalous that where the donor has placed the donee in possession on the express understanding that the donee is not to exercise full ownership over the property, the transfer of possession should be considered to be sufficient, and to transfer not only what the donor purports to transfer but something more.

These objections have been referred to above in detail<sup>2</sup> in order to consider whether any of them can apply where a life-interest is created under a trust, or on account of natural love and affection between parties standing in a near relation to each other (Indian Contract Act, s. 26). It is submitted that they cannot.

Objections  
against life  
interests in  
Hanafi law.

III. TRUST  
for life.

<sup>1</sup> According to English law chattels may be the subject of gift, but at law only an absolute interest in them can be given, 'inter vivos,' and a grant of chattels for life vests the

whole legal estate' Halsbury, "Laws of England," XV., 408, s. 811.

<sup>2</sup> See the summary statement at the end of the comment to s. 444.

## SECTION 444.

Where a Hanafi Mussulman conveys property to trustees and creates under the trust a life-interest in favour of one of the beneficiaries, it is obvious that the Muhammadan law laying down that conditions between the donor and donee of a gift are not "obligatory," i.e., are not enforceable, does not prevail so as to make the trusts unenforceable: because the Indian Trusts Act pronounces with Legislative authority that they are enforceable, unless the trust is invalid under the Indian Trusts Act

The only question, therefore, that remains, to be decided, is whether the trust is invalid as such. It is declared to be invalid if its purpose (a) is forbidden by law, or (b) defeats the provisions of any law, or (c) is immoral, or (d) opposed to public policy (Indian Trusts Act, s. 4): (a) and (b) may be considered together, as the latter includes the former, as to (c) and (d) it may be shortly said that, apart from the provisions of any particular settlement, they have no application. It is submitted that no provision of law is defeated by creating a life-interest, or providing that the trustee should hold the property for the benefit of one person for life, and for another thereafter.<sup>1</sup> Even putting aside the fact that life-interests may be created under a 'waqf,' the Hanafi law as well as the Shiah law provides for giving, without consideration, the right to the use or produce of property under the name of 'ariat,' and it is recognised that a person may give to another the use of a house, without any consideration; nor are life-interests anywhere declared to be illegal.<sup>2</sup> The only effect of the intervention of a trustee is that the revocability of an 'ariat' is taken away, or, in the case of the grant of a life-interest in a house, the grantor has the means of ensuring that the donee will, in accordance with his stipulation, return the subject of the gift, which could not be ensured under a 'hiba ba shart ul 'iwaz.' In other words, a trust provides a method for enforcing the stipulation in a manner that was not contemplated by the Muslim jurists, such enforcement not being possible where the estate, legal as well as equitable, was passed to one donee by way of 'hiba.' These incidents of a trust, it is submitted, do not defeat any such provision of the law as to make unlawful, a trust for a life-interest by a person subject to Hanafi law. It is obvious that if the creation of a trust added no new incident to the transaction, no trusts would ever be created. The very object of trusts is to facilitate what otherwise cannot be done. "If the objects

Life interest not forbidden by nor opposed to Sunni law, though it could not be created by way of 'hiba.'

It could by 'ariat' and in 'waqf.'

Object of trust to accomplish new results.

<sup>1</sup> It seems to have been held that property may be transferred for consideration for a term (viz. a life-interest) *Bibi Janbi v. Hazarath Saib* (1911) 21 Mad. L. J. 258 (Sudhama Aiyar and Phillips, JJ.). Cf. *Puram Alab v. Darshan Das* 1911 9 All. L. J. 709; 11 Ind. Cas. 166, 170.

<sup>2</sup> It is submitted that there is nothing to show that a life-interest contravenes the policy of Sunni law. All that is meant is that there is no machinery available for enforcing the stipulation that it ennotes.

of a trust," it has been said by a great authority on the law of trusts, "do not contravene the *policy* of the law, the mere circumstance that the same end cannot be effectuated by moulding the legal estate, is no argument that it cannot be accomplished through the medium of the equitable. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present moment does not apply, but a trust is a thing 'sui generis,' and when public policy is not disturbed, will be executed by the Court." <sup>1</sup> Again, since, according to Hanafi law, after a 'hiba' is completed, no stipulation between the donor and the donee having reference to the subject of the 'hiba' can be enforced, were that branch of the law applicable to a trust, it would be the trustee and not the life-tenant that would acquire the absolute interest in the trust property. Now, assuming that this rule of the Hanafi law of 'hiba' can and does apply to a trust, it is clear that while on the one hand the trustee may voluntarily act upon the trust, on the other the Hanafi law cannot affect an obligation imposed upon him by the paramount authority of the Legislature. In any case on what principle can the beneficiary for life under a trust invoke the aid of the Hanafi law of 'hiba' for enlarging his beneficial interest to a fee simple? Under that law, on the same principle on which he bases his claim, no benefit at all could be claimed by him as of right, for the trustee would become the absolute owner. And yet the rights and duties of the trustee are fixed by the Legislature, and it is not contended that a trustee appointed by a Hanafi Muhammadan could claim to be absolutely entitled to property conveyed to him in trust. See s. 352, above.

Similar considerations apply with greater force when the gift comes within the Indian Contract Act s. 25 (1). See s. 351, above.

Before quitting this subject it must be pointed out that it is expressly stated that the "bequest of the service of a slave, or the occupation of a mansion, or the produce ('ghullut') of both, or of lands and gardens, is lawful. And it is lawful for a limited time or for ever;<sup>2</sup> for as the profits of a thing may be transferred by a person during his lifetime with or without a consideration, so they may in like manner be transferred after his death; the thing itself being in a manner detained in his ownership that the legatee may enjoy its profits in the same way as a person in whose favour a 'wakf' or appropriation has been made, enjoys its profits by virtue of the ownership of the appropriator."<sup>3</sup>

11. Hanafi law applied to trusts, the Trustee (not beneficiary) would take the full estate.

V. BEQUEST for limited period of time.

<sup>1</sup> Lewin on "Trusts" (1904, 11th Ed.) 87.

<sup>2</sup> "That is during the legatee's lifetime, as will be seen a little further on; and Mr. Hamilton has accordingly rendered the original word an

"indefinite period, following, no doubt the Persian translators."—Ball I. 652; s. I. 652 (*Id.* 1-11).

<sup>3</sup> Ball, I. 652, citing *Hidayat* IV. 1474; trans. IV. 527. Cf. *Med.* 692, et seq.

**SECTION 444.** It is anomalous that there should be no power to create a life-interest 'inter vivos,' but that the testamentary power of disposition should not be restricted in the same manner. The following explanation is offered of this state of the law. The transfer of the profits in the lifetime is referred to as giving an 'ariat,' which may be described as the grant of a right to the use of the thing. Now 'ariat' is revocable at the will of the grantor, and so can hardly be considered an estate; nor is 'ariat' transferable. But when such an interest is created under a will, the testator being dead on the interest opening out, it is apparently irrevocable.<sup>1</sup> Thus, "it is stated in the 'Moortuka,' on the authority of Abu Yusuf, according to one report, that when the occupancy of a house is bequeathed to a person without any limit of time he is entitled to it as long as he lives."<sup>2</sup> There seems, therefore, to be less distinction between such an interest created by will, and a life-estate.<sup>3</sup>

'Ariat.' In will irrevocable.

When the transfer is for consideration, the rule does not apply at all, and then there is no doubt that there may be a conditional transfer, e.g. a transfer for life (assuming that the transfer without consideration of such an interest must be considered a conditional gift).<sup>4</sup>

Summary of arguments

The arguments above referred to may be categorically stated as follows :

**I AGAINST THE VALIDITY OF LIFE-INTERESTS**—The grant of a life interest is a 'hiba' of the absolute interest with a condition ('shart') that the subject of 'hiba' will be returned after the particular life : it follows that :—

(1) the condition is void, because it is in the nature of a stipulation or an 'iwaz' referring to the subject of the 'hiba' but the subject of 'hiba' cannot be the subject of 'iwaz' ;

(2) even assuming that the condition is valid the legal result under Hanafi law would only be that, if the grantee is willing, he may voluntarily perform it ; but its performance cannot be enforced if the grantee wishes to repudiate it. In the latter case the grantor's only remedy, if he has any remedy, is to revoke his original gift.

**II. REPLY TO THE ARGUMENTS GIVEN ABOVE.**—The grant of a life estate is not a conditional 'hiba' of the whole dominium : it is an unconditional grant of that alone which is granted—of a particular interest or right in the property.

<sup>1</sup> Cf. s. 426, above.

<sup>2</sup> Hall, I. 654 (par. 2) ; cf. Hed. 692-696.

<sup>3</sup> On the distinction between life-interest and these grants, see ss. 117, *et seq.*, below.

<sup>4</sup> *Bibi Janab v. Hazarath Sahib* (1910) 21 Mad. L. J. 958—here the transfer was of a life-interest in lieu of dower and it was upheld.

(2) Assuming that it is a conditional ‘hiba,’ the condition does not refer to the subject of gift, for the subject of gift consists of the rights granted and the condition refers to the reversionary rights which are not granted. Hence the transaction may be supported as a ‘hiba-ba-shart-ul-iwaz.’<sup>1</sup>

(3) Assuming that it is a conditional gift and that the condition refers to the subject of the gift,-

(a) the condition may be unenforceable under the strict Muhammadan law, but, under the law of British India, the donee may be considered a trustee for the reversionary or the donor (Indian Trust-Act, s. 82);

(b) if the condition is not enforceable even in British India, it is more in consonance with the theory of the voluntary nature of gifts to hold that, as there has been no intention to transfer the property absolutely, the transfer fails, than to hold that, though the intention was to transfer only a life-interest, yet the absolute interest is transferred.

**445.** In accordance with the exposition of the Hanafi-Sunni law by Abu Hanifa and Imam Muhammad, ‘ruqba’<sup>2</sup> meaning thereby a grant for the life of the donee with a condition that if the donee survives the donor, the subject of the grant shall belong absolutely to the donee, is void. Abu Yusuf holds that the grant of such a ‘ruqba’ gives to the donee the absolute estate in the subject of the gift.<sup>3</sup> Imam Shafi’i latterly held that such a disposition operates as a ‘hiba,’ transferring the absolute estate in the subject of gift, but he had at first expressed a different opinion; and it is stated in the ‘Minhaj’ that both of the Imam’s opinions have equal currency.<sup>4</sup>

(Hanafi law)  
‘Ruqba,’  
its meaning  
and effect

(1) D says to R: “My mansion is thine ‘ruqba,’” meaning, “if thou diest, it is mine; if I die it is thine.” Under Hanafi law the gift is void.<sup>5</sup>

(2) D says to R: “This mansion,” or “this land,” or “this maid” or things “of which the benefit may be derived consistently with the

<sup>1</sup> See p. 508, n. 4.

<sup>2</sup> The expression *ruqba* is used in different senses; cf. s. 447 (1), below.

<sup>3</sup> Hed. 489; Bail. I. 508. For Shi’ah law cf.

ss. 447, et seq.

<sup>4</sup> *Minhaj*, 234. This is a work of paramount authority on Shafi’i law.

<sup>5</sup> Bail. I. 508, (H. 3-7).

*Illustration u.s.*

SECTION 445. subsistence of the thing itself, is 'minha'<sup>1</sup> of thee,"—it would be an 'ariat' loan,<sup>2</sup> unless a gift were intended.

*Illustration.*

(3) If D purports to make a 'minha'<sup>1</sup> of food or of money, or of anything else "of which the benefit cannot be derived except by consumption or destruction of the substance, it would be a gift."<sup>1</sup>

There is little likelihood of any person in British India making the experiment of a grant by way of 'ruqba' with the use of that Arabic term.<sup>3</sup> This section is however not of merely academic interest, as the subject of the grant of limited interests generally is of growing importance in British India.

'Ruqba' in British India in Shiah and Sunni law.

A 'ruqba' is valid in accordance with its terms under Shiah law. In the 'Sharaya-ul-Islam' 'ruqba' is explained as a grant for a fixed term.<sup>4</sup>

The difference between the Sunni and Shiah law is referred to in an interesting passage in the 'Jami'ush-Shittat'.—

"If a declaration is made in the following terms: (1) 'I give this house to you by way of 'ruqba' and the same belongs to you so long as you live,' or (2) 'I give away to you the corpus of this house, on condition that if you die before me, the same shall revert to me, and that if I die before you, it will continue to be yours,'—it has been contended that these words obviously must be interpreted to mean that the corpus of the property is permanently alienated, as has been related by the above mentioned author and by others, on the authority of the Sunni jurists,<sup>5</sup> but (on the other hand) it is (equally) possible that the intention in making such a declaration refers to the enjoyment of the usufruct for the rest of the (donee's) life; and this is clearly stated in the first of the two formulæ; (though) according to the Sunni view even that is not valid (for the purpose of creating a limited interest). It is possible that what is meant by him is that a 'hiba' in this form is valid."<sup>6</sup>

(2) 'Hubs' or Limited Interests under Shiah law.

446. (1) Where (the transaction being subject to Shiah law) the owner of a property empowers another to

(Shiah law.)  
Creation of  
limited  
interests.

<sup>1</sup> Bail. I. 511 *Minha* is translated as *donum* by Freytag, and as "gift" by Richardson. But if the word had that meaning, Bail. I. 511, would be hardly explicable. See, however, Hed. 487 (col. II. par. 3), where *minha* (spelt *moonha*) is defined as a species of loan. It may be that it implies a gratuitous loan, and so it is translated "mit" by the European lexicographers.

<sup>2</sup> Cf. s. 443, above.

<sup>3</sup> The word *ruqba*, it will be observed, is differently defined in ss. 443, and 447. The defini-

tions are taken respectively from a Hanafi and a Shiah Ithna'A shari authority.

<sup>4</sup> Bail II. 228. A *ruqba* as defined in the first clause of s. 445, above, is expressly stated to be valid in Shiah law; see s. 447, below.

<sup>5</sup> Literally jurists of the more general sect. <sup>6</sup> I.e., if a man really intends to make *hiba*, but uses terms such as the above, and it is clearly shown that he intended to give away the corpus, it will take effect as a *hiba* of the corpus, and not merely as a limited interest: *Jawahir-ul-Kalam*, IV 618.



receive its profits or usufruct, he is said to make a grant of SECTION 446 or to create a limited interest in the said property.<sup>1</sup>

(2) Such owner is referred to as the "grantor"; the grantor or grantee person who is so empowered, as the "grantee"; the subject of grant property as the "subject of the grant";<sup>2</sup> and the right that the grantor purports to transfer to the grantee as a "limited interest" in the subject of the grant.

(3) When the grantor signifies his intention to create Declaration and acceptance of grant. a limited interest, with a view to obtaining the assent of the grantee thereto, he is said "to make a declaration of the grant"; and when the grantee assents thereto, he is said to "accept the grant."

(4) A limited interest is said to become "vested," Vesting of limited interest. when the grantee becomes empowered to receive the profit or usufruct of the subject of the grant, in accordance with the declaration of the grant.<sup>3</sup>

A limited interest created in accordance with the rules contained in ss. 446-456, is referred to as 'hubs', it differs from 'waqf' in strict Muhammadan law in the fact that 'waqf' is made from a religious motive, whereas 'hubs' is without any such motive. The distinction is similar to that between 'hiba' and 'sadaqa.' The mere use of the word 'hubs' does not take it out of the rules relating to 'waqf' if a religious motive is expressly or impliedly indicated.<sup>4</sup>

**447.** (1) The grantor may limit the interest of the (Shiah law.) grantee in the subject of the grant to the grantor's or the grantee's life, in either of which cases it is called an 'umra' or life-interest; or the grant may consist of the right of residence, in which case it is called a 'sukna'; or it may 'Sukna.' consist of an interest limited to a specified period of time, 'Ruqba.' 'Ruqba.' in which case it is called a 'ruqba.'<sup>5</sup>

<sup>1</sup> Bail. II. 226 (H. 2-5): "Its object or the advantage to be derived from it (viz. 'this contract') is the empowering a person to receive the profit or usufruct of a thing with a reservation of the owner's right of property in it."

<sup>2</sup> It will be noted that by "the subject of the grant" the whole of the property, in which a limited interest is created, is referred to. In this

regard the analogy of the expression "subject of gift" has not been followed; and there is a certain amount of inaccuracy in this course.

<sup>3</sup> Bail. II. 226. The expression "ruqba" is used in different senses; cf. s. 445, above.

<sup>4</sup> Bail. II. 227 (par. 3); see another translation of this passage in the comment to s. 451, below.

## SECTION 447.

Succession of  
limited  
interest-.

(2) The grant may consist of an 'umra' or other limited interest in the subject of the grant, to the grantee, followed by similar interests to the descendants of the grantee, in which case it will continue binding on the grantor and his heirs, until the descendants of the grantee cease to exist, after which it will revert to the donor or his heirs.<sup>1</sup>

Quære,  
whether other  
limited grant.

(3) It is not quite clear whether the limited interests which may be granted under Shiah law are restricted to those mentioned above, or whether the said limited interests are mentioned in the texts merely as examples.

Illustrations.

(1) D says to R, "I have bestowed on thee this land for thy life." This is a declaration of the grant of an 'umra.

(2) D says to R, "I have given thee the residence ('iskan' in Arabic) of this mansion for thy life," or "the residence of this mansion is to thee while thou livest." This is a declaration of the grant of a 'sukna.'

(3) D says to R, "I give this mansion to thee for the term of 20 years." This is a declaration of the grant of a 'ruqba.'

Forms of  
declaration.

A passage from the 'Jawahir-ul-kalam' a Shia Itna 'Ashari text, may be translated as follows :- "The contract<sup>2</sup> arises by the utterance of any of the following formulæ,

I give you  $\left\{ \begin{array}{l} \text{this house,} \\ \text{or this} \\ \text{land, or this} \\ \text{residence} \end{array} \right\}$  for  $\left\{ \begin{array}{l} \text{your life, or} \\ \text{my life, or} \\ \text{a definite} \\ \text{period} \end{array} \right\}$  by  $\left\{ \begin{array}{l} \text{sukna' or} \\ \text{'umra' or} \\ \text{'ruqba,}' \\ \text{[respectively.]}$

or by an expression serving a similar purpose, there is no difference of view, or doubt as to such a contract being lawful (when made in such terms). However there is difference of opinion as to whether they are so restricted."<sup>3</sup> i.e., whether these are the only formulæ by which such limited interests may be created; *quære*, whether it is also implied that there are differences of opinion as to whether these

<sup>1</sup> *Imam Bughy v. Mir Abed Ali* (1907) 32 Bom. 172, 180 (Ex. 9). See s. 452, below, and comment thereto. That passage seems primarily to be a verbal explanation. (See s. 50, above.) According to the *Jawahir* "there is no difference so far as the legal effect is concerned between an 'umra, sukna or ruqba." *Ameer Ali* J. 73. *Quære*, if the three classes of interest may be

created in succession to one another. Cf. *Ameer Ali* J. 82: "a ruqba for an indeterminate period is valid but resumable at the will of the donor. A sale of the subject of the grant would put an end to the grant." No authority is cited.

<sup>2</sup> *Iqd*-contract.

<sup>3</sup> *Jawahir-ul-Kalam*, IV. 618.

are the only three classes of limited interests known to Shiah law. Syed Ameer Ali, however, writes as follows : "A person is entitled under Shiah law to create other limited rights over his property. For example, a person may give to another a right of way over his land for a term without giving rise to a perpetual easement, or may authorise him to take water from a cistern, etc. Such limited rights are called 'ruqbas' in a restricted sense. The word 'ruqba' used in this connection implies a servitude."<sup>1</sup>

(*Cf.* "It is reported by Abi 'Abbas Sabah al Kaimi about Abi 'Abdulla (blessings be on him) as follows : He was asked about 'sukna' and 'umra.' He replied ; ' If he (the grantor) has created a 'sukna' in favour of the grantee for life, then the grant must be given effect to (lit. the contract must be carried out as stipulated) ; and if he fixes it in his (the grantee's) favour, and in favour of his descendants after his death, to continue until his (the grantee's) descendants become extinct, it does not empower them (the descendants) to sell, or inherit the subject of the grant ; after that (when they are extinct) the house reverts to the first owner (grantor).' And Murtuza Hamran was asked by me about 'sukna' and 'umra.' He replied, ' men must act in this matter according to stipulation : <sup>2</sup> if it is stipulated for his (the grantor's) lifetime, he must live therein for his life ; if it is for his (the grantee's) descendants, then it is for them as stipulated, until the descendants become extinct, thereafter the same will revert to the owner (the grantor) of the house.' And Hasan al Halabi quotes from the authority of Abi 'Abdullah who was asked about a man who makes 'sukna' of his house in favour of another man and after his death in favour of his descendants. He replied : ' It is lawful, but they cannot sell or inherit the same.' I said then, ' if a man makes another man live in his house for lifetime ?' He replied : ' It is lawful.' I said : ' If a man makes another man live in his house and does not fix the time ?' He replied : ' It is lawful, and he may turn him out whenever he wishes.' It is known, that the Mufti by pronouncing it lawful, means that it is so, having particular regard to the latter part of the tradition, and the texts already mentioned,<sup>3</sup> which means that whatever condition is made the same is binding. And likewise it is the correct tradition quoted by Husain ibn Na'im on the authority of Kazim (may the blessings of God be on him)."<sup>4</sup>

'Sukna',  
'umra'  
and  
'ruqba.'

Fulfillment of  
covenants  
enjoined by  
Quran.

<sup>1</sup> "Mahommedan Law," I, 113.

<sup>2</sup> The words that follow, *viz.*, "having regard to the texts already mentioned" indicate that the allusion is to the Quran, II, 172 which says : "Righteousness is in those . . . who fulfill

their covenant when they covenant." The verse is cited in the introductory Chapter.

<sup>3</sup> I. *cc.*, Quran II, 172, see last note.

<sup>4</sup> *Jawahir-ul-Kalam*, IV, 619.

## SECTION 447.

'Ruqba' explained.

"Now 'ruqba' is obviously derived from 'irtiqab,' which means waiting, and the contract is so called because each of the two parties waits for the contracted period; or it is (perhaps) derived from 'ruqba,' having regard to the fact that the house, etc., is given away to the donee for enjoying the usufruct for life; and it is said on the authority of some of the learned that 'ruqba' means the utterance of the formula. 'I place the service of this slave at your disposal for your life or my life'—which would imply that it is derived from 'ruqba,' which means a slave, but this is more than doubtful, as is admitted by others."<sup>1</sup>

Another explanation.

'Ruqba' is stated by Syed Ameer Ali to be "a generic name for all limited estates under the Shiah law. It includes both an 'umra' and a 'sukna.' When a house is given for a limited period it is generally called an 'umra.' When a house is given for residential purposes it is called a 'sukna.' Under the Hanafi law both these will come under the head of an 'a'riat,' but whereas an 'a'riat' is resumable at the will of the donor or his heirs, an 'umra' or 'sukna' is operative for the fixed period and cannot be resumed."<sup>2</sup>

'Da'ayam-ul-Islam' on 'sukna,' 'umra' and 'ruqba.'

In the 'Da'ayam-ul-Islam,'<sup>3</sup> 'ukna' 'umra' and 'ruqba' are explained as follows:—"Sukna," as the grant of the right of residence for a fixed period, without any return or consideration. "Umra," as the grant of the right of residence limited by the life of the resident after which it reverts to the grantor or his heirs, in the absence of a stipulation to that effect, it is not revocable on the death of the grantor by the heirs of the grantor. 'Ruqba,' as a grant limited by the death of either; on which event it reverts to the grantor or to the grantor's heirs, as the case may be.

Limited grants in Shiah law and estates of English law.

The decision holding that life-interests may be created under Shiah law,<sup>4</sup> has been criticized,<sup>5</sup> and it has been suggested that the Shiah authorities mention only the right of residence or of use, and that, accordingly, a Shiah can either make a gift out and out of the whole 'dominium' of the subject of gift, or permit the donee to use the property by residing in it, or by taking its profits; that in the former there can be no restriction in point of time; and that in the latter there is no right over the 'corpus' and so granting the latter is not creating a life-interest (though the use may be limited during the life of a person). The force of the criticism may be admitted, but it may at the same time be pointed out that (1) the right of use granted in such a manner is irrevocable;

<sup>1</sup> *Jawahir-ul-Kalam*, IV, 618-619.

<sup>2</sup> Ameer Ali, I, 113.

<sup>3</sup> *Da'ayam*—Notes. An Imam's authority.

<sup>4</sup> *Banco Begum v. Mir Abed Ali* (1908) 38

Bom. 172.

<sup>5</sup> *Jainabai v. Sethna*, (1910) 34 Bom. 604; *Cassamally v. Currimbhoy*, 13 Bom. L. R. 717, 767-768.

(2) that the Shiah authorities expressly refer to the fact that power SECTION 447.  
 may be validly given to the grantee to transfer his rights to others; (3)  
 that the rights of the grantee devolve upon his heirs unless they are  
 restricted to his life-time. So that the right to use the property, or  
 to its usufruct, during the grantee's life, does not appear to be distin-  
 guishable in material points from a life-interest.<sup>1</sup> No doubt the Shiah  
 authorities draw no practical distinction between the incidents of an  
 estate granted for a term of years, and a life-estate; and yet the latter  
 is styled in English law a freehold estate, and the former not.<sup>1</sup> Hence  
 it may be argued that a grant limited to the life of the grantee under  
 Shiah law is not a freehold estate any more than a term of years; and  
 that consequently the former is not a life-estate, for a life-estate is a  
 freehold estate. But the distinction between freehold and other estates  
 is based on the feudal system of land tenures in England, and cannot  
 affect the use of an expression like "life-interest" or "life-estate" in  
 the general and less technical sense in which alone it can apply when  
 the nomenclature of English law is applied to the institutions of Muham-  
 madan law.<sup>2</sup> When it is said that Shiah law permits the creation of  
 life-estates, it is not meant that the life-estates of Shiah law have exactly  
 the same incidents that life-estates have in England.

**448.** A limited estate becomes vested in the grantee (Shiah law.)  
 when the grantor makes a declaration of grant which the Possession of  
 grantee accepts and thereafter possession of the subject subject of  
 of grant is transferred to the donee.<sup>3</sup> *Semle*, where the grant.  
 grant consists of a succession of limited interests, the  
 interests subsequent to the first of them, vest when possession  
 is transferred to the first grantee.<sup>4</sup>

This section is based on a passage in the 'Sharaya' referring directly  
 to 'waqf'; but the possession required for the completion of a 'waqf'  
 is the same as for limited interests. The distinction between 'waqf'  
 and limited interests consists mainly in the perpetuity of 'waqfs' and  
 the presence of the religious motive. (Compare the difference between  
 'hiba' and 'salaqa': s. 437. above).

As to unborn persons it is said, "if one should make a settlement Unborn person.  
 beginning with a person not yet in existence as for instance one to be

<sup>1</sup> Cf. Williams, "Real Property," 16-20, 64,  
 195, 324, 418, etc.

<sup>2</sup> Cf. s. 215, comment.

<sup>3</sup> Ball. II. 226 (ll. 1-2, 13-15); *Banoo Begum*  
*v. Mir Abed Ali* (1907) 31 Bom. 172, 179 (ex. 8).

<sup>4</sup> Ball. II. 214 (*third*), see comment.

**SECTION 448** born, or a foetus not yet separated from its mother, the 'waqf' would not be valid."<sup>1</sup>

First grantee of limited interest must be in existence and competent to own property.

**449.** The grantee of a limited interest must be in existence at the time when the grant is made; he must be competent to own property, and must be distinctly indicated; provided that where a succession of limited interests is created by the same grant, the grantee of the first interest alone need be in existence at the time of the grant, and if the succeeding grantees come into existence when their respective interests open out, the grants to them are valid.<sup>2</sup>

No rule against perpetuity in Shiah law, nor against unborn persons being grantees.

It seems clear that the Shiah lawyers contemplated a series of limited interests in succession 'ad infinitum.' And that neither creating a perpetuity nor giving remainders to unborn persons seemed to them to be objections invalidating settlements. This, it is submitted, will appear from the authorities that are cited below. Assuming that this is so, what is the effect of the rule in British India? It is submitted that it must be given effect to at least in so far as it does not conflict with the rule<sup>3</sup> against creating perpetuities; whether it should be so cut down as to conform to that rule, or should be given effect to in its entirety, would depend, in the first instance, on the enactment under which the Muhammadan law of gifts is enforced. Where the legislature expressly requires the Muhammadan law of gifts to be enforced, it is submitted that the Shiah law must be given effect to in spite of its infringing the rule against perpetuities; where it is enforced as a matter of justice, equity, and good conscience, the Courts may have to consider whether it should not be disregarded in so far as it infringes the rule against perpetuity, if that rule of law may be considered to embody a fundamental principle.<sup>4</sup>

When some only of a class of grantees in existence.

"A grant may be made to A for life and then to B absolutely, or a grant may be made to A for life, and then to A's children absolutely. There is some difference of opinion as to whether only children living at the time of the grant will take the remainder absolutely, or any children born to A after the grant, will take also. The approved opinion seems to be that *all* the children will take, whether living at the time

<sup>1</sup> Ball II. 214.

<sup>2</sup> Ball II. 234 (*third*) from which the first clause is taken verbatim. See s. 448, comment.

<sup>3</sup> *Quære* whether the English or Indian rule would be held to be binding? See s. 12, above. The fact that the Indian Legislature has chosen

to alter that rule for India would indicate that the English rule of law is not "applicable to Indian society and circumstances." On the other hand, such applicability must be judged by the indigenous laws and customs.

<sup>4</sup> See Table of Acts preceding Ch. II.

of the grant or born afterwards. But when the grant is to A for his **SECTION 449** life and to his children for *their* lives, only the children living at the time of the grant will take with rights of survivorship.<sup>1</sup>

It is submitted that these are questions concerned with the construction of the words, for it seems to be clear that unborn persons may take under a settlement.<sup>2</sup>

**450.** Anything may be the subject of the grant of <sup>Subject of</sup> limited interest which may be the subject of a 'waqf.'<sup>3</sup> grant.

A mansion, furniture, slave, horse, camel, donkey, are mentioned as being valid subjects of grants.<sup>4</sup>

"The subject of a 'hubus' may be either a slave or a horse or any of those objects the use of which may be subjected to such (i.e. limited) use. Where a person is beneficiary all kinds of objects may be dedicated for his use (but that he may enjoy all these benefits). Where approach to God is sought, it is possible to dedicate a slave, a horse, a camel, a donkey, and similar objects. In the case of a 'masjid' and the like, it is possible to dedicate a slave or a quadruped when any is wanted for carrying water, etc., otherwise its use may be fully made by letting it for hire, and then the proceeds may be applied in proper ways. The discourses (of jurists) dealing with questions of this kind are very scanty."<sup>5</sup>

**451.** The grant of a limited estate cannot be revoked <sup>Grant of limited</sup> or altered after it has become vested in the grantee except <sup>interest normally</sup> when it falls within the provisions of s. 451A, below.<sup>6</sup> irrevocable.

It may seem strange that the gift of a limited interest is normally irrevocable, whereas the gift of the whole dominium, 'hiba,' is normally revocable. The reason for the irrevocability of grants of limited interests is probably that such grants rank in the eyes of Muslim jurists as gifts in which a stipulation is made with the donee, and as stipulations are classed as return or 'riwaz' the grant becomes irrevocable. See the comment to s. 407, above.

**451A.** Where the grant of a limited interest is made <sup>Grant of</sup> without any religious motive, and without any provision <sup>limited</sup> <sup>interest can</sup>

<sup>1</sup> Ameer Ali, I. 112.

<sup>2</sup> See ss. 5c, and 448, above; and cf. comment to ss. 348 and 444, above.

<sup>3</sup> Bail II, 227 (par. 2); *Banoo Begum v. Mir Abdul Ali* (1907) 32 Bom. 172, 178 (Ex. 8), and

see s. 476, below (as to subject of waqf).

<sup>4</sup> Bail II, 227 (*il.* 17, 18, 28); in *l.* 28 "house" is mis-printed for "horse."

<sup>5</sup> *Shari' Lun'at*, 213.

<sup>6</sup> Bail. II 226-227; see comment.

if indeter-

nate.

SECTION 451A. fixing its duration,—(a) in accordance with the Shiah Ithna 'Ashari law, the grant may be revoked<sup>1</sup> at any time by the grantor,<sup>2</sup> and it is determined by his death, and, on its being revoked or otherwise determined, the grantee's rights in the subject of the grant cease;<sup>3</sup> (b) in accordance with the law as laid down in the 'Da'ayam-ul-Islam' which governs the Daudi and Sulaimani Shiah, the grant does not seem to be revocable on the death of the grantor unless it is expressly so stipulated.<sup>4</sup>

Grant for  
religious object  
irrevocable

*Explanation.*—Where a grant is made for a religious object, it cannot be revoked or altered, notwithstanding that no provision has been made fixing the duration of the interest created by the grant.<sup>5</sup>

Irrevocability  
of 'hubs' or  
limited grant.

The explanation to this section is based on the last paragraph on 'Hubs' in the 'Shara'ya-ul-Islam,' which does not seem to be quite accurately translated by Baillie.<sup>6</sup> The translation should be as follows: "When a man has made a 'hubs' of<sup>7</sup> his horse, in the way of God, or his slave for the service of the 'Ka'ba' or of a 'masjid,' the act is irrevocable;<sup>8</sup> and he cannot make any alteration (in the terms of the settlement) how long soever the subject be in existence. But when a 'hubs' is made of anything in favour of some (individual) person,<sup>9</sup> and no term is fixed, and the grantor dies, that thing becomes part of his heritage, and similarly if a term is fixed, and it expires, it belongs to the heirs of the grantor.<sup>10</sup> Some of our doctors maintain that it is not rendered obligatory,<sup>11</sup> while others maintain that it is so only when there is an intention on the part of the donor of an approach to God. But the first opinion is the most common or generally received"<sup>12</sup> "When a term is specified for the residence, the contract becomes binding by possession, and cannot lawfully be revoked until after expiration of the time. So also if the residence is for the life of the proprietor, the contract cannot be revoked, though the life-tenant should die, and

<sup>1</sup> Ball II. 227 (l. 4. of par. 3).

<sup>2</sup> In which case it is hardly more than a mere license; cf. Transfer of Property Act, s. 128.

<sup>3</sup> Ball. II. 226 2:7, see comment.

<sup>4</sup> 'Da'ayam-ul-Islam' (Notes)—see also the comment to s. 447, above, when the explanations of *istisna*, *umra* and *ruqba*, as given in the *Da'ayam-ul-Islam*, are set out.

<sup>5</sup> Ball. II. 227 (par. 3). See comment.

<sup>6</sup> Ball. II. 227 (par. 3).

<sup>7</sup> Because there is a religious motive and acts with a religious motive are not revocable.

<sup>8</sup> There being no religious motive, and no term fixed, the grant is taken to be for the life-time of the grantor; unless previously revoked it endures for the life-time of the grantor.

<sup>9</sup> *Jawahir-ul-Kalam*, IV. 622, mentions some precedents.

<sup>10</sup> Cf. comment to s. 420, above.

<sup>11</sup> Ball. II. 226 (ll. 15-19).



what was his is transferred to his heir, till the death of the proprietor."<sup>1</sup>

Cf. "From Ja'far Ibn 'Alī: He said 'sukna' is like an 'ariat' (loan). If its owner wishes to take it back, he might revoke it, and if he wishes to leave it he may do so. This refers to an indeterminate 'sukna,' but when it is limited for life, or for a fixed term it is 'umra' and 'ruqba' as you have already learnt."<sup>2</sup>

452. *Semble*, where the declaration of a grant purports to create one of the particular kinds of limited interests mentioned in s. 447, above, and also contains words that are meaningless with reference to that kind of interest, such words are of no effect.<sup>3</sup>

Terms inconsistent with or derogating from a grant.

G says to R, "I have given this mansion to thee for life, and to thy successor," it would be only an 'umra' or for his own life and there would be no transfer to the life-holder according to the most approved opinion; just as if G had not said "to thy successor."<sup>3</sup> But if he says "I give this house to thee, and to thy descendants by way of 'umra' (successively)," it will be binding so long as the descendants are existing.<sup>4</sup>

Illustration.

Section 452 is based on a passage in the 'Sharā'ya-ul-Islam,' Baillie's translation of which is cited verbatim as the first sentence of the illustration to s. 452. The principle underlying the illustration is not easy to see in the translation. It has, however, been quoted above for the twofold object of giving the authority on which the section is based, and of illustrating the danger of forgetting that many apparent rules of substantive law are mere illustrations of the construction put upon particular Arabic words and expressions,—illustrations that are not easily capable of being rendered in another language.<sup>5</sup> With reference to this Syed Ameer Ali says, "The passage in the 'Sharā'ya' that a grant to A and his 'akab' only takes effect as a life-estate, as if the word 'akab' was not mentioned, refers to the case of an 'umra,' the author of the 'Sharā'ya' being of opinion that the mention of the word 'akab' (which signifies literally 'a person coming after') is not like the mention of descendants, and that therefore does not convey an absolute estate, whereas the author of the 'Mabsut' is of opinion that a gift to A for life, and then

<sup>1</sup> Ball. II, 227 (ll. 12-14 of par. 1, and see par. 3); *Banco Begum v. Mir Abed Ali* (1907) 32 Bom. 173, 179, (Ex. 8).

<sup>2</sup> *Jawāb-ul-Kalam*, IV, 618, 619.

<sup>3</sup> Ball. II, 226-227. See comment.

<sup>4</sup> See s. 447, above.

<sup>5</sup> See s. 50, above.

SECTION 452, for his 'akab' is tantamount to an absolute donation."<sup>1</sup> It is submitted that this is a question merely of the construction of the words of the grant.<sup>2</sup> Similar remarks apply to the following. "A grant to A in these terms, 'If you die before me, the property will revert to me, if I die before you, it will become yours,' will take effect according to some in case the donor predeceases the donee, as an 'umra' in favour of the latter; according to others as an absolute gift (if there is no other limitation)."<sup>3</sup>

'Nasir Husain v. Sughra Begum.'

An examination of this and other passages "convinced" the judges in 'Nasir Husain v. Sughra Begum' <sup>4</sup> that there is no difference on this subject between the two systems of Mahomedan law. In fact, "while the Shafi law is very distinct, they added, the Shiah or Imamee law is silent on the subject, the intention in the latter system evidently being the adoption and application of the Sunni rule to Shiahs."<sup>4</sup> As may be surmised from this preliminary their examination of the passage in question does not throw much light on the subject.

Another remark made by the judges in the case last cited calls for comment. They say: "the author does not explain what he is pleased to call 'the most approved opinion.'"<sup>5</sup> The early Muslim writers on law based their books on precedent and authority, as much as the English lawyers do. And the phrase that "the better opinion" is such and such is not unknown to the latter. The sceptical reader is expected to refer to other books for himself, and verify the statements made. On the other hand, as may be surmised, authors whose works have been considered worthy of being preserved for centuries, by copies made in manuscript, do not indulge in irresponsible statements which on verification are discovered to be unfounded.

Perhaps it was unnecessary "to seek the merits to this decision to disclose, or to draw its frailties from the dread abode," where they have lain buried since the Judgment was first pronounced.

Transfer of limited estate.

**453.** The grantee of a limited interest may, subject to s. 454, below, and to the limitations, if any, contained in the grant, transfer or alienate his interest.<sup>6</sup>

<sup>1</sup> Ameer Ali, I. 81-82, 112 (par. a).

<sup>2</sup> See s. 50, above.

<sup>3</sup> Ameer Ali, I. 82, citing "Jawab-ul-Fatawa, chapter on Gifts."

<sup>4</sup> (1889) 5 All. 505.

<sup>5</sup> "There can be no doubt that this view is founded on a misapprehension of the Shiah Law" says Syed Ameer Ali, I. 84. Probably the judges were not aware that Bailie's work is a literal

translation of the *Sharaya-ul-Islam* for they say: "There is a passage in Bailie's 'Imamee Law,' pp. 226-227, which, in expressing undoubted Shiah doctrine, perhaps deserves some notice." Bailie's words, "not knowing me, argues itself unknown," come to one's mind.

<sup>6</sup> See comment to s. 453; and the illustration to s. 368, above.

"The life-tenant or holder of an estate for a term has the right SECTION 453. of letting the property for any period not exceeding his own interest, provided there are no limitations on his power or his mode of enjoyment. He is bound, however, to return the property on the expiration of the period of his interest in proper order, natural deterioration and the lawful enjoyment of the same excepted."<sup>1</sup>

**454.** The grant of a right of residence empowers only the grantee and his family and children to reside in the subject of the grant; unless it is expressly provided that the grantee may permit others to reside therein, or may let the subject of grant for rent.<sup>2</sup>

**455.** On the expiration or other determination of the period for which a grant is made, the grantee's right in the subject of the grant ceases, and it reverts to the donor or the donee's heirs as the case may be.<sup>3</sup>

Thus when the donor says, "the residence of this mansion is to thee while thou livest," the remainder over will revert to the donor even though the donor does not expressly provide for it by the use of some such words as "when thou diest it will revert to me."

<sup>1</sup> Ameer Ali, I. 118 (no authority is cited).

<sup>2</sup> Bail, II, 227 (par. 2); *Banoo Begum v. Mu*

*Abel Ali* (1907) 32 Bom. 172, 179, (Ex. 8).

<sup>3</sup> Bail, II, 226 (ll. 20-27); *Banoo Begum*

*v. Mu Abel Ali* (1907) 32 Bom 172, 179, (Ex. 8).

## CHAPTER X.

### ‘WAQF.’

#### § 1.—Preliminary.

##### SECTION 456.

##### (1) Explanation of terms.

‘Waqf’  
defined.

**456.** ‘Waqf’ in British India implies the permanent dedication by a person professing the Mussulman faith of any property for charity, or for religious objects or purposes, or for an object of public utility.<sup>1</sup>

See comment to s. 457A, below

Declaration of  
‘waqf.’

**457.** (1) When the owner of any specific property declares that he has made ‘waqf’ of the said property, or that he has dedicated it in perpetuity by way of ‘sadaqa’<sup>2</sup> or charity<sup>3</sup> he is called the ‘waqif,’ or the founder of the ‘waqf,’ and is said to make a declaration of ‘waqf’ or to dedicate the property by way of ‘waqf;’ or “to create a ‘waqf’” or “to make a settlement by way of ‘waqf’”;<sup>4</sup>

‘Waqif.’

(2) the property is called the “subject of the ‘waqf,’ or “the ‘waqf’ property;”<sup>5</sup>

Subject of  
‘waqf.’

(3) the purpose to which the ‘waqif’ declares that the profits or income or benefit of the subject of ‘waqf’ should be devoted, is called the “object of the ‘waqf;’”<sup>6</sup>

Object of  
‘waqf.’

(4) when the object of the ‘waqf’ is to benefit any specified persons or class of persons they are called the “beneficiaries under the ‘waqf;’” and the ‘waqf’ is said to be created for their benefit;<sup>6</sup>

Beneficiaries.

<sup>1</sup> See Waqf Act, s. 3.

<sup>2</sup> *Sadaqa* in this paragraph includes any purpose recognised by the Mussulman law as religious or pious or charitable. cf. Waqf Act, ss. 2, 3.

<sup>3</sup> The word ‘charity’ is used in this chapter in the usual English acceptance as appears in s. 457 (9). See the footnote there to the term.

<sup>4</sup> The last two expressions occur in the Waqf Act, 1913.

<sup>5</sup> *Mawqaf alahi* is the Arabic expression used alike to represent the object and the beneficiaries. The expression literally means, “towards (or for) whom (the property) has been made *waqf* of.”

<sup>6</sup> The texts often speak of the “produce” of the *waqf* property, which is in many cases assumed to be land under cultivation. The word “benefit” is used in this chapter to include produce, rents, and profits, or other advantages.

(5) when the declaration of 'waqf' is in writing, the document containing it, is called the 'waqfnama';<sup>1</sup>

'Waqfnama.'

(6) when a 'waqf' is so made as to come into effect after the death of the 'waqif' it is called a "testamentary 'waqf';"<sup>2</sup>

Testamentary  
'waqf.'

(7) the person who is entrusted with the fulfilment of the object of the 'waqf,' and the carrying out of the directions given at the time of its declaration, is called the 'mutawalli';<sup>3</sup>

(8) a 'sajjada-nashin' is a spiritual preceptor, he may or may not be also the 'mutawalli' of 'waqf' property.<sup>4</sup>

'Sajjada-  
nashin.'

(9) In this Chapter unless there is something repugnant in the subject or context, "charity" means any charitable or religious object or purpose, or any object of public utility.<sup>5</sup>

(10) In this Chapter, a 'waqf' is said to be "completed" or "perfected" when everything is done that the law requires to be done for the purpose of making the property subject to or impressed with the 'waqf,' so that the objects of the 'waqf' must be given effect to in accordance with the directions of the 'waqif,' or the declaration of 'waqf.'<sup>6</sup> "Completion of 'waqf'" is also referred to as "dedication of property by way of 'waqf.'"

Completing  
or perfecting  
'waqf.'

See comment to s. 457A, below.

**457A.** The Mussulman Wakf Validating Act, 1913, hereinafter referred to as the Waqf Act, has been held to have no retrospective effect, and not to affect 'waqfs'

Waqf Act not  
retrospective.

<sup>1</sup> The legal effects do not differ whether the declaration is made verbally or in writing.

<sup>2</sup> See s. 450, below.

<sup>3</sup> *Mutawalli* is the expression most often used in British India. *nazir* and *qayyim* are also Arabic expressions referring to the same.

<sup>4</sup> *Secretary of State v. Mohuddin Ahmed* (1905) 27 Cal. 674; *Pirani v. Abdool Karim* 19 Cal. 203; *Zoolaka Bibi v. Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.

<sup>5</sup> Cf. "Charitable," "pious," or "religious" purposes must be understood in their ordinary

and natural meaning, i.e., in the sense analogous to that of the English law; " (*Muthukuma Anna Ramamundham v. Vada Lersai* (1909) 34 Mad. 12, 16. In *Ibrahim Khan Ahmad Saged Khan* (1910) 7 All. L. P. 761, (Knox and Karamat Husain, JJ.) the meaning of the word "charity" is elaborately considered by Karamat Husain, J. See also *Saged Mustafa v. Amina Begum* (1904) 2 All. L. 519, Stanley, C. J. (Bannerji, J. dissenting).

<sup>6</sup> See s. 462, below.

SECTION 457A. made prior to the 7th of March 1913, when the Act received the assent of the Governor-General.<sup>1</sup>

1. THE MUSSULMAN WAQF VALIDATING ACT, VI. OF 1913.

It will be convenient in the first place to set out the Mussulman Waqf Validating Act in full. It runs as follows :—

*An Act to declare the rights of Mussalmans to make settlements of property by way of "waqf" in favour of their families, children, and descendants.*

Preamble.

"WHEREAS doubts have arisen regarding the validity of waqfs created by persons professing the Mussulman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes and whereas it is expedient to remove such doubts. It is hereby enacted as follows :—

"1. (1) This Act may be called the Mussulman Waqf Validating Act, 1913.<sup>2</sup> (2) It extends to the whole of British India.

"2. In this Act unless there is anything repugnant in the subject or context,—

Definition.

"(1) 'Wakf' means the permanent dedication by a person professing the Mussulman faith of any<sup>3</sup> property for any purpose recognized by the Mussalman law as religious, pious or charitable<sup>4</sup>

<sup>1</sup> See comment.

<sup>2</sup> Act VI. of 1913. It received the assent of the Governor-General on 7th March 1913. This Act will be referred to hereinafter as "the Waqf Act." I spell the word *waqf* in this work throughout, but have not, of course, altered the spelling in the Act, preserving in this case as always in quoting from another source, the original spelling. Tushnet prevented the spelling from being uniform, and has occasioned misapprehension in the mind of at least one of my readers, which I should like to remove.

<sup>3</sup> *Quere*, whether or not this settles the doubts as regards the nature of the property other than immovable, which may be the subject of *waqf* of table of differences of views held as to *waqfs* (comment to s. 156) and s. 476, below.

<sup>4</sup> This implies that according to Muhammadan law the purpose (or object) for which a *waqf* is declared must be religious, pious or charitable. It would perhaps be more accurate, or rather more in accordance with the original theory of *waqf*, to say that *waqf* is a dedication

of property for any purpose whatever, provided that the dedication is made with a religious motive, and provided that its ultimate object is to benefit the poor. The intermediate objects or purposes may be anything whatsoever, provided that such purposes are compatible with their being associated with a religious motive (which implies that the object is not opposed to Islam) and (according to the tenets of schools other than Hanafi), provided that there is no benefit reserved to the *waqf*. Religious motive is difficult of recognition by secular tribunals; and it is not to be wondered at that it has passed out of the scrutiny of the legislature as well as the tribunals of British India. It may indeed be that the aspect of religion has by the wise foresight of the framers of the Act been transferred to the objects or purposes of the *waqf*, from the motive with which the *waqf* must be declared; and the religious character of *waqf* is thus given a local habitation instead of its being allowed to float where it could elude the powers of recognition available to the Courts.

"(2) 'Hanafi Mussalman' means a follower of the Mussalman faith **SECTION 47.** who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.<sup>1</sup>

"3. It shall be lawful for any person professing the Mussalman faith to create<sup>2</sup> a waqf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :—

Power of Mussalmans to create certain waqfs.

"(a) for the maintenance and support, wholly or partially, of his family, children or descendants and

"(b) where the person creating a waqf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated.

"Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious pious or charitable purpose of a permanent character.<sup>3</sup>

"4. No such waqf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature<sup>3</sup> is postponed until after the extinction of the family, children or descendants of the person creating the waqf.

Waqfs not to be invalid by reason of remoteness of benefit to poor, etc.

"5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect."

Saving of local and sectarian custom.

## 2. 'WAQF' ACT NOT RETROSPECTIVE.

It has been held in several decisions<sup>4</sup> that the Waqf Act is not retrospective, and does not affect 'waqfs' that were already in existence when the Act received the assent of the Governor-General: that there is nothing in the Act which enables the Court to hold that the provisions of the Act shall apply to such 'waqfs'; and that therefore whatever the intention of the Legislature may have been, it has by this Act only enabled Muhammadans in future to create 'waqfs' by deeds, which under previous decisions would be liable to be set aside.<sup>4</sup>

Waqf Act not retrospective

<sup>1</sup> Section 2 seems to contain three different expressions for referring to very similar notions: (1) "professing the Mussalman faith," (2) "follower of the Mussalman faith," (3) "who conforms to the tenets and doctrines of the Hanafi School."

<sup>2</sup> The pre-amble refers to "making settlements by way of waqf"; s. 3 refers to creating a waqf.

<sup>3</sup> Section 3 refers to "a purpose of a permanent character"; s. 4 to "a purpose of a permanent nature."

<sup>4</sup> *Amirbibi v. Azienbibi* (1914) 39 Bom. 569, (Macleod, J.); *Rahimunissa Bibi v. Shaikh Manik Jan* (1914) 19 Cal. W. N. 76 (Chaudhuri, J.); *Mahomed Buksh Majumdar v. Desam Ajman Raja* (1915) 43 Cal. 158; 19 Cal. W. N. 967 (Jenkins, C. J., and N. R. Chatterjee, J.); *Naimul Haq v. Mohammad Subhanulla* (1918) 16 All. L. J. 841. The author was informed by Kumarasami Sastri, J., of Madras that his Lordship had given a similar decision on the original side of that Court.

**SECTION 437.** The question was not free from doubt, as the preamble is framed in terms appropriate to a declaratory Act, which does not enact any new law but authoritatively states what was already, before the Act, the correct law, and which, therefore, according to the general principles of interpreting Acts, must be construed retrospectively. The question as shown in Macleod, J.'s judgment was whether the Act must be construed <sup>1</sup> as a declaratory Act as indicated by the preamble, or whether the expression "it shall be lawful" in s. 3 must be taken to refer to future 'waqfs' alone. Jenkins, C. J., expressed doubts whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the legislature may think that in future the law should be otherwise administered.<sup>2</sup>

### 3. SCOPE OF 'WAQF' ACT.

Restricted to  
establishing  
validity of  
family 'waqfs',  
&c.

The general object and intention of the Act are indicated in the preamble: viz., that the object of the Act is to remove the doubts as to the existing law and that the Act does not deal with the validity of 'waqfs' in general but of one specified kind of 'waqfs': that kind being particularised in the preamble by reference to these characteristics: for its object is stated to have reference only to 'waqfs' created,

(1) by persons professing the Mussulman faith,  
(2) in favour of themselves, their families, children and descendants, and

(3) ultimately for the benefit of the poor or for other religious, pious or charitable purposes.

The first of these three characteristics does not require any further consideration (see s. 460, below); (2) and (3) are connected with each other. With reference to (2), the preamble does not, it will be noticed, refer to a 'waqf' under which strangers are the first beneficiaries. With regard to (3), the provisions of the Act (see s. 3 thereof) will be considered more fully below.

Definitions in  
Waqf Act.

The second section of the Act contains two definitions: the first of which alone need be further referred to. A 'waqf' is defined in it--of course, only for the purposes of the Act, viz., for the purpose of declaring the validity of 'waqfs' of the kind particularised above--as connoting the following matters:--

<sup>1</sup> Maxwell, "Interpretation of Statutes," (5th ed.) p. 361, citing *A. G. v. Theobald* (1890) 24 Q. B. D. 557; and *A. G. v. Hertford* (1849) 18 L. J. (Ex) 332. See also *R. v. Christchurch* (1846) 12 Q. B. 149; 18 L. J. (M. C.) 23; and

*Re Chapman* [1896] 1 Ch. 323, reversed on another point in [1896] 2 Ch. 763.

<sup>2</sup> *Mohamed Buhit v. Jivan Ajman* (1915) 43 Cal. 158, 162.



- (1) a permanent dedication of property ; SECTION 457.  
 (2) that the dedicator is a person professing the Mussulman faith ; and  
 (3) that the dedication is for any purpose recognised by the Mussulman law as religious, pious or charitable.

In the terms of this definition the preamble may be taken to imply Object of Act.  
 that (1) it is not the object of the Act to lay down the law in general terms, as to the principles or rules applicable for determining whether in any case whatever, there has been a valid permanent dedication of property ; nor (2) is there any general principle laid down which covers all objects whatever that are recognised by Mussulman law to be religious pious or charitable (so that property may be permanently dedicated for those objects and no other). But the ambit of the Act is merely to provide that dedication with the specified objects is a valid dedication.

#### 4. PROVISIONS OF THE 'WAQF' ACT EXAMINED.

The first portion of the third section is somewhat redundant, by Operative portion,  
 reason of the definition in s. 2 (1). Expanded by including in it the terms s. 3.  
 of the definition, it would read :

"It shall be lawful for any person professing the Mussulman faith, to create a 'waqf', i.e., "(1) a permanent dedication (2) by a person professing the Mussulman faith (3) of any property (4) for any purpose recognised by the Mussulman law as religious, pious or charitable" (5) "which in all other respects is in accordance with the provisions of Mussulman law, for the following among other purposes : -

- (a) for the maintenance and support, wholly or partially, of his family, children or descendants, and
- (b) where the person creating a 'waqf' is a Hanafi Mussulman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rent and profits of the property dedicated :

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussulman law as a religious, pious or charitable purpose of a permanent character."

The fourth section again is in reality in the nature of an explanation ss. 4 and 5.  
 to s. 3 ; and the fifth section saves the effect of custom and usage.

#### 5. EFFECT OF ACT RE-STATED.

The effect of the whole of the Act may, therefore,—after reciting Effect of Waqf  
 that its object is to remove doubts regarding the validity of 'waqfs' for Act re-stated.

**SECTION 457.** the particular purposes mentioned in clauses (a) and (b), below, and providing that nothing in the Act shall affect any custom or usage whether local or prevalent among Mussulmans of any particular class or sect,—be stated in the following terms :—

“ A permanent dedication of any property by way of ‘ waqf ’

“(a) by a person professing the Mussulman faith for the maintenance and support, wholly or partially, of his family, children or descendants, or

“(b) by a follower of the Mussulman faith who conforms to the tenets and doctrines of the Hanafi school of Mussulman law for the maintenance and support, wholly or partially, of his family, children and descendants, and also for his own maintenance and support during his life-time, or for the payment of his debts out of the rents and profits of the property dedicated,—

shall be lawful, provided that—

“(1) the ‘ waqf ’ is in all other respects in accordance with the provisions of Mussulman law ; and in particular that

“(2) the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussulman law as a religious, pious or charitable purpose of a permanent character.

“ *Explanation.*—The ultimate benefit in such ‘ waqfs ’ shall not be deemed to be invalidly reserved for the purposes of proviso (2), above, merely because such benefit is postponed until after the extinction of the family, children and descendants of the person creating the ‘ waqf. ’ ”

The chief importance of the Act consists however in that the Muhammadan law is now to be given effect to with reference to ‘ waqfs ’ created after 7th March 1914, not as interpreted in the earlier decisions of the Privy Council, but as it in fact is.

#### 6. CERTAIN POINTS INVOLVED IN ‘ WAQF ’ ACT.

The following points are implied in the Act. on some of these the texts of Muhammadan law are not certain, or take divergent views.—It is difficult to say whether on these points the Courts will follow the trend of previous decisions, or the analogy of the Act.

Waqf Act :  
what property  
may be subject  
of waqf.

(1) With reference to the property that may be the subject of ‘ waqf,’ “ any property ” may be the subject of ‘ waqf,’ according to s. 2 (1), but it is also provided the ‘ waqf ’ in order to be valid has to be in “ all respects in accordance with the provisions of Mussulman law,”

except that the objects mentioned in clauses (a) and (b) are declared to be valid. It is doubtful whether the law can be taken to be altered in this respect by the Act, for it will be noticed in the sequel that the text-writers are not unanimous as to whether certain classes of property may validly be the subject of 'waqf.'

(2) The benefit of the property dedicated by way of waqf must Charity. be ultimately reserved for

- (a) the poor or other religious, pious or charitable purpose
- (b) of a permanent nature.

The text-writers are not agreed as to whether an express provision to this effect is necessary, but in the Act it seems to be provided that the reservation of the ultimate benefit may be made either impliedly or expressly.

(3) Whether or not any purpose is religious, pious or charitable and is of a permanent nature has to be determined in accordance with Mussulman notions and not in accordance with English law.

(4) The ultimate benefit may be deferred until the extinction of the family of the person creating the 'waqf': *quære*, whether it may be so deferred for an indefinitely long period by the intervention of some object other than the maintenance and support of the family of the 'waqif.'

(5) The objects for which a 'waqf' may be created are referred to in the Act under two heads: one is the ultimate, and the other may be called the preliminary, though the latter expression does not occur in the Act. It would seem that the Act must be taken to lay down (in accordance with the definition in s. 2) that the support and maintenance of the 'waqif's' family, &c., must be considered to be a purpose recognised by the Mussulman law as religious, pious or charitable. This is the view of the Muhammadan law that was put forward by Amir Ali, J., with great learning in his dissenting judgment in '*Bikani Mia v. Sheik Lal*,'<sup>1</sup> where he says: "When a 'waqf' is created, constituting the family or descendants of the 'waqif' the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the 'waqf' charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made) but simply to impart permanency to the endowment." Probably the Act is based on the same view though its provisions are not as clear as they might be.

Without under-estimating the difficulties of their task,<sup>2</sup> it may also be respectfully pointed out that the framers of the Act do not seem to

<sup>1</sup> 20 Cal. 106 at. pp. 145-146, see also p. 139, *et seq.*

<sup>2</sup> "I dislike finding fault with statutes,"

said Lord Bramwell, "there is nothing so difficult to draft": *Northbrook Colliery Co. v. Bourns* (1889) 14 App. Cas. 238, 239.

SECTION 457A, have been aware of the state of the authorities on the matters which are above referred to as being implied or involved in the provisions of the Act.

#### 7. 'WAQF' UNDER MUHAMMADAN LAW.

Early history  
of 'waqf.'

Tradition of the  
Prophet about  
'waqf.'

Definitions  
of 'waqf.'

The following is taken from Syed Ameer Ali's learned work, which is particularly full on 'waqf,' and to which all authors writing after him must be indebted: "The validity of 'waqfs,' says the 'Ghâit-ul-Bayân,' is founded on the rule laid down by the Prophet himself, under the following circumstances, and handed down in succession by Ibn Auf, Nâfé and Ibn Omar, as stated in the *Jâmaa-ut-Termizi*: Omar had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet, and sought his counsel to make the most pious use of it. (whereupon) the Prophet declared, 'tie up the property ('asl'—'corpus') and devote the usufruct to human beings; and it is not to be sold or made the subject of gift or inheritance: devote its produce to your children, your kindred, and the poor in the way of God.' In accordance with this rule, Omar dedicated the property in question, and the 'waqf' continued in existence for several centuries, until the land became waste."<sup>1</sup>

The following definitions of 'waqf' have been given:—

(1) HANAFI LAW:

(a) Abu  
Hanifa's  
view:  
continuance  
of 'waqif's'  
right of  
ownership.

1. " 'Wakf' in its primitive sense means detention. In the language of the law according to Hancéfa—

- (i) "It signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue,<sup>2</sup> and the advantage of it go to some charitable object; "<sup>3</sup> or
- (ii) It "is<sup>4</sup> the detention<sup>5</sup> of a specific thing in the ownership of the 'waqif' or appropriator, and the devoting or appropriating of its profits or usufruct in charity, on the poor, or other good objects<sup>6</sup> in the manner of an 'areent'<sup>7</sup> or commodate loan."<sup>8</sup>

According to the two disciples of Abu Hanifa—

- (i) " 'Wukf' signifies the appropriation of a particular article in such a

<sup>1</sup> Ameer Ali, I. 125.

<sup>2</sup> See however s. 461, below.

<sup>3</sup> Hed. 231: adding in a note, "meaning always of a pious or charitable nature."

<sup>4</sup> Bail. I. 549.

<sup>5</sup> "The meaning of the word [ *wakf* ] as given in the dictionaries is merely 'detaining' or 'stopping.'" *Id.* n. 2.

<sup>6</sup> "Mr. Hamilton has unnecessarily restricted the legal meaning to appropriations of a 'pious or charitable nature' (*Hedaya*, II. 339 n. Hed. 231); and he has been followed by Sir William Macnaghten, who renders the word by 'endowment.' But it will be seen hereafter

that the term is more comprehensive, and includes settlement on a person's self" [under Hanafi law], "and children."—Bail. I. 549, n. 3.

<sup>7</sup> "In the manner of an *areent* or commodate loan."—"This does not mean that the profits are merely lent; but that the objects of the *wakfs* are to have the same benefit from it as if the subject of it were lent to them in the manner of an *areent*, when they would have the use of it, or in other words, its profits or usufruct for their own benefit so long as it remained in their possession." *Id.* n. 4.

<sup>8</sup> Hed. 231; Bail. I. 549.

manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creature;”<sup>1</sup> or

- (ii) “‘Wukf’ is the detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind.”<sup>2</sup>

2. The ‘Shara’ya-ul-Islam’ says with reference to Shiah law “‘Wukf’ is a contract the fruit or effect of which is to tie up the original and to leave its usufruct free.”<sup>3</sup> and later on it is stated : “the ‘wukf’ or subject of appropriation is transferred, so as to become the property of the ‘mowkool alehi,’ [or ‘persons on whom the settlement is made’] for he has a right to the advantage or benefits to be derived from it.”<sup>4</sup>

3. The definition contained in the Waqf Act is given in s. 456, above.

#### 8 ‘WAQF’ IN BRITISH INDIA.

The law of ‘waqf’ as laid down in the Privy Council decisions prior to the Waqf Act differed from strict Sunni Muhammadan law on two points. (The leading case was that of ‘Abul Fata v. Rasamaya,’<sup>5</sup> which seemed to refer for the law not to the recognised texts of Muhammadan law but to what must have been in the mind of the Prophet<sup>6</sup>—apparently in disregard of the principles on which decisions are usually given.<sup>7</sup>) According to the Privy Council (1) a ‘waqf’ had necessarily to be for a charitable object, and (2) whether a particular object was to be considered charitable was according to the Privy Council to be decided in accordance with the definition of charity in England. This law is not applicable to ‘waqfs’ created after the passing of the Waqf Act,<sup>8</sup> i. e., after 7th March 1913.

(b) His disciples : extinction of ‘waqf’s’ rights : transference to God.

(2) SHIAH definition : property transferred to beneficiary.

Divergence between Privy Council decisions and exposition contained in Muslim texts.

<sup>1</sup> Hed. 231, Ball I. 549.

<sup>2</sup> Ball. I. 550.

<sup>3</sup> See p. 530, n. 9, above.

<sup>4</sup> Ball. II. 211, 220, (*first*) 219 (*third*). It will be observed that this definition resembles that of Abu Hanifa, but the latter holds that the ownership is not transferred from the *waqf*, and that it is like an *ariet* loan (cf. Ball. I. 549), whereas the Shiah authorities consider it as transferred to the beneficiaries. This difference of view as to the nature of *waqf* results in a difference on the point of its revocability : under Shiah law it is irrevocable, according to Abu Hanifa it is revocable unless there is a decree of Court, after which “the right of the appropriator abates” : Ball. I., 546.

<sup>5</sup> (1894) 22 Cal. 619; 22 I. A. 76.

<sup>6</sup> “Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan law, as known and adminis-

tered in India, but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precept taken from the mouth of the Prophet. These precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of *waqf*, as the learned judges say they have. But it would be doing wrong to the great law-giver to suppose, that he is thereby commending gifts for which the donor exercises no self-denial.” Then follows the passage cited in the text later on.

<sup>7</sup> See ss. 11, 12, above; see also the comment to s. 10, referring to the conflict between customs and law. The real ground of decision was no doubt that it is against the policy of law to allow family settlements in perpetuity and also the effect that a *waqf* has on the rights of creditors.

N. R.—Rules contained in [ ] are not followed in British India.

	Sunni-Hanafi law.			Shiah law.
	<i>Abu Hanifa.</i>	<i>Abu Yusuf.</i>	<i>Imam Muhammad.</i>	<i>Shiah Authors.</i>
Ownership.	The ownership of the 'waqf' subsists	The ownership of the 'waqf' abates, in favour of ownership of God. <sup>1</sup>	The ownership of the 'waqf' abates, in favour of ownership of God. <sup>1</sup>	The ownership in beneficiaries.
Revocability.	[ 'Waqf' is revocable unless (a) there is decree of court, or (b) it is testamentary.]	'Waqf' irrevocable on the mere pronouncing of the word. <sup>1</sup>	'Waqf' irrevocable after possession given to 'mutawalli,' not before. <sup>2</sup>	'Waqf' irrevocable after possession given to beneficiaries or 'mutawalli.' <sup>3</sup>
'Musha'.		'Waqf' of 'musha' valid except as to mosque. <sup>3</sup>	[ 'Waqf' of divisible 'musha' invalid]	'Waqf' of 'musha' valid. <sup>10</sup>
Perpetuity.	Must expressly purport to be in perpetuity.	Perpetuity will be presumed if not stated.	Must expressly purport to be in perpetuity.	Must not purport to be limited to a fixed period of time. <sup>11</sup>
Object failing.	If the object of 'waqf' fails, or is such that it may fail, 'waqf' is void. <sup>4</sup>	If object of 'waqf' fails, it will result in favour of poor. <sup>4</sup>	If the object such as may fail, the 'waqf' is void. <sup>4</sup>	If object of 'waqf' fails, the property reverts to the 'waqf' or his heirs.
'Waqf' I. taking benefit.		'Waqif' may take benefit under the 'waqf.' <sup>5</sup>	[ 'Waqif' cannot take any benefit under the 'waqf.' <sup>5</sup>	'Waqif' cannot take any benefit under the 'waqf.' <sup>12</sup>
II. as 'mutawalli.'		Appointment of 'waqif' as 'mutawalli' valid. <sup>6</sup>	[Appointment of 'waqif' as 'mutawalli' not valid and avoids 'waqf'. <sup>7</sup>	Appointment of 'waqif' as 'mutawalli' valid. <sup>13</sup>
III. if no 'mutawalli.'		If no 'mutawalli' appointed, 'waqf' will be considered 'mutawalli.' <sup>7</sup>	If no 'mutawalli' appointed 'waqf' void. <sup>7</sup>	If no 'mutawalli' appointed the beneficiary acts as 'mutawalli'; unless the 'waqf' is for some object of general utility. <sup>13</sup>
IV. removing 'mutawalli.'		The 'waqif' may validly reserve to himself the power of removing the 'mutawalli'— If power not expressly reserved, it will be presumed to have been reserved. <sup>8</sup>	If power not expressly reserved, the 'waqif' cannot remove the 'mutawalli.' <sup>9</sup>	

<sup>1</sup> Shafi'i agrees with this: *Minhaj*, 232, (Bk. 21, c. 3.)<sup>2</sup> The Hanafi authorities are equally divided on this point, though Malik, Shafi'i, and Ibn Hanbal agree with Abu Yusuf in holding that nothing more is needed than a declaration of *waqf* to make it irrevocable.<sup>3</sup> Ball. I. 564.<sup>4</sup> Ball. I. 567.<sup>5</sup> Hed. 237.<sup>6</sup> Ball. I. 551, 591; *Minhaj*, 232.<sup>7</sup> Ball. I. 591.<sup>8</sup> The *Shahis* of Bukhara are said to accept Imam Muhammad's opinion in accordance with which the *Fatawa Alamgiri* says the *fatawa* is given; the *Shahis* of Balkh, however, adopt Abu Yusuf's view: Ball. I. 592, 591.<sup>9</sup> Ball. II. 218 (par. 2); 218 (fourth, II. 23-26); 219 (par. 3).<sup>10</sup> Ball. II. 214 (par. 1, II. 5-7).<sup>11</sup> Ball. II. 218 (par. 2).<sup>12</sup> Ball. II. 218 (par. 3).<sup>13</sup> Ball. II. 214 (par. 3).

As to the first of the two points mentioned in the last paragraph SECTION 457A. above, neither the Shiah lawyers nor Abu Hanifa in defining 1 ' waqf ' 1. As to necessity of object make any mention of a charitable object being necessary for it; the of ' waqf ' definition that Abu Yusuf and Imam Muhammad give of a ' waqf ' being a charity, implies a charitable motive, since they call it the "detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind,"<sup>2</sup> but the charity is seen to be merely the ultimate destination of the property.

The objects for which ' waqfs ' may be validly created, and which Objects mentioned are referred to in the ' Fatawa 'Akamiri,' fall under the following heads; as valid objects of ' waqf ' (1) the relief of the poor, (2) provisions for individuals, mainly the family of the ' waqif ' himself, or of specified persons, (3) ' masjids,' (4) caravanserais, aqueducts, roads, bridges, etc.

Though the poor have been mentioned first, as that seems to be Provision for poor, the ultimate destination of every ' waqf ' still far the greatest number of illustrations and rules refer to a ' waqf ' for the benefit, in the first instance, of members of the family of the ' waqif ' himself, and of other persons that the ' waqif ' may name in the instrument of ' waqf '.

The ' Shariya-ul-Islam ' also in speaking of the objects of a ' waqf ' Individuals primarily contemplated as beneficiaries under ' waqf ' mentions first the ' mowkoof alahi ' or person on whom the ' waqf ' is made," and then adds (as though it were an extension or application of the primary rule relating to a ' waqf ') that "a ' wakf ' for ' musalch ' or works of general utility, such as bridges, and ' masjids, ' or places of worship, is quite valid; for such a ' wakf ' is in truth a settlement on all Mussulmans though some only can participate in their advantages."<sup>3</sup>

What the Muslim lawyers, however, refer to as the essential feature of ' waqf ' is that it is made with a religious motive—a desire to Religious motive ' waqf ' approach God. It does not seem to be stated that approach to God can only be made by an object that is charitable in the sense of English law. Thus ' sadaqa ' which is a gift made with a desire to approach God, ' quicquid datur Deo sacrum, ut pars opum,'<sup>4</sup> may be made equally to the rich and the poor;<sup>5</sup> and similarly ' waqf ' can strictly be made for any object not prohibited by Islam. See now the Waqf Act, s. 2 (1) printed above, and footnotes thereto.

As to the second point mentioned above, in connection with the decisions of the Privy Council prior to the Waqf Act, "a family ' waqf '" 2. As to provisions for family of ' waqif ' grounds on which family settlements condemned. is characterised in the judgment<sup>6</sup> as a gift "(i) for which the donor

<sup>1</sup> Though Ball. II. 214 (second) seems to refer a waqf as a "charity" in connection with the age of competence to make it.

<sup>2</sup> Ball. I. 550 (II. 7-10).

<sup>3</sup> Ball. II. 214 (Hind) 215 (par. 2).

<sup>4</sup> Freytag, cited in Ball. I. 545, n. 1.

<sup>5</sup> Ball. I. 545 (I. 6.)

<sup>6</sup> *Abul Fata v. Rasamaya* (1894) 22 Cal. 619, 632.

SECTION 457A, exercises no self-denial : (ii) in which he takes back with one hand what he appears to put away with the other; (iii) which are to form the centre of attraction for accumulation of income and further accessions of family property; (iv) which carefully protect so-called managers from being called to account, (v) which seek to give to the donors and their family the enjoyment of property, free from all liability to creditors; (vi) and which do not seek the benefit of others beyond the use of empty words." <sup>1</sup> Now it may be admitted that the form that a 'waqf bar-farzandan' often takes in our times in India is open to some of these objections. But it is necessary to point out, in the first place, that, except in accordance with Abu Yusuf's exposition of Hanafi law, no school of law permits the 'waqif' to take any benefit under the 'waqf,'—so that the gravamen of the criticism cannot apply to a 'waqf' made in accordance with any other exposition of the law. Nor is it correct to say that the donor exercises no self-denial: for even where, being governed by the Hanafi law the 'waqif' reserves the life-interest to himself, it is impossible for him to deal with the 'corpus' of the property; and few persons are placed in such happy circumstances that they can contemplate the giving away of this power without the feeling that it may cause them great inconvenience in times of need which they cannot forestall. Next, a very important point has been overlooked when it is said that a 'waqf' does not "seek the benefit of others beyond the use of empty words": a 'waqf' by way of a family settlement is the only mode in which two classes of descendants whom Islam takes specially under its protection—women and orphans—can often be provided for. The children of predeceased children, and of females are excluded by the Sunni law of inheritance; and under a 'waqf' they are generally given an equal share with the other descendants. Nothing can be considered more truly charitable than to provide for these.

The Waqf Act has brought the law more into accord with the original texts: though the power to make family settlements in perpetuity requires under modern conditions some check. In this connection the remarks of Melvill and Bayley, JJ., in '*Abdul Ganne Kasam v. Hussien Miya Rahimtulla*' <sup>2</sup> are specially noteworthy. They refer to a 'waqf' for a family settlement as "creating a perpetuity of the worst description, for it prevents the alienation of the house for ever, and necessitates its use in a manner which the natural increase in the number of descendants would probably render impossible, even if they should be willing (which could hardly be expected) to live amicably under one roof throughout

'Waqif' can benefit under 'waqf' only according to Abu Yusuf's exposition of Hanafi law.

Self-denial by 'waqif'.

Charity underlying family settlements.

Evils of family settlements in perpetuity.

<sup>1</sup> (1894) 22 Cal. 610, 632.

<sup>2</sup> (1873) 10 Bom. H. C. R. 7, 10.



all generations. The absurdity of the settlement,” they continue, “is SECTION 457A. sufficiently shown by the circumstance that even during the life-time of the executing parties family quarrels arose which rendered it impossible for them to continue to live together.”

The law as laid down in the decisions prior to the Waqf Act must therefore be accepted with caution. The decisions are however cited in this work and the effect of the Waqf Act stated in the appropriate places. Those decisions are still of value as it has been held that the Waqf Act is not retrospective.

#### 9. CHARITIES IN FORMS OTHER THAN ‘WAQF’

The fact that ‘waqf’ is the most important of the forms that charity takes amongst Mussulmans, (so far as the law courts are concerned, but certainly not in any other sense) has sometimes been the cause of a misapprehension that every charitable disposition must be classed as a ‘waqf.’<sup>1</sup> The fact that a gift is made with a religious or charitable intention does not make it the less a gift, though it is then termed ‘sadaqa,’ and it comes under the class of a gift with a return, and is irrevocable.<sup>2</sup> The Indian Trusts Act is applicable to Mussulmans, but it does not affect a trust for a charitable object, whether created in the form of a ‘waqf’ or otherwise.

#### 10. ‘WAQF’ AND TRUST COMPARED.

The following points of distinction between a ‘waqf’ and a trust ‘Waqf’ and trust. under the law of British India, may be noted : (1) ‘Waqf’ requires a religious motive; necessity for such motive is all but forgotten by the British Courts, in giving decisions upon ‘waqf’ cases.<sup>3</sup> Whether it is possible to give effect to strict Muhammadan law, and to the requirements of a religious motive for its validity, is quite a different question.<sup>4</sup> (2) The author of the trust may be a beneficiary under it; but except under the Hanafi law, the ‘waqif’ cannot reserve to himself any benefit under a ‘waqf.’ (3) A trust may be made for any lawful Charity. object; under the Privy Council rulings a ‘waqf’ could be created only for a charity; under the Waqf Act ‘waqf’ may be created also for family settlements. (4) There are limitations as to what may be the

<sup>1</sup> Cf. *Jainabai v. R. D. Sethna* (1910) 34 Bom. 604; *Cassam Ally v. Currimbhai* (1911) 36 Bom. 214, 13 Bom. L. R. 717. On one point the former decision was altered on reconsideration in the latter.

<sup>2</sup> Cf. (*Muthukana Ana*) *Ramangadhan v. Vada Iyanni* (1909) 34 Mad. 12, 14, where *waqf* and *sadaqa* are compared and distinguished

(per Benson and Abdur Rahim, JJ.); affirmed (1410) 40 Mad. 116 (P.C.).

<sup>3</sup> See, however, *Doyal Chund Mullick v. Keramat Ali* (1871) 16 W. R. 116, 118 (par. 2, l. 4.)

<sup>4</sup> See ss. 59 and 437, above. There is perhaps some misunderstanding about the law requiring the existence of a religious motive.

SECTION 557A. subject of 'waqf,' but any transferable property may be the subject of a trust. (5) The 'mutawalli' has more restricted powers than the trustee has under the Indian Trusts Act, ss. 16, 20, 36, 40. (6) The 'mutawalli' may ask for reasonable remuneration, which the trustee cannot (ib. s. 50). (7) A 'waqf' is perpetual. (8) It is irrevocable. (9) 'Waqf' property is inalienable. (10) A trust results for the benefit of its author when it is incapable of execution, or it does not exhaust the trust property; in a 'waqf' a general charitable intention would be presumed, and the 'cy près' doctrine applied.<sup>1</sup>

### (2) Form of Declaration of 'Waqf.'

#### (a) The Terms of the Declaration.

No form essential.

458. The declaration of 'waqf' may be made in any appropriate words showing an intention to make a dedication by way of 'waqf.'<sup>2</sup> The use of the word 'waqf' is neither essential<sup>3</sup> for the validity of a declaration of 'waqf' nor conclusive<sup>4</sup> to show that a dedication by way of 'waqf' was intended to be made. It need not be in writing.<sup>5</sup> Dedication may be inferred from long use as 'waqf' property.<sup>6</sup>

#### Illustrations.

(1) The following are valid declarations of 'waqf.'<sup>7</sup>—

(a) "This my land is a perpetually<sup>8</sup> endowed charity for the benefit of the poor."<sup>9</sup>

(b) "This my land is endowed for the poor."<sup>10</sup>

<sup>1</sup> Of course, only so far as the subject of the waqf is concerned. See p. 362, n. 2, above.

<sup>2</sup> Ball, I. 559 (par. 2).

<sup>3</sup> *Pirani v. Abdool Karim* (1891) 19 Cal. 203-215; *Jeevan Doss v. Shah Kuberooddeen* (1840) 2 Moo. I. A. 390; *Sahy-un-nisa v. Maiti Ahmed* (1903) 25 All. 418 (Shah law).  
<sup>4</sup> *Abdul Ganne Kasam v. Hussan Miya Rahimulla* (1873) 10 Bom. H. C. R. 7; *Muhammad Munawar v. Razia Bibi* (1905) 27 All. 320, 324; 32 I. A. 86.

<sup>5</sup> *Nurbo Narain Singh v. Alty Bakh Khan* (1903) 3 Hay. 415.

<sup>6</sup> *Court of Wards v. Ilahi Bakh* (1912) 40 Cal. 297 (P.C.); *Fakhruddin Shah v. Kiyasut-ul-Jah* (1910) 7 All. L. 1095; though mere appropriation of the rents and profits of a property for charity may not be sufficient proof of dedication: *Abdul Ghafur v. Sham Sundar Das* (1912) 17 Ind. Cas. 303; cf. *Isma'il Miya v. Wahadani Begam* (1911) 36 Bom. 308; *Mahomed*

*Isma'il Ariff v. Ahmed Maulla Dawood* (1916) 43 Cal. 1085, 1100, in *Ghulam Hazrat v. Gulzari Lal* (1912) 15 Ind. Cas. 12 a mere recital in a deed that the income of certain properties be spent for charity was held not to be sufficient; *Ramanandan Chettiar v. Vasa Leria Marakayar* (1910) 40 Mad. 119, 122 (line 12 from the bottom) (P.C.). See also n. 402, *Explanation I.*, below.

<sup>7</sup> Ball, I. 558.

<sup>8</sup> The word perpetual is unnecessary according to the generally accepted view: Ball, I. 558 (par. 2); and see n. 463, below. If he stops at the word *sadaga* without adding "and perpetual" the disposition would not be by way of waqf, but would fall within n. 437, above: *Bahr-ur-Raiq*, V. 205. But see s. 5c, above.

<sup>9</sup> *Bahr-ur-Raiq*, Book on Waqf, V. 205-206 cited and translated by Karamat Husain, J., in *Fakhruddin v. Kiyasutullah* (1910) 7 All. L. J., 1093, 1109-1111.

## SECTION 458.

*Illustrations.*

- (c) "This my land is endowed for meritorious purposes."<sup>1</sup>
- (d) "I devote this room of mine for the oil of such a mosque."<sup>1</sup>
- (e) "This my land is a 'sadaqa' or charity fund and perpetual,<sup>2</sup> during my life and after my death."<sup>3</sup>
- (f) "This my land is a 'sadaqa' endowed and tied up in perpetuity<sup>1</sup> during my life and after my death."<sup>3</sup>
- (g) "This my land is 'waqf.'"<sup>1</sup>
- (h) "This my land is dedicated to God Almighty for ever."<sup>4</sup>
- (i) "This house is free [i.e., from the claims of the 'waqf's'] heirs] for the mosque [the mosque being specified] on my death."<sup>1</sup>
- (j) "I have made this house of mine free for the leader (Imam) of such a mosque that he may pray and keep fasts on my behalf. [This expression makes the house 'waqf' although its income is not sufficient for his prayers and fasts]."<sup>1</sup>

(k) "I have made over this property to the 'Sajjada-nashin' specifically for the expenses of the 'Khangah.' "[But the word 'tawliat' does not imply any spiritual office, it means "mastership" and does not by itself impress the property with any trust or 'waqf'].<sup>5</sup>

(l) "Ye should purchase from the rent of this house of mine every month ten 'dirhams' worth of bread and distribute it among the poor."<sup>2</sup>

(2) The declaration of a 'waqf' which is not for a religious purpose may take the form of a deed made with the consent (therein recited) of the Official Trustee assigning to him the 'waqf' property upon the terms of his applying the income thereof for the objects of the 'waqf.'<sup>6</sup>

(3) The declaration of a 'waqf' which is for a charitable, but not exclusively for a religious purpose, may take the form of a scheme settled by the Local Government, on the application, and with the concurrence of the 'waqif' for the administration of the 'waqf' property.<sup>7</sup>

(4) A 'sanad' of the Emperor Shah Jahan, dated 1651-1652, granted the village of Dharoda, and other land in 'inam' to one Syad Hasan, "settled and conferred manifestly, and knowingly for means of subsistence of the children of the said Syad Hasan . . . that they may engage themselves in praying for this ever-enduring Government;" held, that this grant did not constitute a 'waqf,' that the property was

<sup>1</sup> See p. 536, n. 9.

<sup>2</sup> See p. 536, n. 8.

<sup>3</sup> *Id.* I. 558.

<sup>4</sup> *Piran v. Abdul Karim* (1891) 19 Cal. 203.

<sup>5</sup> *Zoolata Bibi v. Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1068.

<sup>6</sup> Official Trustee Act, XVII. of 1864, s. 8.

<sup>7</sup> Charitable Endowments Act, 1890, ss. 2, 6, 8.

**SECTION 458.** not descendible 'per stirpes' nor would the grant be forfeited or avoided by neglect to pray for the said Government, nor by its downfall.<sup>1</sup>

*Illustrations.*

(3) One Syed Ahmad Rafai (*f.* Busreh, circ. 500 A. H.) was a 'Sufi' teacher, and gained eminence in Arabia. He was the founder of the family, and came to be called 'pir,' and his descendants imputed to themselves religious attributes, and took upon themselves the office of spiritual teachers ('sajjada-nashins') which was transmitted not by descent, but by appointment by the last holder. The 'sajjada-nashin' made disciples, who made offerings, or presents ('nazrana'). Held, that nothing specific having been done to dedicate the property thus acquired to charitable or religious uses, it was the private property of the 'sajjada nashin,' and would descend to his heirs.<sup>2</sup>

(6) A lady, Mai Pak Daman, was revered as a saint, and her body was buried in a shrine near Multan. The Mussulmans began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. For hundreds of years the land about her tomb was used as a burial ground. In 1858 a representative public meeting of the Muhammadans was held for considering the question of Muhammadan graveyards for the city, and the graveyard of Mai Pak Daman was one of the four which it was resolved were to be kept open. Though there was no direct proof of dedication as 'waqf,' the High Court concluded that long before 1858, it had become 'waqf' by use and the Privy Council upheld this decision.<sup>3</sup>

Necessity of  
some kind of  
declaration.

On the necessity of some kind of declaration being made, see 'Banubi v. Narsingrao,'<sup>4</sup> in which case it was important to fix when the 'waqf' came into force, if at all; for, being mentioned in the will as already having been made, the question was whether such mention was enough to give it retrospective force. It had been suggested in argument by Mr. Karamat Husain, and held by him subsequently when on the bench, that a 'waqf' is not validly created unless there is an oral declaration to that effect.<sup>5</sup> It is submitted that the rule must be taken as having become inoperative either by desuetude in British India, or as being of no practical importance 'because a written declaration implies an oral declaration,' or because of the presumption that the Courts would raise, of an oral declaration having preceded.

<sup>1</sup> *Mahomed Ali v. Gobar Ali* (1881) 6 Bom. 88.

<sup>2</sup> *Zoolaka Bibi v. Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1060-1061.

<sup>3</sup> *Court of Wards v. Isha Bakhsh* (1912) 40 Cal. 279 (P.C.)

<sup>4</sup> (1906) 31 Bom. 250; 9 Bom. L. R. 91, 96-97 (Beaman, J., Jenkins, C. J., concurring).

<sup>5</sup> *Syed Mustafa v. Amina Begam* (1904) (1905) 2 All. L. J. 519; *Fakhruddin v. Kifayatullah* (1910) 7 All. L. J. 1093.

## (b) Testamentary 'Waqf.'

## SECTION 459.

**459.** (1) A testamentary 'waqf'<sup>1</sup> may or may not <sup>Testamentary</sup> form part of the general will of the 'waqf.'<sup>2</sup> <sup>'waqf.'</sup>

(2) Where a testamentary 'waqf' is purported to be <sup>Must be</sup> made of property exceeding in value the bequeathable third<sup>3</sup> <sup>within a third of</sup> of the 'waqif's' estate, subject to subsection (3) below, the 'waqf' is valid and effective as to the bequeathable third, and void as to the excess,<sup>4</sup> unless the heirs of the 'waqif' consent to the 'waqf' operating in regard to such excess.<sup>1</sup> <sup>the estate.</sup>

(3) According to Hanafi law where a testamentary <sup>is or no que.</sup> 'waqf' of property exceeding in value the said bequeathable third is for the benefit of a mosque, it is wholly void, unless the said heirs consent; and if they consent then it is wholly valid:<sup>5</sup> *quaere*, whether under Shiah law it would be valid as to the bequeathable third without such consent.<sup>6</sup>

(4) According to Hanafi law where a testamentary <sup>For heirs.</sup> 'waqf' is purported to be made, and any of the beneficiaries under it are the heirs of the 'waqif,' the portion of the income to which the said heirs are purported to be entitled under the 'waqf' is divisible amongst all the heirs of the 'waqif' in the proportion of their rights of inheritance, notwithstanding any directions to a contrary effect, unless (after the death of the 'waqif') the heirs whose rights are affected by the 'waqf' consent to the said directions being given effect to.<sup>7</sup>

(5) According to the 'Ithna 'Ashari' Shiah law, be- <sup>Shiah Ithna</sup> <sup>'Ashari law,</sup> quests to heirs within the bequeathable third are valid

<sup>1</sup> See s. 457 (b) above.

<sup>2</sup> *Jum. Bibes v. Abdollah Barber* (1835) Fulton, 345. See comment. A testamentary *waqf* is called *waqf bil wasiat*. When a *waqf* is made *inter vivos*, and it includes testamentary provisions, the testament is called *wasiat bil-waqf*: *Agha Ali Khan v. Altaf Hussain Khan* (1892) 14 All. 429; *Abdul Karim v. Shofiabinnisa* (1892) 83 Cal. 853.

<sup>3</sup> I. e., the portion of the estate over which a Muslim has testamentary powers: see s. 579 (1), below.

<sup>4</sup> *Ball. I.* 550, 601 (*H.* 1-6), 602 (*H.* 7-15), *ib.*

(*par. 2*); *II.* 212 (*par. 2*); *Hed.* 233 (*col. 1, par. 3*); *Bombayyan v. Mahomed Nurool Huq* (1868) 10 W. R. 375. *Ali Hussain v. Fazal Hussain Khan* (1914) 23 Ind. Cas. 291 (Shiah law).

<sup>5</sup> *Ball. I.* 605 (*par. 4*). The reason being that a *maejid* cannot be *musha'*: it must be absolutely separated off from property not dedicated to God.

<sup>6</sup> The objection to *musha'* property is not recognised in Shiah law. The doubt arises, as the recognition of testamentary *waqfs* in Shiah law seems to be an innovation. See comment.

<sup>7</sup> *Ball. I.* 601, 602. See illustrations.

SECTION 459. without the consent of the other heirs ; and *semble*, a testamentary 'waqf,' under which heirs are beneficiaries to an extent not exceeding the bequeathable third is valid without the consent of the heirs.<sup>1</sup>

*Illustrations.*

(1) W is governed by Sunni Hanafi law, and,—

(a) W makes a testamentary 'waqf' for his child, and his child's child, and his 'nasl' ' ' for ever so long as there are any, and after them for the necessitous.<sup>2</sup> If the 'waqf' land is in excess of the bequeathable third of W's property, the 'waqf' is void as to the excess, unless W's heirs consent.<sup>3</sup>

(b) If the value of the land forming the subject of the 'waqf' in illustration (a), above, is within the one-third of the estate, and W leaves a son, a daughter, a widow, a mother and a father : then it is evident that under the terms of the 'waqf' the son and daughter take the whole of the income of the 'waqf' : and as they are heirs, the 'waqf' is inoperative (unless of course the other three heirs consent) and the whole of the said income is divisible amongst all the heirs in accordance with their rights of inheritance.

(c) If W leaves all the heirs mentioned in illustration (b), but has also a grandson and a granddaughter, then each of the two grandchildren and the son and daughter respectively would have received in accordance with the terms of the 'waqf' one-fourth of the income of the 'waqf' property.<sup>4</sup> The provision in favour of the grandchildren to take one-fourth each is valid, as they are not heirs : but the portions that the son and daughter are purported to be given (*viz.* half of the income) will be divisible amongst all the heirs in the proportion of their legal rights.<sup>5</sup>

(d) The facts being as stated in illustration (c), if the son and daughter die after W's death, then the whole of the income of the 'waqf' property will be divisible between the grandson and granddaughter alone, *i.e.*, they will take a half of the income each, and the widow and parents will take nothing.<sup>1</sup> (Because the grandchildren were not heirs of the deceased. But if the son and daughter had predeceased W the case would have been different, for then the grandchildren would have been heirs. This also illustrates the doctrine of lapse).

<sup>1</sup> The *Shara'ya-ul-Islam* is silent ; Bail, II, 212.

<sup>2</sup> This would have been considered an illusory waqf under *Abdul Fata Mahomed Isak v. Rasamaya Dhen Chowdhri* (1894) 22 Cal. 619; 22 I. A. 76; but is valid under the Waqf Act which overrules the exposition of the law

contained in that case.

<sup>3</sup> Bail, I. 601.

<sup>4</sup> On the principle that each beneficiary shares in equal proportion : see s. 512 (1), below.

<sup>5</sup> Bail, I. 601-603, and n. 2. thereto.

<sup>6</sup> Bail, I. 602.

(2) If W had been governed by the 'Ithna 'Ashari' Shiah law the **SECTION 459.** 'waqf,' in each case mentioned above, would have been valid within *Illustrations.* the bequeathable third of the estate.

(3) W states in his will that he has at a former time given away or set apart a portion of his property to a charity. This does not form a testamentary declaration of 'waqf' though it may be evidence of a 'waqf' having been made by W in his lifetime.<sup>1</sup>

Mahmood, J., had held,<sup>2</sup> that inasmuch as the Shiah law requires Testamentary 'waqf' under Shiah law. that possession should be given of the 'waqf' property in order to complete the 'waqf,' no testamentary 'waqf' can be valid under that law. Though there do not seem to be any direct references to a testamentary 'waqf' in the Shiah books of authority, this decision was overruled fourteen years later by the Privy Council, who held<sup>3</sup> that a Shiah equally with a Sunni may make a testamentary 'waqf.' They proceeded on the ground<sup>4</sup> that possession is necessary for the completion of a gift as much as for a 'waqf,' and as a testamentary gift (or bequest) is allowed under Shiah law, there was no reason why a testamentary 'waqf' should not be allowed.<sup>5</sup>

As to Sunni law, Abu Hanifa is stated to have expressly excepted a testamentary 'waqf' from his general rule that a decree of the court is necessary to complete it. But this report is stated in the 'Hidaya' to be altogether unfounded.<sup>6</sup> Imam Muhammad held transfer of possession to be necessary, and his view of the law agrees in most particulars with the Shiah law. It would be of interest to find out whether he recognised a testamentary 'waqf.'

A 'waqf' made in death-illness is governed by the rules relating 'Waqf' made in death-illness.<sup>7</sup> to testamentary 'waqfs' contained in s. 459.<sup>8</sup> See s. 461A, below.

### (3) Competence of 'Waqif.'

#### 460. Any Muslim<sup>9</sup> who has attained majority and Majority, nuberty.

<sup>1</sup> *Banubi v. Narsingrao* (1907) 31 Bom 250.

<sup>2</sup> *Agha Ali Khan v. Alaf Hasan Khan* (1892) 14 All. 429.

<sup>3</sup> *Bagar Ali Khan v. Anjuman Ara Begum* (1902) 15 All. 236; 30 I. A. 64. See also *Murtuzi Bibi v. Jamia Bibi* (1890) 13 All. 231.

<sup>4</sup> The basis of their judgment is indicated in ss. 11, 12, above, and comment thereto.

<sup>5</sup> Their Lordships' judgment has the much-desired effect of making the Sunni and Shiah law agree in this important matter, and there seems no reason why a Shiah should not, like a Sunni, have the power of making a testamentary *waqf* in India. In their reasoning they seem to

have overlooked the distinction between a gift and a *waqf* by the fact that the existence of a religious motive is a necessity in the case of *waqfs*. The British Courts, however, have not been considering whether any religious motive existed in the mind of the *waqif* at the time of the dedication; cf. *Doyalchand Mullick v. Keramut Ali* (1871) 16 W.R. 116; and s. 5n, above, and comment thereto.

<sup>6</sup> Hed. 233 (col. 1, par. 1, l. 18.)

<sup>7</sup> See s. 5n, above.

<sup>8</sup> See s. 400, below.

<sup>9</sup> But not a Hindu; *Fazle Rahman Nasser v. Quath Bandhe Pal* (1911) 16 Cal. W. N. 114; 11 Ind. Cas. 436. See, however, comment.

SECTION 460. is of sound mind may make a 'waqf.' " *Quære*, whether a Mussulman who has attained the age of puberty<sup>1</sup> but not of majority under the Indian Majority Act can make a 'waqf.'<sup>2</sup> *Semble*, a 'waqf' made by a minor may, by his subsequent adoption of it, become valid and incapable of being avoided by him.<sup>3</sup>

*Illustration.*

One Fatmabibi prayed in 1881 to have a 'waqf' purported to be made by her in 1866 declared void, on the ground, amongst others, that it was declared by her when she was fourteen years old. *Held*, that though the dedication by a girl of fourteen was not to be upheld without inquiry, yet the transaction never having been questioned by her husband (to whom she was married in 1866 and who died in 1872) and that she having for fifteen years confirmed her own act, by a continued acceptance of the profits of the estates from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects, or want of an accompanying volition.<sup>3</sup>

*Waqf' by Hindu.*

It might have seemed unlikely that the Courts should have to consider whether a non-Muslim can validly create a 'waqf.' The question has however arisen, and it has been assumed that Muhammadan law must govern the question, and held that a non-Muslim may make a 'waqf' except for endowing a mosque.<sup>2</sup> It is difficult to see how the question can be governed in British India by Muhammadan law. The transactions of a Hindu would ordinarily be governed by the Hindu law. And the Muhammadan law of 'waqf' would, it is submitted, be irrelevant in this connection except perhaps for the purpose of discovering the intentions of the dedicator. When, on the other hand, a contract is purported to be made (as was apparently contended in the case<sup>4</sup> referred to), and when for valuable consideration, a Hindu agrees to set aside property to be utilized for the benefit of Muslims in a particular manner, it is submitted that the law of contracts would govern the transaction, and the contract would be upheld unless it is opposed to any law or public policy. The Calcutta High Court has held that since the Muhammadan law of 'waqfs' is opposed to a 'waqf' for a mosque being made by a non-Muslim such a contract would be illegal. It is submitted that such a contract would not necessarily be opposed

<sup>1</sup> Bail. II, 214 (par. 2.); I. Bail. 552; *Minhaj*, 230 (Bk. 23, a. 1.)

<sup>2</sup> *Ameer Ali*, I, 137-142.

<sup>3</sup> *Fatmabibi v. Advocate-General of Bombay* (1881) 6 Bom. 42. Cf. *Debroo Banco Begum*

*v. Nawab Asghar Ally* (1875) 15 Beng. L. R. 167 where the deed was set aside, being by a *parda-nashin*.

<sup>4</sup> *Fuzur Rahman v. Anath Bandhe* (1911) 16 Cal. W. N. 114.



to any law. For what Muhammadan law lays down is that there can be SECTION 460. no 'waqf' for a mosque by a non-Muslim, because 'waqf' implies a religious motive, and an act that is meritorious in accordance with the faith of the 'waqif.' In the case of a contract by a Hindu to dedicate property for certain purposes which he calls 'waqf,' would any question of religious merit arise? or would the question be merely whether the property had been transferred by the Hindu subject to certain trusts, and whether in the hands of the transferee it would be subject to those trusts? If the trusts are such as can be given effect to under the general law, there would apparently be no objection to the agreement.

The Indian Majority Act does not save from its operation, capar Indian Majority Act. city in regard to 'waqf,' unless it be considered that making a 'waqf' must be a religious rite or usage. The applicability of the Act with reference to various questions of Muhammadan law has been considered in previous chapters.<sup>1</sup> It is submitted that the decision of the question now under consideration must depend upon the objects or purposes of the particular 'waqf': in any case it is unlikely that a 'waqf' should, merely by reason of being a 'waqf,' be considered to be, not a disposition of property, but a religious rite or usage. Though Muhammadan law (like other systems based on religion) assumes that every person will devote a certain amount of his property to charitable and religious objects, yet that duty is primarily discharged by donations and not by settlements by way of 'waqf.' The 'Sharaya-ul-Islam' mentions "a report which favours the legality of charity" by "one who has attained to ten years only," but "the preferable opinion" is stated to be that 'waqf' by him "is forbidden because the inhibition under which he is placed by reason of his youth is not removed until he has attained to puberty and discretion." These last words may imply that puberty is the period of life after which 'waqf' is permissible because then the person is competent to act; hence in British India the age of majority under the Indian Majority Act would no doubt be taken to apply, unless the object or purpose of the particular 'waqf' is such that in creating it the minor is to be taken to perform some religious rite.

461. A 'waqf' cannot be validly created so as to 'Waqt' defeat or delay the rights of creditors; and when a 'waqf' delaying or defeating creditors void. is purported to be so created, it may be avoided by any creditor whose rights are so defeated or delayed.<sup>2</sup>

<sup>1</sup> See ss. 5A, 292 above and comment to ss. 286, 278.

<sup>2</sup> Cf. (*Muthukana Ana*) *Ramanadham v. Vada Levasi* (1900) 34 Mad. 12.

**SECTION 461.** "It is a further condition that the party making the appropriation is not under inhibition at the time, either for facility of disposition or debt."<sup>1</sup> See s. 359, above, and comment thereto.

'Waqf' in death-illness.

**461A.** A Muslim who is in 'marz-ul-maut' or death-illness,<sup>2</sup> cannot make a valid disposition of more than one-third of his property; and if he purports to make a 'waqf' in such illness, (unless his heirs assent<sup>3</sup> to the 'waqf' taking effect in respect of the whole of the property purported to be made 'waqf' of) the 'waqf' will affect only one-third of his estate, and will be invalid in so far as the property purported to be made 'waqf' of exceeds the said one-third. The rule contained in this section will operate notwithstanding that possession of the whole of the property purported to be made 'waqf' of, has been delivered to the person nominated 'mutawalli'.<sup>3</sup>

The principle of s. 461A has been already referred to: see s. 498, above; see also s. 600, below.

'Pardanashin' women.

**461B.** The rules contained in s. 359A, above, relating to transactions by 'pardanashin' women apply with the necessary modifications to 'waqfs.'

#### (4) Completion of 'Waqf.'

- I. Hanafi law.  
(a) Abu Yusuf : mere declaration.  
(b) Muhammad (i) Appointment of 'mutawalli.'  
(ii) Possession.  
(c) Abu Hanifa :

**462.** (1) Under Hanafi law a 'waqf' is completed, (a) according to Abu Yusuf, by the mere declaration; (b) according to Imam Muhammad it is completed only if after the declaration, a 'mutawalli' is appointed, and possession is delivered to him; (c) according to Abu Hanifa it is completed when a decree of the Court declares that

<sup>1</sup> Bail. I. 555 (par. 2.)

<sup>2</sup> See s. 600, below.

<sup>3</sup> The assent of the heirs in accordance with Sunni law must be given after the death of the waqif; in accordance with Shiah Ithna 'Ashari law it may be given either before or after his death; and validates the dedication in either case: cf. s. 570, below; *AK Hussain v. Fazal Hussain Khan* (1914) 36 All. 431 (Shiah law).

\* Hod. 239, 220 (col. 1. par. 2), 240 (col. ii);

Bail. I. 551, (H. 1-3) 591 (par. 1). "The opinion of the learned seem to be nearly balanced between them, two authorities declaring that the *fatus* is with Abou Yusuf, while two more allege that it is with Mohammed": Bail. I. 551 (H. 4-7). Cf. *Doyat Chand Mullick v. Karamat Ali* (1871) 16 W. R. 116 which lays down as the chief elements of waqf: (a) special words of declaration, and (b) proper motive.

<sup>5</sup> Cf. (*Muthukana Ane Ramnadhham v. Vada Lervai* (1909) 34 Mad. 12.

the property is the subject of a 'waqf,' but not before, SECTION 462. unless it is a testamentary 'waqf.'<sup>1</sup>

(2) It was held in an early case that the exposition of Hanafi law by Abu Yusuf prevails in India;<sup>2</sup> but more recently the Allahabad High Court has held that Imam Muhammad's opinion must be followed in preference to that of Abu Yusuf.<sup>3</sup> It is not clear whether the Allahabad High Court intended to go beyond deciding that the mere utterance of the declaration of 'waqf' cannot by itself complete it,<sup>4</sup> and also intended to lay down that a 'waqf' is not complete without the appointment of a 'mutawalli' and transfer of possession to him.

(3) Under Shiah law a 'waqf' is not completed unless II. Shiah law, possession. possession<sup>5</sup> of the 'waqf' property is given either to the 'mutawalli,' or to the first beneficiary under the 'waqf'; provided that where the object of a 'waqf' is a charity, it is not completed unless a 'mutawalli' is appointed, and possession is given to him.<sup>6</sup>

*Explanation I.*—Where the object of a 'waqf' is a charity, the transfer of possession (which is above referred to as being necessary for the completion of a 'waqf') may

<sup>1</sup> Hed. 233; Ball. I. 550.

<sup>2</sup> *Doe, d. Jaun Beebee v. Abdoolah* (1833) Fulton, 345 (here the *waqif* had declared himself to be the *mutawalli*). This opinion is stated to be formed "after obtaining all the information we are able to collect through the means of our moulvies and a reference to the authorities." Cf. (*Khajah Hossein Ali v. Hazaru Begum* (1869) 12 W. R. 344, *per* Kemp, J. (affirmed *id.* 408): "decision are primarily given according to Abu Yusuf, and next according to Imam Muhammad." *Ameer Ali*, I. 128-129 says that "Abu Yusuf's enunciations are recognised as law throughout the Sunni world" (citing *Fatawa 'Alamgiri* II. 454); and that "Mohammed's views were adopted only by some of the Bokhariot schoolmen, and have no application in any other part of the Sunni world" (citing *Tashih and Fatawa 'Alamgiri*, II. 455). "That (i.e., agreeing with Abu Yusuf) is also the view of the three Imams [Malik, Shafel and Ibn Hanbal] and of the bulk of the learned; and is followed by the jurists of Balkh, and on that is the *fatawa*,

as in the *Fathul Kadir* and *Munich*. And on that is the *fatawa*; so says the *Siraj-ul-Wahaj* also." *Doe d. Jaun Beebee's* case was followed in *Ramjan Mistro v. Zahur Hussain* (1913) 18 Ind. Cas. 241 (Calcutta), in so far that it was held that the appointment of a *mutawalli* is not essential for the completion of a *waqf*.

<sup>3</sup> *Muhammad Azizuddin v. Legal Remembrance* (1893) 15 AIL 321. See illustration (4).

<sup>4</sup> Cf. *Banubi v. Narsingrao* (1907) 31 Bom. 250; *Mulla Vuttil Ussau v. Subramania Aiyar* (1916) 31 Mad. L. J. 431. See also *n.* 114, above, which shows that where the texts differ, the Courts have a wide discretion under Muhammadan law, to follow the text that will best meet with the justice of the case.

<sup>5</sup> *Ib.* Ball. II. 212 (*id.* 8-9). 182 (*id.* 27-29.)

<sup>6</sup> Ball. II. 219 (par. 3.) Cf. *n.* 383 comment.

<sup>7</sup> But such use is not conclusive proof, nor in itself sufficient to create *waqf*; payments out not rent of a property for expenses of a mosque is not proof of itself that the property is endowed: *Shurfoonissa v. Kooloom* (1876) 25 W. R. 447; cf. *n.* 458, above, and the last footnote thereto.

**SECTION 462.** be effected by the subject of the 'waqf' being utilised for the said object.<sup>1</sup>

Presumption of non-completion if not acted upon.

**Explanation II.**—Where the declaration of a 'waqf' is not acted upon by the 'waqif,' and its objects are not given effect to, it may be presumed<sup>2</sup> that the 'waqf' was not completed;<sup>3</sup> or that the waqif had no 'bona fide' intention to create a 'waqf'; and where the 'waqif' has declared himself to be the 'mutawalli,' but has not given any effect to the alleged 'waqf,' the presumption that the 'waqf' was not completed may be very strong, especially in favour of creditors.<sup>3</sup>

After completion not affected by breach.

**Explanation III.**—Where a 'waqf' has been declared and completed, its validity is not affected by the misfeasance of the 'mutawalli'<sup>4</sup> nor by the debts or liabilities of the 'waqif' arising subsequently to the completion of the waqf.<sup>5</sup>

Illustrations.

(1) A Shiah purports to make a 'waqf,' but dies without giving possession of the subject of 'waqf' to the 'mutawalli' or to the beneficiaries. The 'waqf' is void, unless the beneficiaries are the 'waqif's' minor children, or the minor children of his sons or (according to the better supported opinion) he is the executor of the father or grandfather of such minor children.<sup>6</sup>

(2) W makes a 'waqf' in favour of B, and after him for BA, and then to the poor. Possession is sufficiently transferred according to Shiah law if it is given to B, and all regard to possession ceases in the subsequent steps.<sup>7</sup>

(3) When a plot of ground is designated or specified by a Hanafi Mussulman for the purpose of being dedicated by way of 'waqf' as a

<sup>1</sup> See illustrations: *Explanations I., II. and III.* are complementary, and should be read together.

<sup>2</sup> *Muhammad Azizuddin Ahmad Khan v. Legal Remembrancer N. W. P. and Oudh* (1893) 15 All. 321; *Ditroos Banoo Begum v. Nasob Asghur Ally* (1875) 15 Bom. L. R. 167; *Zoolaka Bibi v. Zymul Abedin* (1904) 6 Bom. L. R. 1058, 1096, *et seq.* See however, *Abdul Rajak v. Bai Jimbadaf* (1912) 14 Bom. L. R. 295, 14 Ind. Cas. 988, where the waqif was himself the first mutawalli.

<sup>3</sup> Cf. proviso (2) to s. 346, above, and comment thereto.

<sup>4</sup> *Doyal Chund Multak v. Karamul Ali* (1871) 16 W. R. 116; *Rasool Ali v. Ahmed*

(1869) 12 W. R. 132. But see *Explanation II.* to s. 462; where the waqif is himself the mutawalli and he has never given effect to the waqf, it naturally raises a doubt whether a waqf was ever intended to be created, and if so, ever actually completed: see illustration (4) to s. 482; *Kulsoom Bibee v. Gohar Hossain* (1905). 10 C. W. N. 449; and comment below.

<sup>5</sup> *Fegredo v. Mahomed Mudessur* (1871) 15 W. R. 75; cf. as to prior mortgage, *etc.*: *Hajra Begum v. Khajah Hossain Ali Khan* (1869) 4 Beng. L. R. (A.C.) 88; 12 W. R. (344), 488.

<sup>6</sup> Ball. II, 218 (H. 27-25), and see s. 400 above, relating to gift.

<sup>7</sup> Ball. II, 219 (par. 3.)

cemetery, the 'waqf' is completed, according to Abu Yusuf, by the mere declaration of 'waqf'; according to Imam Muhammad by (such a declaration followed by) the burial of at least one person in it, and according to Abu Hanifa by a decree of the Court, unless the 'waqf' is made under a will. According to Shiah law the 'waqf' is completed by formal words of declaration, and by the burial of the first individual. Illustrations.

(4) On 1st June 1882 W, the defendant's father, executed and registered what purported to be a 'waqf-nama.' The deed recited that the 'waqif' made an endowment (no person being mentioned as the object) of the village of Para to the extent of Rs. 90 a month net profits for the use of the poor and the needy. He designated his sons as mutawallis, W., having registered the deed, took it home and never carried his recorded intentions into effect. He never spent any portion of the income of the village in accordance with the terms of the document; he did not transfer possession to his sons who were designated mutawallis, but retained the exclusive possession and enjoyment of the village and its income till his death on 27th February 1886. The Court was told that he destroyed the document; the document was not produced before the Court by either side; *held* (1) that it was unnecessary to determine whether the deed was bad for want of terms of impropriation and for uncertainty as to its objects; (2) that Imam Muhammad's opinion on the question when the 'waqf' is completed, must be preferred to that of Abu Yusuf; (3) that in respect of this 'waqf,' the income of which was never employed for the declared purpose, the appropriator having retained exclusive proprietary possession, which possession passed by inheritance under the Muhammadan law to his two sons, there never was a valid and operative 'waqf,' but an inchoate endowment only which stopped short at the written and registered declarations of the 'waqif.'<sup>1</sup>

A 'waqf' being a voluntary transaction, on principle, where anything in such a transaction is left undone, the law will not oblige it to be done. Hence, it is important to note when a 'waqf' will be considered to have been completed. Important to know when 'waqf' completed.

First, as to Hanafi law: Abu Hanifa and his disciples take different views on this point; the view of the former does not prevail.<sup>1</sup> Hanafi law: Abu Yusuf's view: mere declaration enough.

<sup>1</sup> Muhammad Arzuuddin Ahmad Khan v. The Legal Remembrancer to Government, (1898) 15 All. 321 (Tyrrell and Blair, JJ.); Bibant Mia v. Sheikh Lal Poddar (1898) 20 Cal. 116 (P. B.) was referred to, and it was stated that the majority of the full bench decided that the authority

of Abu Yusuf is to be postponed to that of Imam Muhammad; and Doyal Chand Mullick v. Syed Koranset Ali (1871) 16 W. R. 116, was distinguished as having reference to Shiah and not Sunni law

## SECTION 462.

(1) Abu Yusuf holds that a mere declaration of 'waqf' completes the 'waqf,' and operates as a transfer from the 'waqif' to the implied ownership of God.<sup>1</sup>

2. Imam Muhammad's:  
(a) Declaration,  
(b) Mutawalli,  
(c) Possession.

(2) Imam Muhammad considers three elements necessary for completing the 'waqf': (a) the declaration, (b) appointment of a 'mutawalli,' (c) transfer of possession to the 'mutawalli.'<sup>2</sup>

3. Abu Hanifa's:  
decree of  
Court.

(3) Abu Hanifa<sup>1</sup> considers a decree necessary for extinguishing the 'waqif's' power to resile from the 'waqf';<sup>3</sup> and this could be obtained by a procedure which has been compared to the fines and recoveries of English law: "The way to obtain which (viz., the decree of the Qazi) is for the appropriator to deliver the subject of the 'wakf' to the 'mootwuli' or superintendent and then require it back from him on the ground that it is not obligatory, whereupon the judge may pronounce the decree that it shall be obligatory."<sup>4</sup> This refers primarily to the revocability and not the completion of a 'waqf,' but it may be said that a 'waqf' is not brought to its entire completion unless it is made irrevocable; and the more so, as, according to Abu Hanifa, the 'waqf' property continues to be detained in the ownership of the 'waqif.'

- II. Shiah law:  
possession,  
Completion  
of 'waqf'  
distinguished  
from its  
execution after  
it has been  
completed.

Next as to Shiah law, it is nearly to the same effect as Imam Muhammad's exposition of Hanafi law. See s. 462 (3), above.

The completion of a 'waqf' is, of course, distinct from the acting upon a 'waqf' after it has been completed. But the acting upon a declaration of 'waqf' may be evidence<sup>5</sup> to show (1) whether it has been completed, e.g., where transfer of possession is necessary, acts of ownership show unequivocally whether such transfer has been made

<sup>1</sup> Note that Abu Hanifa does not adopt the theory of the transference to the implied ownership of God. He considers the *waqf* property to be detained in the ownership of the *waqif*. Ball. I. 519 (J. 3) On the other hand Syed Ameer Ali says: "It is a transfer to the real ownership of the Almighty for substantial consideration, viz. His reward which is obtained the moment the *waqf* is created." 1.143. Religious merit or approach to God is, it is true, likened by the Muslim jurists to a "return." "In the matter of charity it has been cited as a proof of its being obligatory, that, inasmuch as a return from God is also an *iqaz*, so it falls under the head of a gift with a return": *Jams'-'ush-Shul'at*, Book on Hibas, 392. But the return differs materially from "consideration." The return is not enforceable.

<sup>2</sup> Cf. "Abu Yusuf says his (i.e. the *waqif's*) ownership ceases by mere declaration . . . Imam Muhammad says it does not cease till

he appoints a manager for the *waqf*, and give the property in his charge": *Fathul Qadir* II. 856, 879. Cf. *Fatawa Qazi Khan*, III. 294.

<sup>3</sup> The reason why Abu Hanifa thinks that no *waqf* is revocable seems to be that he holds there is no transfer of ownership to God. Hence there is no "approach to God" in making a *waqf*, hence no return for the transfer.

<sup>4</sup> Ball. I. 550 See comment to s. 420, above.

<sup>5</sup> *Sahib Raza v. Amjad Khan* (1906) All. W. N. 159; cf. the remark of Sir Barnes Peacock: [actual delivery of possession would not be necessary] "but the mode in which the father dealt with the profits would be important as regards the 'bona fides' and completeness of the gift as throwing light upon the intention." (*Ranee Khujooronnissa v. Musamat Roushan Jehan* (1876) 3 I.A. 201, 307, 308; 2 Cal. 184, 197; (passage cited in footnote to comment to s. 410); see also *Ashna Bibi v. Amdjaji Bibi* (1916) 44 Cal. 698, 702.

(see explanations to this section), and the 'waqif's' acts and conduct SECTION 462. also show (2) whether there was any intention that the declaration should take effect.

Where there is a written declaration of 'waqf,' the terms of the 'waqf' may, by operation of the Indian Evidence Act, ss. 91-92, have to be gathered from the document alone; and evidence of the 'waqf' having been acted upon, or not, would be excluded where it is sought thereby to contradict, vary, add to, or subtract from its terms.<sup>1</sup> But a person may have fully intended to create a 'waqf,' and yet not have completed it: in which case it will be inoperative. And thus even where there is a written declaration of 'waqf,' evidence as to its never having been given effect to, may show that it was never completed,<sup>2</sup> and indeed in some cases giving effect to the 'waqf' by acting upon it forms an integral part of its completion. See s. 514, below, and compare s. 494, above, and comment thereto. With reference to 'Muhammad Azizuddin v. The Legal Remembrancer' <sup>3</sup> it was remarked in a recent case <sup>4</sup> that upon the line of reasoning followed in it, "it would be impossible ever to hold an appropriator who had constituted himself the first 'mutawalli' to the terms of his 'waqf-nama.'"<sup>4</sup> This remark, it is submitted, assumes that a mere declaration of 'waqf' (1) completes it, and (2) conclusively proves an intention to make a 'waqf'; it overlooks the distinction between acting upon a 'waqf' that has been already completed, and acts of ownership exercised by the 'waqif' over the subject of the 'waqf,' adduced as evidence that the 'waqf' was never in fact completed. The Court, it is presumed, will not complete an inchoate 'waqf,' any more than any other voluntary act.

Where the 'waqif' has merely made a declaration of 'waqf,' and afterwards continued to be in possession of the property and utilized it just as though it were not subject to any 'waqf,' it would in many cases be important evidence showing that there was intention to create a 'waqf,' in which case, it is submitted, that the Court would hold that no 'waqf' had been validly created, especially if the interests of creditors are involved. Reference in this connection may also be made to 'Watson and Company v. Ramchand

Facts irrelevant as to interpretation of 'waqf' may be relevant as to completion.

Giving effect to 'waqf' is evidence of 'bona fide' intention to create it.

<sup>1</sup> *Kulsoom Bibee v. Golam Hussein* (1905) 10 C. W. N. 149, 184: "It is of course clear that if there was a real intention to give effect to the documents as *waqfs*, and *waqfs* were formally constituted and perfected, it is wholly immaterial, in this suit, whether their provisions were carried out or not, for that is a matter for breach of trust only" (per Woodroffe,

J.), cf. *Luchmiput Singh v. Shah Amir Alum* (1882) 12 Cal. L.R. 22, at p. 26; cf. penultimate paragraph of judgment.

<sup>2</sup> *Zoolaka Bibi v. Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1067, (par. 2.)

<sup>3</sup> (1893) 15 All. 321.

<sup>4</sup> *Abdul Rajak v. Bai Jimbabai* (1911) 14 Bom. L. R. 295, 301.

## SECTION 462.

Acts show  
intention.

Dutt. " There one Pudmalochun had executed deeds purporting to divest himself of his share in certain properties and to dedicate the same to trustees for the worship of the family idols. " From the time of the deed of the 24th of July 1877, until after the death of Pudmalochun, a period of about 3 years and 3 months, no change took place in the accounts, or in the management of, or dealing with, the business or estates, or the proceeds thereof. Mortgages were executed in which Pudmalochun joined and everything appears to have gone on in the same manner as if the deeds had never been executed, except that the family idol was removed from the house of Gungaram to that of Pudmalochun. No act was done by Pudmalochun or his brothers in which he was described as shebait." On these facts their Lordships of the Privy Council held that " it was not the intention of Pudmalochun or of his brothers that the deeds should be acted upon or that Pudmalochun should thereby divest himself of his share of the property. The deeds were merely fictitious or benami." Their Lordships did not attach much importance to the fact that Pudmalochun's daughter (Banasundari) received three monthly payments of the allowance provided for her by the deed and did not accede to the argument that these receipts were inconsistent with the fact that the deed was not intended to take effect. (Cf. comment to s. 346. above.

Pleditions or  
benami  
transactions.

Civil Procedure  
Code, s. 92.

Should it be deemed necessary in any case to get a decree of the court vesting the 'waqf' property in a 'mutawalli,' the Civil Procedure Code, s. 92, will apply. See s. 475. below.

## § 2.—Legal Incidents of 'Waqf.'

### (1) Perpetuity.

I. Hanafi law;  
'waqf' void if  
for limited  
period.

**463.** A 'waqf' purported to be made only for a limited period of time is void<sup>2</sup> according to all schools of law.

See the illustrations and comment to s. 463A, below.

Or for objects  
that will fail  
(Abu Yusuf  
dissenting).

**463A.** (1) In accordance with Hanafi law—

(a) A 'waqf' that does not expressly purport to be limited in point of duration, will, according to Abu Yusuf's

<sup>1</sup> (1890) 18 Cal. 10, 18, (P.C.); cf. comment to ss. 346 and 352 above.

<sup>2</sup> H. & C. 234. Bail. I. 567, II. 218 (fourth).



exposition of the Hanafi law be presumed to be perpetual, SECTION 463A. and effect will be given to it.<sup>1</sup>

(b) According to Abu Hanifa and Imam Muhammad, a ‘waqf’ purported to be made for objects that will fail, is void.<sup>2</sup> According to Abu Yusuf, such a ‘waqf’ is not void, and it will be presumed that, on failure of the objects expressly referred to, it is for the benefit of the poor in perpetuity.

(c) *Seemle*, the ultimate benefit of the ‘waqf’ property may be reserved for any purpose recognised by the Mussulman law as a religious, pious or charitable purpose of a permanent character.<sup>3</sup> Such reservation may be either express or implied.<sup>4</sup>

(2) In accordance with Shiah law where the objects for which a ‘waqf’ is made are such that they will not necessarily continue in perpetuity, and will in all probability fail, and it is not provided who shall be benefited by the ‘waqf’ property when the said objects fail,<sup>5</sup>—

(a) according to some Shiah authorities, the ‘waqf’ is void from the beginning; but

(b) the ‘Sharaya’-ul-Islam’ supports the view of other authorities who hold that the ‘waqf’ will be given effect to so long as the said objects are in existence, and

<sup>1</sup> “As the terms appropriation or charity do clearly argue thus much”: Hed. 231; Ball. 1, 557. Cf. Abu Yusuf says: “If any object is named which is not perpetual it would be valid, and the *waqf* would be for their benefit after it (the named object) ceases; although he does not mention them (i.e., the poor).”—*Fatmul Qadir*, II. 865. See the table showing different views as to *waqfs* in the comment to s. 456. Abu Yusuf’s opinion refers in clause (a), to a more general aspect of the question than is contemplated in clause (b) of sub-s. (1) or in subs. (2) of s. 463A.

<sup>2</sup> Ball. 557-558.

<sup>3</sup> See comment *Fatmabibi v. Advocate-General of Bombay*, 6 Bom. 42, 51, (where it is said, “It must be to have a final object which cannot fail: and this object, it seems, must, according to the better opinion, be expressly set forth,” and Ball. 1, 567, and *Abdul Ghanee v. Hussein*, 10 Bom. H. C. R. 7 are cited.) See however 10 Bom.

H. C. R. at pp. 13-14; *Nizamuddin Gulam v. Abdul Gafur* (1888) 13 Bom. 284; (where after citing *Fatmabibi v. A.-G. of Bombay*, 6 Bom. 51, and *Amrullah Kalidas v. Shakh Hussein*, 11 Bom. at p. 504, the Court said, “Having regard to the opinions expressed by West and Farran, JJ., in the cases of *Fatmabibi* and *Amrullah*, we do not feel justified in extending the rulings in those cases to such a case as the present, where there is no express provision at all for the ultimate devolution of the property to any religious or charitable object. The grant in *waqf* cannot, therefore, be upheld.”) This decision was affirmed: *Abdul Gafur v. Nizamuddin* (1892) 17 Bom 1; 19 I. A. 170.

<sup>4</sup> Waqf Act, s. 3. This implies that Abu Yusuf’s opinion is to prevail on this point. See comment, and table on p. 532, above.

<sup>5</sup> It will be observed that this corresponds with clause (c) of s. 463A, subs. (1), clause (a) whereof is more general in its nature.

Implied reservation.

If Shiah law:

‘Waqf’ for limited period void.

When objects may fail ‘waqf’ either—

(a) void from beginning or

(b) valid until they fail then

revert to (i) ‘waqf’ or (ii) beneficiaries.

SECTION 463A. thereafter the 'waqf' property will revert to the 'waqif' or his heirs ;

(c) other authorities hold that after the failure of the said objects, the 'waqf' property will revert to the heirs of the beneficiaries ; but this view is stated in the 'Sharaya'-ul-Islam' to be less well supported by traditional authority.<sup>1</sup>

III. In British India charity considered perpetual.

(3) *Seemle*, under the rulings of the British Courts such a 'waqf' would apparently be held to be valid under all schools of Muhammadan law, provided that its object is religious, pious or charitable, but not otherwise, (*quaere*, whether not even under Shiah or Shafi'i<sup>2</sup> law) ; and when the specified object fails, the 'waqf' property would be applied to other charities in accordance with s. 481, below.

*Illustrations.*

(1) A says, "I make a 'waqf' of this house for a month, and afterwards the 'waqf' will cease." The 'waqf' is void 'ab initio'.<sup>3</sup>

(2) A says, "I have made a 'waqf' in favour of B, or for B and his sons and daughters." According to Abu Hanifa and Imam Muhammad the 'waqf' is void (as also according to a minority of Shiah lawyers). According to Abu Yusuf the 'waqf' is valid, and after B, or B and his sons and daughters (as the case may be) the 'waqf' property will be devoted to the poor. According to the 'Sharaya'-ul-Islam the 'waqf' property will, after B (and his sons and daughters), revert to A or his heirs.<sup>4</sup>

(3) A 'waqf' in favour of "my son," or "the poor of my kindred, being good persons," is invalid according to Imam Muhammad, because the objects would fail, but it is valid according to Abu Yusuf (according to whom a dedication in favour of the poor is to be implied after the death of the persons expressly mentioned). So if a man were to dedicate property to a named or specified person, or to his children, they would be entitled to the produce of the subject of 'waqf,' which would, after his death, be given to the poor according to Abu Yusuf.<sup>5</sup>

Divergent views of the three Doctors on Hanafi law.

The distinction in the points mentioned in clauses (a) and (b) of s. 463A subs. (1) may be overlooked. Attention is therefore invited to the illustrations. Abu Yusuf is most favourable to the

<sup>1</sup> Bail. II. 218

<sup>2</sup> Cf. *per* Macleod, J., in *Mahomed Abdulla v. Abdul Rehman Jitkary* (1907) Bom. L. R. 908.

<sup>3</sup> Bail. I. 557 (II. 15-20)

<sup>4</sup> See s. 463A (2).

<sup>5</sup> Bail. I. 559.

validity of ‘waqfs.’ He does not require it to be expressly SECTION 463A. provided (1) that the ‘waqf’ is to operate perpetually; nor that (2) objects which can never fail should be expressly mentioned in the ‘waqfiama’: if the objects that are expressly mentioned fail, then the poor are (according to him) to be taken to be the beneficiaries by implication.

It is submitted that in many cases the question would be resolved <sup>Construction of ‘waqf’</sup> into one of the construction of the particular ‘waqf.’ If it appears that the real intention was to dedicate only for a fixed period, then what purports to be a ‘waqf’ for carrying out such an intention cannot be given effect to. Such an intention may appear (or may be betrayed) in either of two ways: (1) failure to mention that the ‘waqf’ is to prevail in perpetuity, or (2) failure to mention objects that will continue in perpetuity. The views of Abu Yusuf are expressed with reference to the first contingency; and of the other authorities with reference to the second.

But, on the other hand, failure to do either thing, is not, it is submitted, in itself necessarily conclusive: from the surrounding circumstances and from the terms of the ‘waqfiama’ it may appear that the ‘waqf’ was intended to be a perpetuity; and that such objects as would never fail were also intended to be benefited.

Abu Yusuf favours a presumption in every case that the ‘waqf’ is valid in both particulars, and holds that such an intention may be read into every ‘waqf.’ Abu Hanifa and Imam Muhammad hold otherwise.

In regard to the law of British India it is not enough to consider the views of the authorities above referred to, but it is also necessary to advert to the Waqf Act.

The preamble to the Waqf Act recites that it is expedient to remove <sup>Waqf Act primarily gives power to Mussalmans to create certain ‘waqfs.’</sup> the doubts “regarding the validity of wakfs created by persons professing the Mussulman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes”; and in s. 3 of the Act it is laid down that it “shall be lawful for any person professing the Mussulman faith to create a wakf which in all other respects is in accordance with the provisions of Mussulman law, for the following among other purposes:—for the maintenance and support, wholly or partially, of his family, children or descendants”; “provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussulman law as a religious, pious or charitable purpose of a permanent character.”

## SECTION 463A

Implied  
reservation.

It is therefore not necessary to provide expressly that the 'waqf' funds should ultimately be devoted to the poor (or any other object that can never fail). The Waqf Act, it is true, refers in terms only to the 'waqfs' having for their purpose the objects specified in the Act. But it would be in accordance with principle as well as analogy and uniformity of law to follow the same rule as regards other 'waqfs.'

Family  
settlements.

The High Court of Bombay had declined (before the Waqf Act was enacted) to uphold 'waqfs' which purported to create family settlements, but which contained no express reference to any object that could never fail: with reference to these decisions, it must be noted that they proceed to a great extent on the unwillingness of the Court to recognise a family settlement in perpetuity.<sup>1</sup> When properly examined they seem to establish the law as submitted above: for where a general charitable intention is shown, it may be more easy to presume that it was intended, that, on the failure of the particular objects mentioned, the poor should have the benefit of the 'waqf'; whereas if it appears that the only object was to subserve family aggrandisement, it may seem more difficult to introduce the poor as beneficiaries: the application of these considerations in view of the Waqf Act, which recognises family settlements as charities and therefore as valid objects for 'waqfs,' must be very different: for now the 'courts will not start with the predisposition implied in the statement that such a 'waqf' is a perpetuity of the worst kind. The decision of any particular case must of course depend upon the terms of the particular dedication.

Shah's law.

In a case where the 'waqif' was a follower of Shafi'i, the point was left undecided whether a 'waqf' could be validly made for the purpose merely of conferring a perpetual and inalienable estate on a family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries.<sup>2</sup> Such a 'waqf' would have been held to be void under the Privy Council decisions,<sup>3</sup> because family settlements were not considered by them valid objects for 'waqfs.' Under the Waqf Act that object is valid, and the question would be only whether the absence of express mention of an object that will never fail, is fatal to the 'waqf.'

It must be admitted that the Waqf Act has left the law in a very unsettled state.

<sup>1</sup> *Amirul Koolas v. Shauk Hussain* (1887) 11 Bom. 402. *Fatmahbi v. Advocate-General* (1891) 6 Bom. 42; *Nizamuddin Gulam v. Abdul Gafur* (1898) 13 Bom. 264. See the footnotes to s. 463A (1) (C), above.

<sup>2</sup> *Phote Sahib Bibi v. Damodar Premji* (1879)

<sup>3</sup> Bom. 84.

<sup>4</sup> Cf. *per* Macleod, J., in *Mahomed Abdulla v. Abdul Rehman Jinnar* (1907) Bom. L. R. 998.

(2) *Inalienability of 'Waqf' Property.*

SECTION 464.

**464.** (1) After the completion of a 'waqf,' its subject passes out of the ownership of the 'waqif'<sup>1</sup> and subject to subs. (2) of this section and to s. 467A, below, it cannot be alienated or transferred either by the 'waqif'<sup>1</sup> or the 'mutawalli';<sup>2</sup> nor do their heirs take it by way of inheritance.<sup>3</sup>

subject cannot be alienated.

(2) According to Shiah law the beneficiaries under a 'waqf' may validly make a lease<sup>4</sup> of the 'waqf' property or otherwise transfer or alienate<sup>5</sup> it for the period during which they are entitled to the benefit of the 'waqf,' but so that such lease or transfer or alienation does not prejudice the rights of any succeeding beneficiaries.<sup>4</sup> *Semblr*, the Hanafi law is to the same effect.<sup>6</sup>

lease of alienation by beneficiaries.

*Explanation.*—Where part only of a property forms the subject of the 'waqf,' or where the whole of its income or produce is not devoted to charitable or religious purposes, that portion which is not the subject of 'waqf' may be alienated.<sup>7</sup>

Alienation of part of property, another part of which is 'waqf.'

The authorities take different views as to where rests the ownership of 'waqf' property:—<sup>8</sup>

Legal ownership of 'waqf' property.

<sup>1</sup> *Hed.* 235; *Jeeun Dass Sahoo v. Kubeer-ooddeen* (1840) 2 Moo. I. A. 300; 6 W. R. (r.c.) 3; *Doyal Chund Mullick v. Keramat Ali* (1871) 16 W. R. 116; *Hidayatunnissa v. Aszul Hossien* (1870) 2 N. W. 420 (Shiah case); *Kuttayan v. Mamanna Raouthan* (1912) 35 Mad. 681. Cf. *Imadul Arif v. Mahomed Ghous* (1893) 20 Cal 834, where the claim was for a declaration that the plaintiff was sole absolute owner, but the Court declared merely that he was lawfully entitled to possession. Abu Hanifa's view is no doubt opposed to s. 164 (1). But his two disciples take a contrary view, and their opinion prevails. So that the statement in *Kuttayan v. Mamanna Raouthan* (1911) 35 Mad. 681-683, that "according to the accepted view of both Imam Abu Hanifa and Imam Shafi' it is in the very conception of a *waqf*, which is a name for a grant by which mosques and similar institutions are dedicated—that all proprietary rights of men should be extinguished in the property so dedicated," would have been accurate had it run as follows: "According to the accepted view prevalent among the followers both of Imam Abu Hanifa." etc.

<sup>2</sup> See comment.

<sup>3</sup> *Jaffer Mohudun Sahib v. Aji Mohudun Sahib* (1863) 2 Mad. H. C. R. 19, *Egredo v. Mahomed Mudseer* (1871) 15 W. R. 75.

<sup>4</sup> *Bail.* II. 222. See comment.

<sup>5</sup> Mortgage good so far as interest of the beneficiary concerned: *Amrullah Kalidas v. Hussein* (1887) 11 Bom. 402. This case must be taken to be overruled so far as it held that the *waqf* was valid though it created a perpetual family settlement; *Abdul Fata v. Russomoy* (1891) 22 Cal. 619; 22 I. A. 76.

<sup>6</sup> Cf. *Indian Trusts Act*, s. 56.

<sup>7</sup> *Fuloo Bibee v. Bhurru Lal Bhukul* (1868) 10 W. R. 209; *Kuneez Fatima v. Sahaba Jan* (1866) 8 W. R. 313; and see comment; and cf. *Indian Trusts Act* II. of 1882, s. 83; (i. s. 478, below. It has been held in *Puranlal v. Barham Das* (1911) 9 All. L. J. 709 that a mere right to the usufruct, such as a rent charge, or revenue of villages, cannot be the subject of a 'waqf.' The decision, it is submitted, is erroneous, and opposed to the trend of the authorities in British India.

<sup>8</sup> Cf. *Phals Sahab Bibi v. Damodar Premji* (1879) 3 Bom. 84 (*mutawalli* the owner).

SECTION 464. (1) Abu Hanifa says that the ownership of 'waqf' property is in the 'waqif,'<sup>1</sup> [and on the death of the 'waqif,' his heirs].

(2) Abu Yusuf and Imam Muhammad hold that the property is "in the implied ownership of God."<sup>2</sup> "The 'fatwa' is in conformity with the opinion of the two disciples."<sup>3</sup>

(3) The Shiah authorities consider that it is transferred so as to become the property of the beneficiaries or the object of the 'waqf.'<sup>3</sup> The Shiah law relating to the grant of limited interests (ss. 446, etc., above) is closely allied to that of 'waqf'—the two differing in this, that 'waqf' is (a) perpetual, (b) made with the intention of "approach to God."

Reason why  
'waqf' property  
inalienable.

The reason of the rule against the alienability of 'waqf' property, contained in s. 464 (1), is thus explained by Sir Barnes Peacock in delivering the opinion of the Privy Council: "If this property is to be sold," he says, "it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. . . . Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan law? For example, that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrun, and taking care that it should be duly and properly performed, when it is well known that disputes and bitter feelings frequently exist between Hindus and Mahomedans at the time of the Mohurrun?"<sup>4</sup> It is submitted, however, that the real reasons for the inalienability of 'waqf' property are, that the wishes of the 'waqif' have to be given effect to as the paramount consideration. They point to the property having been "tied down," i.e., made inalienable. Secondly, the purpose of the 'waqf' being to benefit the specified objects, and not to allow the property to be put to any private use, the alienation of the 'waqf' could only be for the purpose of varying the investment (as to which see below). Moreover, it may be pointed out that the alienation contemplated by Sir Barnes Peacock is rather a transfer of the right to be 'mutawalli' than of the property; and as regards competence to act as such, being a non-Muslim is not necessarily fatal—though it may make the person so unfit in regard to particular species of 'waqfs' as to render it extremely undesirable that he should be

<sup>1</sup> Bail. I. 549 (H. 2-3).

<sup>2</sup> Bail. I. 550 (H. 8-9); *Moochunmud Sadik v. Moochunmud Ali* (1798) 1 S. D. A. Cal. 17.

<sup>3</sup> Bail. II. 22<sup>a</sup> (first appendage). See s. 466,

above.

<sup>4</sup> *Bukht Chand v. Nadir Hossein* (1887) 15 Cal. 329; 15 I. A. 1.

recognised as a 'mutawalli.' On the other hand an alienation of the office is certainly invalid : s. 492 (10) below.

Subs. (2) to s. 464 seems to follow from the Shiah law to the effect that the property in the subject of 'waqf' is vested in the beneficiaries. It is based, however, on an illustration in the 'Sharaya'-ul-Islam<sup>1</sup> referring to a lease by the beneficiaries where the point directly under discussion is whether a lease so granted becomes void on the death of the beneficiaries granting the lease. The answer is that the beneficiaries themselves, having only a life-interest, cannot, in any event, grant a lease for a longer period. Reference is also made to the question (as to which the authorities are divided) whether even the owner of private property may make a lease that should continue in force after his death.<sup>1</sup> Similarly it is stated : "If then a person should appropriate his share in a slave, and subsequently emancipate him, the emancipation would not be valid, because the right of property in the slave has passed out of him ; but neither would it be valid if the 'mowkoof alehi' (beneficiary) should emancipate the slave, because of the right which future generations have in the slave."<sup>2</sup> Cf. Indian Trusts Act, ss. 58, 56.

With the explanation to this section the following statement of English law may be compared : "A charitable trust may be so limited as to affect part only of the property granted or devised, as when property is given subject to or in trust to make specified charitable payments which do not exhaust the whole estate. In those cases where the donor has not expressed a general intention to devote the whole property to charity, the donee takes beneficially, subject only to the specific appropriation."<sup>3</sup>

Any person acquiring such property with notice of the charity charged upon it, is bound by it.<sup>4</sup>

Conversely, the 'mutawalli' has generally the right of remuneration for administering the 'waqf' (see s. 496, below), and though this might give him a sort of beneficial interest in the 'waqf' property,<sup>5</sup> nevertheless the 'corpus' of the estate cannot be sold (in execution of a personal decree against him), nor can any specific portion of the 'corpus' of the estate be taken out of the hands of the trustee ('mutawalli') because there may be a margin of profit coming to him after the performance of all the religious duties.<sup>6</sup> In another case it was alleged

Lease or  
alienation  
by beneficiary.

Alienation of  
property not  
itself subject  
of 'waqf' but  
forming part  
of that which  
is subject of  
'waqf.'

'Mutawalli's'  
remuneration.

<sup>1</sup> (Case 9) (Calc. ed.) p. 239; Ball. II, 222 (note).

<sup>2</sup> Ball. II, 220 (par. 2).

<sup>3</sup> Halsbury, "Laws of England," IV, 143, s. 225. Cf. s. 481, below, and footnotes thereto, and Indian Trusts Act, s. 58.

<sup>4</sup> *Charitable Donations Commrs. v. Wybrants* (1845) 2 Jo. & Lat. 182, 198.

<sup>5</sup> Cf. *Mohiuddin v. Sayyiduddin* (1898) 20 Cal. 810.

<sup>6</sup> *Biehn Chand v. Nadir Hossain* (1887) 15 Cal. 329; 15 I. A. 1.

**SECTION 464.** that the office of 'mutawalli' was transferred by sale according to custom, and hence could be attached; but the custom was held to be opposed to public policy, and the office incapable of being attached in execution.<sup>1</sup> So that not only can the trust property not be attached for the debts of the trustee, but if he purports to sell it and the purchaser is aware of the trust he will be bound by it, and if he is not a fit person to administer the trust, the Courts will no doubt appoint another trustee. But on the other hand, where part only of a property is the subject of the 'waqf,'<sup>2</sup> there is nothing to prevent the alienation of the other part, which does not form the subject of a 'waqf' at all.

Suit to set aside unlawful alienation.

**465.** Where 'waqf' property is purported to be alienated, a suit may be instituted by any person interested in the objects of the 'waqf' to have the alienation set aside and the objects of the 'waqf' given effect to.<sup>3</sup>

But a person who has no interest in the 'waqf' property cannot institute a suit.<sup>4</sup> This is said by a learned author to be based on "the general principle of law that possession is sufficient as against a mere trespasser."<sup>5</sup>

### (3) Revocation or Alteration of 'Waqf.'

'Waqf' cannot be revoked or altered.

**466.** (1) A 'waqf' cannot be revoked after it has been completed.<sup>6</sup> *Semble*, no portion of the declaration of 'waqf' can be altered by the 'waqif' after the 'waqf' has been declared and completed;<sup>7</sup> [unless, (subject to subs. (2), below,) the power to alter has been reserved in the declaration of 'waqf'.]<sup>8</sup>

<sup>1</sup> *Sarkum Abu Torab v. Rahaman Buksh* (1896) 24 Cal. 83; cf. s. 492 (10) below.

<sup>2</sup> Cf. s. 478, below.

<sup>3</sup> *(Kasi) Hassan v. Sagwa Balkrishna* (1899) 24 Bom. 170; giving effect to the *waqf* means in this connection, requiring the income of the property to be dealt with in accordance with the *waqf*, and otherwise treating the property as *waqf* property.

<sup>4</sup> *Bharruck Chandra Sahoo v. Golam Shuruff* (1898) 10 W. R. 458.

<sup>5</sup> Wilson, "Anglo-Muhammedan Law," 367, 345, referring to *Imamul Arif v. Mahomed Ghous* (1893) 20 Cal. 834.

<sup>6</sup> *Hed. 231-232*; *Bell. I. 550, II. 212*; *Fatma Bibi v. Advocate-General of Bombay* (1881) 9 Bom. 42. The rule in s. 466, (1) above, is apparently intended to be laid down by the statement: "The *waqf* was created by a living man

and is therefore irrevocable,"—which occurs in *Ashna Bibi v. Aswafadi Bibi* (1916) 44 Cal. 698.

<sup>7</sup> *E.g.*, the *waqif* having laid down that the *mutawalli* is to be selected from a specified class of persons, he cannot appoint some one outside the class: *Advocate-General v. Fatma Sultan Begam* (1870) 9 Bom. H. C. R. 19, and see illustration.

<sup>8</sup> Cf. *Amoor Ali, I. 341*, citing the *Surreal-ul-Fatawa*: "In the chapter on *waqf* in the *Khazanat-ul-Fatawa* it is stated that the *Sahib-ul-Manah* (the author of *Manah*) was asked about a deed of *waqf* in which there was a condition to the effect that the *wilayat* of the trust should appertain only to the *wakif's* male descendants, but now a deed has been discovered bearing a prior date, in which the *talwat* was given to his male as well as female descendants; the question was which deed should be acted



(2) *Quære*, whether a right of revocation or alteration may be validly reserved in a 'waqf.'<sup>1</sup> Where a 'waqf' purports to be made subject to an option to the 'waqif' to revoke it, in accordance with Imam Muhammad's exposition of Hanafi law the 'waqf' is void.<sup>2</sup> Abu Yusuf is of opinion that it is valid where the option is limited for three days; provided *first* that where the object of the 'waqf' is a 'masjid' Abu Yusuf and Imam Muhammad are agreed that the 'waqf' is absolutely valid, and the option is void, notwithstanding that it may be purported to be made subject to an option (restricted to three days) to the 'waqif' to revoke it;<sup>3</sup> and *secondly* that a testamentary 'waqf' may be revoked at any time by the 'waqif'; and the validity of such a 'waqf' is not affected by its purporting to be subject to the power of revocation or cancellation either wholly or in part: and the power of revocation may be exercisable either on the happening of a contingency or absolutely.<sup>3</sup>

Car right of revocation or alteration be reserved.

Option for three days,

Testamentary 'waqf' revocable.

*Explanation.*—A 'waqf' purporting to be made with a reservation of a power to sell the subject of 'waqf' and to expend its proceeds on the 'waqif' or settlor is void.<sup>4</sup>

Reservation of power to sell avoids 'waqf.'

According to Abu Hanifa a 'waqf' is revocable unless and until there is a decree of the Court confirming it: this is the usual form in which the rule is stated: its effect is that a person who has pur-

Irrevocable only after completion,

upon (in regard to the *teuhat*). The *Sahib-ul-Manah* answered, 'If the *waqf* in the first deed or at the time of the dedication reserved to himself the power of altering any of the provisions regarding the management, etc., of the *waqf*, in that case the second deed should be acted upon, that is, the deed in which the *teuhat* is restricted to his male descendants. But if he reserved to himself in the original *waqf* no such power, in that case the first deed of *waqf*, etc., in which there was no restriction should be acted upon.'

"In the 'Assaf' it is stated that the *waqf* cannot go beyond the conditions laid down at the time of dedication."

"In the *Fauaid* it is stated from Khassaf that where there are two contradictory conditions made by a *waqf*, the second is to be acted upon, unless it is beyond his powers."

"When there are two contradictory provisions

in a *waqf-namah*, the one which follows will be given effect to, according to us (Hanafis) as the last condition overrides the first."

'Surrat-ul-Fatawa,' p. 425.

<sup>1</sup> Cf. the last footnote, and *Assobai v. Norbei* (1905) 8 Bom. L. R. 245, 250-251; *Hidayatunnissa v. Asful Hossein* (1870) 2 N. W. 420; *Cassamally v. Currimbhai* (1911) 35 Bom. 214; 3 Bom. L. R. 717. See comment.

<sup>2</sup> Ball, I, 557 (H. 5-9.) Three days is the period for which the law permits an option in a sale and other transfers of property; Hod. 238. *Waqf* must not be subject to option: *Fatmabibi v. Advocate-General of Bombay* (1881) 6 Bom. 42.

<sup>3</sup> *Muhammad Ahsan v. Umaradas* (1906) 28 All. 663; 2 All. L. J. 387. But see *Fathabibi v. Asithalathayku* (1889) 13 Mad. 66, Compare a. 474, below.

<sup>4</sup> Ball, I, 556; *Fatmabibi v. Advocate-General of Bombay* (1881) 6 Bom. 42.

**SECTION 406.** ported to make a 'waqf' may rescile from his declared intentions and acts, notwithstanding that he may have acted upon such declarations, so long as he has not obtained an order of the Court confirming his declaration. But the opinion of Abu Yusuf and Imam Muhammad is opposed to Abu Hanifa's; and it is stated that the 'fatwa' is in conformity with their opinion.<sup>1</sup> The opinion of Abu Hanifa has never been given effect to.

There is another opinion attributed to Abu Hanifa that "the appropriator's right of property is extinguished in consequence of his suspending that upon his decease"<sup>2</sup> allusion is made to this alleged opinion in the 'Fatawa 'Alamgiri'<sup>3</sup> but in the 'Hidayah' it is stated that there is no foundation for its being so attributed.<sup>4</sup>

Irrevocability of 'waqf.' Its explanation.

It has been said<sup>4</sup> that previous to Islam "appropriations were absolute (i.e., irrevocable), but our law has rendered them otherwise," viz., according to Abu Hanifa, who is alone in holding them to be revocable; the ground he gives is that the Prophet said: "property cannot, after the decease of the proprietor, be detained from division among his heirs." No one else shares this view with Abu Hanifa; and whether a 'waqf' was revocable or not previous to Islam, according to Muhammadan law it is irrevocable, because, though a voluntary transaction, it brings an 'iwaz' to the 'waqf' in the form of approach to God ('qurbat')<sup>5</sup> and such transactions are irrevocable. Abu Hanifa does not consider 'qurbat' a necessary constituent of 'waqf,' hence in his view it is possible to class it under revocable transactions. The revocation of a testamentary 'waqf' may be evidenced in the same manner as of bequests generally, e.g., by the way in which the testator subsequently dealt with the subject of the 'waqf.'<sup>6</sup>

Reservation of power to alter.

With reference to reserving a power to alter the terms of a declaration of 'waqf,'—

1. Hanafi law.  
Power may be reserved to employ produce at option of—  
(1) 'Waqif.'

(1) For Hanafi law, see the following, which is translated from the 'Fatawa 'Alamgiri': "When a man has said: 'my land is a 'sudukah' appropriated to Almighty God for ever, on condition that I may employ the produce as I please, he may lawfully do so.'<sup>7</sup> But if he should

<sup>1</sup> Ball. I. 549-550. The word "obligatory." Ball. I. 549 (last line) may be misleading at first: It is opposed to "voluntary" and means (in effect) revocable. See comment to s. 420, above.

<sup>2</sup> Hed. 233 (col. 1, par. 1, 3).

<sup>3</sup> Ball. I. 550 (II. 3-7) 605 (4, 7 of par. 3), 609 (1, 6.) v. c. a testamentary waqf.

<sup>4</sup> Hed. 232 (col. 1, II. 35-42): by Shirkah.

<sup>5</sup> The expression qurbat, often spelt korbat,

(sacrifice) is, I believe, well known in Jewish, and also English theology. It is derived from the same root qurb, as qurabat=nearness (to God) and has become synonymous with "sacrifice."

<sup>6</sup> Abdul Karim v. Shofannissa (1906) 33 Cal. 853; Cf. Ball. I. 618 (par. 2), 619; II. 831 (par. 2).

<sup>7</sup> But see Mujibunnissa v. Abdur Rahim (1900) 23 All. 233, 243-245.

apply it to the indigent or in pilgrimage or to a particular individual SECTION 466. he cannot reclaim it, even though he should say in doing so: 'I have given it to such an one.'<sup>1</sup> He may give it to one set after another. Yet if he were to apply it to himself, the 'waqf' would be void. It would be different if he said: 'on condition that I may give it to whomsoever I please.' When a man has settled his land on condition that he may give the produce to whom he pleases, the 'waqf' is lawful, and he has the power of doing so while he lives, but it ceases on his death, and he cannot eat of the produce himself. He may, however, bestow it on the rich, or even on one rich person in particular. A man makes a 'waqf' of his estate on condition that the administrator may give the produce as he pleases; this is lawful, and he may give it to rich and poor. If he should say 'on condition that such an one may give the produce to whomsoever he pleases,' it is lawful, and the power may be exercised during the life of the appropriator and after his death; and the person authorised may give to his own child and 'nusi,' and also to the child and 'nusi' of the appropriator, but not to himself."<sup>2</sup>

(2) The Shiah law is thus stated in the 'Sharaya-ul-Islam'— "If one should make an appropriation with a condition that the property is to revert to him in case of need, the condition would be valid, but the 'waqf' void,<sup>3</sup> and the property would remain in the condition of a 'hoobs' until the occasion should arise, while if he should die, it would go to his heirs. And if he made it a condition that he shall have the power of excluding whomsoever he may please, that would invalidate the 'waqf.'<sup>5</sup> But if the condition were that he may add to those in whose favour the appropriation has been made, some yet to be born, the condition would be lawful, whether the appropriation were for others or his own children. If again the condition were that he may make an entire transfer from those on whom the settlement has been made to others subsequently to come into being, that would not be lawful, and the 'waqf' would be void. Some have said that when one has made a settlement on his young children, he may lawfully make others participate with them without reserving any express power to that effect; but this opinion is not to be relied upon."<sup>6</sup>

(n) of 'mutawalli  
(m) or a third  
party.

2. Shiah law—

(i) provision  
that the  
Property  
should  
revert to  
'waqf'  
makes it  
void.  
(ii) power to  
exclude  
void.

(iii) power to  
add valid.

(iv) power to  
transfer  
void.

(v) can power  
to add be  
exercised  
without  
express  
provision?

<sup>1</sup> I.e., though he purports to give it merely as a gift, it is not revocable; being impressed with the *waqf*.

<sup>2</sup> Bail. I. 587-588.

<sup>3</sup> Under Shiah law any condition for the benefit of the *waqif* avoids the *waqf*.

<sup>4</sup> "Retention; but also devotion to a particular purpose," Bail. II. 226, n. 2. A *waqf* requires a religious motive; and a "detention"

not having such motive differs from a *waqf* just as *hiba* differs from *sadaqa*. A provision for the benefit of the *waqif* interdicts with the religious motive in the opinion of all jurists except Abu Yusuf, and thus avoids the *waqf*.

<sup>5</sup> Probably on the ground that this amounts to a power to revoke the *waqf*.

<sup>6</sup> Bail. II. 219 (par. 2).

**SECTION 467.** Some of the rules referred to in the extracts given above, are no doubt merely of moral obligation.

Power may be reserved to exchange subject of 'waqf.'

**467.** The declaration of a 'waqf' may validly empower the 'waqif' to exchange the land forming the subject of the 'waqf' for other land, or to sell the land and to purchase another land; and thereafter the land so taken in exchange or purchased would become subject to the 'waqf'; provided that the 'waqif' may not validly exchange or sell the 'waqf' land except in strict accordance with the terms of the declaration.<sup>1</sup> *Semble*, a subsequent 'mutawalli' may be similarly empowered.

Where the declaration of 'waqf' empowers the 'waqif' to exchange the land for another land, the 'waqif' cannot exchange the land more than once, nor can he exchange the land for a mansion.

Court may authorize alienation, —

**467A. (1)** The Court may empower the 'mutawalli' to sell or mortgage the 'waqf' property in a proper case for the urgent necessity of the 'waqf,' and it has been held that the sale or mortgage may be retrospectively approved and validated by the Court.<sup>2</sup>

§ or alteration of investments.

(2) *Semble*, the Court has power in a proper case to order that the original subject of 'waqf'<sup>3</sup> be sold and that another property be purchased with the sale proceeds,<sup>4</sup> notwithstanding that the declaration of 'waqf' contains a provision that the 'waqf' property<sup>3</sup> should not be changed.<sup>5</sup>

Varying investments.

The inalienability of the 'waqf' property is not to be so understood as to militate against the power in the 'mutawalli' (always to be exercised however with the sanction of the Court) to "vary the investment" (so to say) in a proper case.<sup>10A</sup> Thus we find statements in the texts

<sup>1</sup> Bail. I. 586-587. This is in accordance with the opinion of Abu Yusuf from whom Imam Muhammad dissents. Cf. the Indian Trusts Act, s. 40.

<sup>2</sup> *Nimas Chandaddya v. Golam Hossein*, (1909) 37 Cal. 179. See s. 501, below.

<sup>3</sup> I have used two expressions "subject of waqf," and "waqf property," to denote the same thing, but perhaps the reader will think this justifiable in the context.

<sup>4</sup> Cf. *Imambandi v. Mulanadi* (1918) 45 I. A. 73, 91, in which the Privy Council refers to the discretion of the judge to sanction alteration of

investments in the interests of minors; see the comment to s. 272 above, the clause numbered (3) (-).

<sup>5</sup> This section is based on a passage in the *Bahr-ur-Raj*, V. 241, where it is stated that even if there is a condition to the effect that the 'waqf' property should never be changed the *Qazi* has the power to authorise its being replaced by another property if he thinks it advisable. See also *Mahomed Ismail Ariff v. Ahmed Moolla Dasood* (1910) 43 Cal. 1055, cited in the comment to s. 403, below.

to the effect that where the 'waqf' property is reduced to such a condition that the objects of the 'waqf' cannot be given effect to inasmuch as the beneficiaries are unable to derive any benefit from it, the 'Qazi' may order the sale of the property, and direct that the sale proceeds be invested in the purchase of another property.<sup>1</sup>

The 'Bahr-ur Raig,'<sup>2</sup> refers to the sale of property dedicated to a mosque (not the mosque itself), provided that the property has become useless for the purposes of the mosque. The Qazi Khan<sup>3</sup> contains a suggestion that in some cases 'waqf' property may be sold, and another purchased out of the sale proceeds merely because the variation of the investment would be beneficial to the 'waqf'.

The force of these rules will become clearer when they are contrasted with the rules relating to land that has been dedicated and utilized as a mosque. The land and the structure so dedicated and utilized cannot thereafter be utilized for any other purpose: so that if the site and building of a mosque have become less fitted for their original object they cannot be alienated with the intention of purchasing another site and building for the mosque.

**468.** A 'waqf' purported to be made subject to a contingent waqf is void.<sup>4</sup>

In *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak*<sup>5</sup> the High Court had held, prior to the Waqf Act, that the primary object of a 'waqf' being a charity, if it is postponed to provisions for the family of the 'waqif' it is void, because the 'waqf' depends upon the uncertain contingency of the possible extinction of the 'waqif's' family. This result differs from the provisions of the Waqf Act, under which, in a dedication for members of the family and then for the poor, the 'waqf' operates immediately, and not after the extinction of the family: provisions for the family being valid objects of 'waqf.'

A 'waqf' was purported to be executed in which it was provided that "the deed of 'waqf' shall come into force from the date of its registration;" and it was held that this made the 'waqf' contingent and thus void under Shiah law.<sup>6</sup> The decision was based on the remarks

contingent  
waqf void.

Family 'waqf'  
held, prior to  
'Waqf' Act, to  
be contingent.

Does postponement of effect  
make it  
contingent.

<sup>1</sup> *Bahr-ur-Raig*, V. 223, 237; *Qazi Khan* 111, 383.

<sup>2</sup> *Bahr-ur-Raig*, V. 223.

<sup>3</sup> *Qazi Khan* III, 302.

<sup>4</sup> Bail. I. 556, Bail. II. 213 (*fourth*, II. 5, 6, 25, 26); *Pathukutti v. Anathala Kutti* (1889) 13 Mad. 66, contingent on the waqf dying without issue, but *semble* this would have been valid as a testamentary waqf, see ss. 457-458

and 466); *Kalab Hossein v. Mehrun Bebe* (1872) 4 N. W. 156 (Shiah parties); *Patna-bibi v. Advocate-General of Bombay* (1881), 6 Bom. 42; *Cassanally v. Carrackhai* (1911) 36 Bom. 211; 13 Bom. L. R. 717, 772.

<sup>5</sup> (1891) 18 Cal. 399, upheld (1905) 22 Cal. 619; 22 I. A. 76.

<sup>6</sup> *Sped Bibi v. Magha Jan* (1902) 24 All. 231.

**SECTION 468.** of Mahmood, J., in 'Aga Ali Khan v. Altaf Hasan Khan'.<sup>1</sup> That case was, seven years later, expressly overruled by the Privy Council.<sup>2</sup> The rule of law contained in s. 468 is plain enough, though by this statement it is not meant that, where the facts are complicated or unusual, the rule is easy of application. With reference to 'Syeda Bibi's' case<sup>3</sup> it may be suggested that where a deed purports to be made so as to come into operation on registration, the 'waqf' merely provides that it is not complete till he takes a further step, and that, when the deed is in fact registered, that further step is taken by the 'waqif,' showing his assent to the completion of the 'waqf,' after which all element of contingency disappears. This is very different from the case where the 'waqif,' after having made a declaration, "suspended upon a condition" takes no further steps in the matter.

(4) *Application of Income of 'Waqf' Property.*

Repairs first charge on income, then the objects of the 'waqf' to be given effect to

**469.** The benefit or income or proceeds of the 'waqf' property is or are to be applied for the following purposes in the order in which they are mentioned: (1) the maintenance and repairs of the subject of the 'waqf';<sup>4</sup> (2) the specified objects of the 'waqf';<sup>5</sup> (3) that which is necessary for the general purpose of the specified objects,<sup>6</sup> (4) the benefit of the poor,<sup>6</sup> or other object recognised by the Muhammadan law as a religious, pious or charitable object of a permanent character, for which the ultimate benefit of the 'waqf' property has been expressly or impliedly reserved.<sup>7</sup>

Repairs do not include improvements.

*Explanation I.*—By repairs is meant the preservation of the 'waqf' property in the state in which it is at the time when it is dedicated; improvements in the property are not included.<sup>8</sup>

Court must order suspension of 'waqf' in order to provide for repairs.

*Explanation II.*—Where the repairs of the subject of 'waqf' are not made the first charge on its income or

<sup>1</sup> (1892) 14 All. 429 (F. B.)

<sup>2</sup> *Baqar Ali Khan v. Anjuman Ara Begum* (1903) 25 All. 236; 30 I. A. 91.

<sup>3</sup> *Syed Bibi v. Mughla* (1902) 24 All. 231.

<sup>4</sup> *Hed. 236*; *Bail. I.* 565 ("The income of a waqf is to be expended on necessary repairs, whether the appropriator has made it a condition or not"); *Bail. I.* 568-569, 596 (l. 3).

<sup>5</sup> *Bail. I.* 565, *Jugtanmoni v. Chowdhram Ramjan Kibbi* (1884) 10 Cal. 533; excess in-

come to be devoted to same purpose as originally specified.

<sup>6</sup> *Bail. 558* (par. 1, 2), 559; see comment.

<sup>7</sup> *Cf. ss. 463 and 481 of this work.*

<sup>8</sup> *Hed. 236* (col. II); but see *Bail. I.* 608 (par. 2), showing that a minaret may be added to a mosque if necessary for making the call to prayers heard; and *cf. s. 270*, above, see also *Re Casanally Jaisrajhai Peerbhais* (1906) 30 Bom. 591.

proceeds, the Court may order that the said income or pro- SECTION 469  
ceeds should be suspended from being applied to the objects  
specified in the dedication of 'waqf' and that the repairs  
should be made thereout; but neither the 'mutawalli'  
nor the beneficiaries have the authority to do so without  
an order of the Court.<sup>1</sup>

(1) If a person should say: "I have given the produce to *illustration*  
such an one for a year (or two years) and after that to the poor," and  
should make it a condition that the repairs are to be made out of the  
produce, the repairs are to be postponed to the right of the person.  
unless the postponement of them should be for the manifest injury of  
the 'waqf,' in which case the repairs must first be made.<sup>2</sup> This is  
evidently a question of construction,<sup>3</sup> and the decision adopted by  
the compilers of the 'Fatawa 'Alamgiri' is that, in the circumstances  
mentioned, the object of the 'waqf' was in effect to give one year's  
(or two years') product to the beneficiary. The rules laid down in the  
Settled Land Act, 1882, and Conveyance Acts, 1881, &c., in England  
may occasionally afford useful guidance.

(2) If property is made 'waqf' of for the residence of a benefi-  
ciary, the repairs are to be made by the beneficiary; and if he refuse or  
is poor the 'Hakim' or Judge (or Court) is to let the property, and to  
make repairs out of the rent; and when these have been completed he  
should restore it to the beneficiary.<sup>4</sup>

The ultimate destination of 'waqf' property is, according to Abu *For a ultimate*  
Yusuf's exposition of Hanafi law, always assumed to be the benefit *beneficiaries under a*  
of the poor.<sup>5</sup> The Waqf Act implies that other objects may under *His son, law,*  
Muhammadian law be mentioned as fit objects for taking the ultimate  
benefit of the 'waqf.'

In the 'Fatawa 'Alamgiri' it is stated that, if the express object  
of the 'waqf' is to provide residence for pilgrims,—"When the days of  
the season (of 'haj') have passed, it should be let, and kept in  
repairs out of the rents; and the surplus, if any, distributed amongst  
the poor,"<sup>6</sup> and according to Abu Yusuf, if an intention to create  
a 'waqf' is validly declared, but no object is expressed, the 'waqf'

<sup>1</sup> See comment and ss. 498 *et seq.*, below.

<sup>2</sup> Ball. I. 565.

<sup>3</sup> See s. 50, above.

<sup>4</sup> Ball. I. 565-566.

<sup>5</sup> Ball. I. 568 (par. 1, 2) 550, 610. Kemp,  
J. says, referring to the *waqf* in *Khajah Hussein*  
*Ali v. Hazara Begum* (1860) 12 W. R. 344

(affirmed *ib.* 498): "The poor are provided for  
which is the primary object of every *waqf*."  
*Bikani Mia v. Shuk Lal Poddar* (1892), 20  
Cal. 116, 157 (per Ameer Ali, J.); Cf. *Radd-ul-*  
*Muhhtar*, III. 670, cited Ameer Ali, I. 291.

<sup>6</sup> Ball. I. 610 (par. 1). Cf. Ameer Ali, I. 150.

SECTION 469. does not become void, but it will be for the benefit of the poor. The expression "the benefit of the poor" seems indeed to be used as synonymous with "a [religious, pious or] charitable object of a permanent character."

The effect of the rule of law, according to Abu Yusuf's exposition, that the ultimate beneficiaries under a 'waqf' are always the poor, has a threefold aspect:—

1. If exhausted or  
2. If appropriated  
3. If devolves on  
poor.

Assuming that there is a valid declaration of 'waqf,' the property being already impressed with a 'waqf': (1) if the objects of the 'waqf' are not mentioned, the property will be devoted to the poor; (2) if the objects fail, there is a resulting 'waqf' for the poor; (3) if the objects of the 'waqf' do not fail, but exhaust only a part of the income, the rest will be for the poor. According to the rulings of the Courts of British India, with reference to the first case the doctrine of 'cy près' applies when "a general charitable intention" has been shown, but not otherwise. The result of these rulings is not quite easy to state. But probably it would be correct to say that, (a) in a case where the 'waqfnama' is silent, if the 'mutawalli' were (without any order of the Court) to apply the 'waqf' property for the benefit of the poor, e.g. for feeding, or clothing, or educating the poor, there would be no breach of trust, but that (b) the Court might, in framing a scheme, specify the objects by application of what is shortly called the 'cy près' doctrine. The second case is contemplated by Abu Yusuf chiefly where the first objects of the 'waqf' is to provide for individual beneficiaries, and, in particular, for the descendants of the 'waqif'. Thirdly, where the 'waqif' provides for the application of a part only of the income of the 'waqf' for specified charitable objects, it would probably be held that that part of the property is alone the subject of the 'waqf' and the rest is outside the scope of the 'waqf,' hence it would continue to be the private property of the 'waqif,' and remain alienable and heritable.<sup>1</sup> Though it is possible that the 'waqif' may have intended to impress the whole of the property with 'waqf' but have omitted to lay down how the whole of the income is to be utilized; or the income may gradually increase to such an extent as to be only partly exhausted by the specified purposes of the 'waqf'. In such cases the rule thirdly mentioned in this paragraph would be applicable.

1. Temporary  
2. Suspension of  
'waqf' for  
repairs.

*Explanation II* is based on the following illustration: A 'waqf' is dedicated in favour of an individual for life and after him to the poor. If the beneficiary occupies the house but does not repair it, nor



pays for the repairs, it must be taken from his possession and let out **SECTION 469.** until sufficient rent is realised for the repairs; and after they are completed the house will be returned to him.<sup>1</sup>

The effect of s. 469 is also contained in a statement in the 'Fatawa Taxes Alamgiri' that the right to the produce accrues to the beneficiary when the produce exceeds the actual expenses, in which are included the land tax, ('kharaj'), and the compulsory cesses,—“which are a debt for which the crop is liable.”<sup>2</sup>

**470.** Where, under a declaration of 'waqf,' several objects or beneficiaries are entitled to take the benefit, <sup>all benefit, jointly and simultaneously</sup> they will take simultaneously, and in equal shares, unless it is expressly or impliedly provided therein that some one or more of the beneficiaries shall take in priority to the others, or a larger share, or that one shall succeed the other.<sup>3</sup>

**471.** (1) Where some of the objects for which a 'waqf' <sup>Failure of some objects.</sup> is purported to be made, fail, or cannot be given effect to, the validity of the other objects of the 'waqf' is not thereby affected<sup>4</sup> (except as provided in this section).

(2) Under Shiah law, when the object which, in point <sup>Failure of first object.</sup> of time, is to benefit in the first instance, fails, the whole 'waqf' is void.<sup>5</sup>

(3) Under Hanafi law, according to Abu Yusuf, where the terms of the declaration of 'waqf' identifying the beneficiaries or the objects of the 'waqf,' cannot apply to any existing persons or objects, the benefit of the 'waqf' property will be given to poor Mussulmans, provided that if, thereafter, the said terms apply accurately to any persons or objects they will be entitled to the said benefit.<sup>6</sup> <sup>When beneficiaries unascertainable poor take it.</sup>

<sup>1</sup> Hed. 236 (col. ii.)

<sup>2</sup> Ball. I. 568-9.

<sup>3</sup> (V. Ball. II. 221 (H. 10-12); I. 579 (par. 3), cited in comment to s. 485, below. See also s. 512 (1), below.

<sup>4</sup> Ball. I. 553; *Bikani Mia v. Shuk Lal Poddar* (1897) 20 Cal. 166 (P.B.), (per Princep, Ghose and Amcer Ali, JJ.,—Petheram, C. J., and Trevelyan, J., dissenting); but see *Ramanadham v. Pada* (1910) 31 Mad. 12, 18-20, confirmed

(1916) 40 Mad. 116 (P.C.) and comment to s. 171, below; *Kalub Hossain v. Mehrun Bee* (1872) 4 N. W. 155. *Nizamuddin v. Abdul Gafur* (1889) 13 Bom. 264; affirmed (1892) 17 Bom. 1; 19 I. A. 170.

<sup>5</sup> Ball. II. 214 (*third*), 218 (last lines).

<sup>6</sup> Ball. I. 57 (par. 3). But see s. 460, above. The plural includes the singular in this paragraph.

SECTION 471.  
Acceleration.

(4) *Semble*, the benefit that one of several objects of a 'waqf' takes under it, may be accelerated by the failure of a prior object.<sup>1</sup> *Quære*, whether under Shiah law a subsequent object of 'waqf' may be accelerated by the failure of a prior one.<sup>2</sup>

*Illustrations.*

(1) W purported to create a 'waqf' for the benefit (a) of his family who are to receive Rs. 400 a year, and (b) of the poor who are to be paid Rs. 75 a year, and (c) on failure of his descendants upon the poor of Dacca. Prior to the Waqf Act it was held that the provisions in favour of the family were void, but that the provision for payment of Rs. 75 annually to the poor was valid.<sup>3</sup> Under the Waqf Act the waqf would be wholly valid.

(2) "If a non-Muslim says, devote the produce to such and such a temple, and then if the temple is ruined, the produce should be given to 'faqirs' and the indigent; in such a case the produce will be devoted to the 'faqirs' and the indigent and not to the temple: so it is stated in the 'Muhit'."<sup>4</sup>

Family 'waqf.'

As has been already pointed out, prior to the Waqf Act, the Privy Council had not accepted the correctness of the exposition of the law of 'waqf' contained in the 'Fatawa 'Alungiri,' 'Hidayat,' and other commentaries on Hanafi law; and had held contrary to the express statements contained in the said commentaries, that a family settlement cannot be a valid object of 'waqf.' Hence consequential changes had to be made in the other rules contained in the said commentaries. So that the rule stated by Abu Yusuf that as soon as a declaration of 'waqf' is made, the property becomes subjected to 'waqf,' and, as a corollary, that the failure, or even the illegality, of the object does not make the 'waqf' void, but that in that case the property would be applied 'cy pres,' to other and valid objects of 'waqf,'—this series of rules had to be read with the proviso, that where the settlor's real intention was to make a family settlement, the use of the word 'waqf' was a "mere verbal fiction" on his part, and that it could not change the nature of the property, nor make it the subject of 'waqf'; that the settlor

Application of  
'cy pres'  
doctrine.

<sup>1</sup> See Illustration (2) Ball. I. 553. But see *Fatima Bibee v. Asif Imdadjee Bhuta* (1881) 9 C. L. R. 66.

<sup>2</sup> When the one that fails is the first of those mentioned in the waqf, all the subsequent objects fail. But it is said that "the sehin that is required is that of the first of all the *mushoor alchi*, or persons for whom an appropriation is made; and all regard to possession ceases the

subsequent steps."—Ball. II. 219 (par. 3). So if the second object fails, would the third be accelerated if it is valid?

<sup>3</sup> *Bikani Mia v. Shuk Lal Poddar* (1892) 20 Cal. 116 (F. R.) Princep, (Hose, Amos Ali, J.J., Petheram, C. J., and Trevelyan, J., dissenting.

<sup>4</sup> *Fatawa 'Alungiri*, Waqf Ch. 1; cf. Ball. I. 553 (ll. 5, et seq.). The endowment in favour of the temple being void under s. 182, below.

having intended not to create a valid 'waqf' but a family settle-  
ment, there was nothing like a general charitable intention, or, (to para-  
phrase that expression) nothing like a general intention to devote the  
property to purposes that are valid objects of 'waqf,' on which the  
Court could proceed 'cy près.' Where, of course, apart from the use  
of the word 'waqf,' a general charitable intention is shown in other  
words where the ultimate benefit is expressly or impliedly reserved for  
purposes recognised by Muhammadan law as religious pious or charit-  
able—and the particular object which is mentioned is illegal, the  
benefit is diverted to the lawful objects of charity.<sup>1</sup>

In England "a personal bequest attached to a void charity, as English law,  
an endowment must fail."<sup>2</sup>

**472.** (1) In regard to 'waqfs' to which the Waqf Act (Objects of 'waqf  
does not apply, sub-section (2) below, must be read subject and 'Waqf' Act,  
to ss. 480—484 inclusive, below. *Quære*, whether in regard  
to such 'waqfs' sub-section (2) can be of any effect consis-  
tently with s. 480, below; and, *semble*, where a specified  
part of any property is purported to be dedicated by way  
of 'waqf' for an object that may fail, without an ultimate  
reversion to charitable or religious objects, the said part  
continues to be the private and heritable property of the  
'waqif,' and is not impressed with any 'waqf.'<sup>3</sup>

(2) According to Abu Yusuf's exposition of Hanafi law, Interest  
where the beneficiaries under a 'waqf' consist of a number disclaimed by  
of persons, and,—beneficiaries  
acquires to poor  
(if general  
charitable  
intention  
is shown).

(a) they all disclaim their interest under the 'waqf,'  
then the whole of the benefit must be devoted  
to the poor; <sup>4</sup> but,—

(b) if some of them disclaim and others accept it, then,—

<sup>1</sup> *Ramanathan v. Vaid* (1910) 34 Mad. 12, 18-20; *Salehah v. Bai Sahab* (1911) 36 Bom. 111; 13 Bom. L. R. 1025; see also *A. G. v. Vint* (1850) 3 De G. & Sm. 704 (for supplying alcoholic drink to workhouse); *Moogridge v. Thackwell* (1802) 7 Ves. 36, 75, citing *A. G. v. Baxter* (1684) 1 Vern. 141 (charity for ejected ministers); and *De Costa v. De Pas* (1754) Amb. Part I. p. 228 (by a Jew for establishing a Jesuit or assembly for reading the law, and instructing people in that religion).

<sup>2</sup> *A.-G. v. Whitchurch* (1796) 3 Ves. 141.

See also *Thomson v. Shakespeare* (1800) 1 De G. L. & J. 390.

<sup>3</sup> *Nizamudin v. Abdul Gafur* (1888) 13 Bom. 264 (1892) 17 Bom. 1; 19 I. A. 170; *Pathu Kalla v. Arathalakutti* (1898) 13 Mad. 66.

<sup>4</sup> It would seem that the words "or other purpose recognised by the Muhammadan law as a religious, pious or charitable purpose of a permanent character" must be added after the word "poor" to bring the statement into conformity with the Waqf Act.

## SECTION 472.

- (i) if the beneficiaries are identified in the instrument of 'waqf' as a class, under a general description, which applies to those who have accepted, they take the whole of the benefit ;
- (ii) if the beneficiaries are named or otherwise specifically identified in the instrument of 'waqf,' the share in the benefit of those who disclaim, must be distributed amongst the poor.<sup>1</sup>

Seceders from  
a community.

*Explanation.*—Where the object of a 'waqf' is to benefit a community holding specified religious tenets, and some of its members secede from it (by renouncing the said tenets) such members may for the purposes of clause (a), above, be considered to have disclaimed the benefit of the 'waqf.'<sup>2</sup>

'Waqf' presumed  
in Hanafi law  
to be perpetual  
and ultimately  
for poor.

The Hanafi law, according to Abu YUSUF, is to the effect that if the intention of creating a 'waqf' is shown, the transfer will be presumed to be, (1) in perpetuity, and (2) ultimately for the benefit of the poor, that purpose being supposed to be the appropriator's design, though he should fail to mention it.<sup>3</sup>

British  
India ; 'waqf'  
and charity.

The Privy Council decisions prior to the Waqf Act had held that a 'waqf' is valid only if it is for charitable or religious uses as understood in English law : in that view, on failure of the objects specified in the 'waqf-nama,' the benefit is diverted under the *cy-près* doctrine to other objects of charity. The Waqf Act however contemplates an express or implied ultimate dedication to the poor or other religious or charitable object of a permanent character.

Charges on  
property

The decisions prior to the Act contemplate the possibility of there being mere charges upon the profits of the estate for objects that are not charitable and which may fail, if these charges are on the whole of the 'waqf' property, then, on their failure, the whole property is devoted to the charity, free from the said charges. If the said charges are on specific portions of the property (*e.g.*, a definite fraction of it) and that portion of the property never goes to charity at all, or the charity with reference to it is illusory, then presumably the said portion is not 'waqf' property at all ; and on failure of those charges the property is free of any trust and must result to the original owner or his heirs.<sup>4</sup>

<sup>1</sup> *Bail.* I. 600 (par. 2) : cf. *Bail.* I. 574 (par. 2) above, cf. s. 512 below, and the last footnote.

<sup>2</sup> See illustration (2) to s. 481 below. For other rules of a similar nature see s. 512, below.

<sup>3</sup> *Bail.* I. 558 (par. 1, II. 7-8 of par. 2), 559 (par. 1), *Ameer Ali* I. 132 (par. 3), *Ramunadham v. Fada Lerru* (1911) 34 *Mad.* 12, 18-20.

<sup>4</sup> See s. 478, below.

(5) *Provisions that may be Contained in a 'Waqfnama.'* SECTION 472.

**473.** Subject to ss. 480 and 481, below, provisions similar to life-interests or other limited interests may be validly made in a declaration of 'waqf' for the benefit of a succession of persons, during their lives, or during specified periods; and notwithstanding that at the time of the declaration of 'waqf' the said persons are not in being.<sup>1</sup>

The narrow scope and object of the Waqf Act has been already alluded to. It contains no reference to the question whether provisions in favour of others than members of the family, children and descendants of the 'waqif' are valid. The texts, however, seem to be clear that such provisions as are referred to in s. 473 may be made in favour of strangers. Thus, in the 'Fatawa 'Alamgiri' after the construction of a 'Waqf' in favour of "my child," has been explained, the following sentence is added: "Everything that has been said of 'my child,' is applicable to the words 'child of such an one'"<sup>2</sup> Later on reference is made to a settlement on the heirs of Zeyd.<sup>3</sup>

**474.** (1) According to Hanafi law it may be validly provided in a declaration of 'waqf' that, on the happening of some future event, a beneficiary therein named should cease to take any benefit thereunder.<sup>4</sup>

(2) According to the 'Sharaya'-ul-Islam' the 'waqif' may reserve to himself the right of adding to the beneficiaries others yet to be born, but not of excluding from the benefit of the 'waqf' any person that he may choose,<sup>1</sup> nor of transferring the benefit from the existing beneficiaries to others subsequently to come into being.

Thus, according to Hanafi law, a 'waqf' may be dedicated for the benefit of a person on condition that if the said person marries, the

<sup>1</sup> Bail. I. 570-584. There does not seem to be any rule of Hanafi law that the first beneficiary should be in existence: cf. s. 449, above, for Shiah law: a disposition for the benefit of individuals under the Shiah law would no doubt be considered in the nature of a *hubs* rather than *waqf* in British India.

<sup>2</sup> Bail. I. 570.

<sup>3</sup> Bail. I. 574. *Zeyd* is the equivalent of John Doe and Richard Roe in English Real Property law.

<sup>4</sup> Bail. I. 589 (par. 2). See comment. It will be observed that these rules refer primarily to individual beneficiaries.

<sup>5</sup> Bail. II. 219 (par. 2).

**SECTION 474.** benefit of the 'waqf' property is to be given to another person.<sup>1</sup>  
 The Indian Contract Act, s. 26, apparently does not affect this rule of law. See s. 466, above.

Provision in  
 favour of  
 unborn person.

**474A.** It may be validly provided in a 'waqf' that a person who is not in being at the time of the declaration of 'waqf' or who cannot then be identified, should be a beneficiary thereunder when he comes into being or can be identified.<sup>2</sup>

*Illustration.*

In a 'waqf' for the 'waqif's' child ('walad') and after him "upon the poor or on any child and the children that may be born to me, and when they fail, upon the poor, the child who may be in existence at the time of the existence of the produce, enters into the benefit of the 'waqf' notwithstanding that there may be no child in existence at the time of the dedication."<sup>3</sup>

(6) *Legal Proceedings for Enforcing 'Waqf' or other Reliefs.*

Civil Procedure  
 Code s. 92.  
 Parties to suit  
 on breach of  
 trust, etc.  
 (I) Advocate-  
 General or  
 (II) two or  
 more  
 persons  
 having  
 interest  
 with  
 consent of  
 Advocate-  
 General.

**475.** (1) In<sup>1</sup> the case of any alleged (i) breach of trust in the administration of a 'waqf,' for public purposes of a charitable or religious nature or (ii) when the direction of the Court is deemed necessary for the administration of such a 'waqf,' the Advocate-General or two or more persons having an interest in the 'waqf' and having obtained the consent in writing of the Advocate-General,<sup>5</sup> may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government, within the local limits of whose jurisdiction the whole or any part of the subject of 'waqf' is situate to obtain a decree—

(a) removing any 'mutawalli,'<sup>4</sup>

(b) appointing a new 'mutawalli,'<sup>6</sup>

(c) vesting any property in a 'mutawalli,'<sup>1AA</sup>

*Reliefs—*

'mutawalli'

<sup>1</sup> Ball. I. 589 (par. 2). Other instances of the condition are: going out of a named city, or pursuing legal studies, leaving the sect of Abu Hanifa and adopting that of Shafi'i, or apostatizing.

<sup>2</sup> Ball. I. 567-8; see illustration.

<sup>3</sup> Ball. I. 567-8.

<sup>4</sup> Sect. 475 of this work is the Civil Procedure Code, 1908, s. 92, (s. 539 of Act XIV of 1882) *mutawalli mutandis, Mahomed Ismail Ariff v. Ahmed Mulla Dawood* (1914) 43 Cal. 1043. 1001, (P. 6.

<sup>5</sup> *Sayed v. Ali Jan* (1912) 11 All. L. P. 28.

<sup>6</sup> In the original, "trustee."

- (d) directing accounts and enquiries, SECTION 47:  
accounts  
allocation of  
benefit  
 (e) declaring what proportion of the 'waqf' property or of the interest therein shall be allocated to any particular object of the 'waqf,'  
 (f) authorising the whole, or any part of the 'waqf' property to be sold, mortgaged or exchanged, sale or  
mortgag  
or exchange,  
as them  
 (g) settling a scheme, or  
 (h) granting such further or other relief as the nature of the case may require.<sup>1</sup>

(2) Save as provided by the Religious Endowments Act, 1863,<sup>2</sup> no suit claiming any of the reliefs specified in sub-section (1), above, can be instituted in respect of any 'waqf' except in conformity with the provisions of the said sub-section :

It seems best to give this section as a whole, but the application of it on the various branches of the law will be found noted in their appropriate places. See ss. 462, 469, 481, 489, 493, 500, 501, etc., below. For the numerous decisions on this section see the commentaries on the Civil Procedure Code. See also Order I, r. 8. thereof.

### §3.—Subject of 'Waqf,' or 'Waqf' Property.

**476.** According to Hanafi law the subject of 'waqf' <sup>(1) Hanafi law.</sup> may consist either of,—

- (a) immovable property,<sup>3</sup> or (a) Immovable  
property.  
 (b) movable property which is accessory to immovable property,<sup>4</sup> or (b) Accessories  
to it.  
 (c) beasts of burden, or arms,<sup>5</sup> or (c) Beasts of  
burden,  
arms.  
 (d) Qurans or other books,<sup>6</sup> or (d) Books.  
 (e) such other property as it is customary to make the subject of 'waqf'; <sup>Not thing  
which  
consumed  
by use.</sup> <sup>6</sup> provided that, according to the general opinion held amongst the Hanafi authorities, things that are consumed by use cannot validly be the subject of 'waqf.'

<sup>1</sup> See p. 572, n. 4.

<sup>2</sup> I. r., in s. 520, below.

<sup>4</sup> Ball. I. 538.

<sup>3</sup> Ball. I. 561 (ll. 1-1).

<sup>5</sup> Ball. I. 562 (par. 1).

<sup>6</sup> Ball. I. 562 (par. 2).

SECTION 476.

- (2) Shiah and Shafi law: whatever is not consumed by use.  
 (3) Money, and shares *quære*.

(2) According to Shiah Ithna 'Ashari and Shafi'i law the subject of 'waqf' may be land, and everything that admits of use without being consumed by use.<sup>1</sup>

(3) *Quære*, whether money, and shares in a joint stock company, are objects that are consumed by use, and cannot therefore validly be the subject of a 'waqf.' The High Courts of Madras and Bombay have held that they cannot be the subject of 'waqf.'<sup>2</sup> In Allahabad it has been held that they can be;<sup>3</sup> and a similar opinion was expressed in Bombay.<sup>4</sup> The High Court of Calcutta has given two decisions<sup>5</sup> in accordance with the former view, and a third in accordance with the latter.<sup>6</sup> It is submitted that the decision in Allahabad and the later decision in Calcutta are in accordance with the Muslim authorities.

The law as stated in the 'Fatawa 'Alamgiri' may be thus summarized: The subject of 'waqf' must be immovable, or accessory thereto,<sup>7</sup> or beasts of burden or arms,<sup>8</sup> or Qurans or other books, or such property as it is the custom to make 'waqf' of.<sup>9</sup> According to the general opinion held amongst the Sunni authorities, things that are consumed by being used cannot be the subject of a 'waqf', but in some places it is the custom to make 'waqf' even of money or grain, and decrees are given in favour of such 'waqfs,' and where a 'waqf' is permitted to be made of money, it is lent to the poor and taken back again; or given in 'muzaribat' (or partnership) and the profit is given in charity; or grain is given to the poor to sow, to be returned afterwards, or clothes lent to wear.<sup>10</sup> The 'Hidaya'<sup>11</sup> shows on the other hand the different views taken by the authorities, which with the addition of the Shiah law, are tabulated below:—

<sup>1</sup> See comment.

<sup>2</sup> *Khadir Ibrahim v. Mahomed* (1909) 33 Mad. 118; *Fatmabai v. Gulam Husen* (1907) 9 Bom. L. R. 1337.

<sup>3</sup> *Abu Sayid v. Bakur Ali* (1910) 24 All. 190.

<sup>4</sup> In *Banubi v. Naraynrao* (1906) 31 Bom. 250, 257; 9 Bom. L. R. 91, 96, Beaman, J., (Jenkins, C.J. with him) expresses the opinion of the Court that movables may be the subject of *waqf*, and also funded moneys. It is stated, however, that the point is not necessary for the decision of the case.

<sup>5</sup> *Fatima v. Arif Ismailjee Bham* (1881)

9 C. L. R. 66; *Kulsum Bibee v. Goolam Hossein* (1905) 10 Cal. W. N. 449.

<sup>6</sup> *Sakina Khanum v. Luldun Sahiba* app. from O. D. 110 of 1900 decided on 10th June 1902; *unreported*—referred to by Ameer Ali, l. 182, n. 1.

<sup>7</sup> Ball. I. 561 (H. 1-4.)

<sup>8</sup> Ball. I. 558. Sheep, together with their wool and milk, are referred to as the subject of a *waqf*: Ball. II. 213 (par. 3).

<sup>9</sup> Ball. I. 562 (par. 1).

<sup>10</sup> Ball. I. 562 (par. 2).

<sup>11</sup> Hed. 234.

'Fatawa  
'Alamgiri  
on subject  
of 'waqf.'

Money.

'Hidaya.'



SUBJECT OF 'WAQF' : DIVERGENT VIEWS.

SECTION 476.

<i>Hanafi law</i>		<i>Shafi' and Shiah law.</i>
<i>Abu Hanifa</i>	<i>Imam Muhammad.</i>	<i>Abu Yusuf.</i>
Land alone may be the subject of 'waqf' but not movable property even if accessory to land. <sup>1</sup>	Lands, together with accessories; also instruments of husbandry. <sup>2</sup> Horses, camels and arms may be subject of 'waqf' for war against the infidels. <sup>3</sup>	Land, and everything that admits of use without destruction of the subject and of everything lawfully saleable, because such articles admit of usufruct resemble land, horses or arms; may be the subject of 'waqf'. <sup>4</sup>
	All movables may be subject of 'waqf' of which 'waqfs' are customarily made, e.g., spades, shovels, axes, saws, planks, collins (with their appendages) stone or brazen vessels and books. <sup>5</sup>	[On this point Abu Yusuf disagrees with Imam Muhammad, holding that 'waqf' is not valid of movables even if they are customarily made 'waqf' of.]
	Scrabble furniture and clothes cannot be subject of 'waqf'. <sup>6</sup>	

The 'Sharaya'-ul-Islam<sup>7</sup> mentions four conditions as being required in the subject of 'waqf': it must be (1) a substance, (2) the property of the 'waqif' (3) capable of being used without being consumed, (4) also capable of being delivered.<sup>8</sup> The last two requirements are alone applicable to the present section; and as illustrations are mentioned: 'Aqar' or lands and houses, clothes, furniture, lawful instruments, and generally everything from the use of which any benefit<sup>9</sup> can be lawfully<sup>8</sup> derived with the preservation of the thing itself. About money it is said that the doctors are divided on the question whether it may be the subject of 'waqf,' but the opinion which is the most manifest and best supported by traditional authority is stated by the author of the 'Sharaya'-ul-Islam' to be that it cannot validly form the subject of 'waqf'.<sup>10</sup>

The different views as to what kind of movable property may form the subject of 'waqf' may be classified under the following heads:—

(1) As to movable property generally,—

(a) Abu Hanifa holds that movables cannot be the subject of 'waqf'.<sup>10</sup>

<sup>1</sup> Hed. 234.

<sup>2</sup> Bail. I. 561 (H. 1—4).

<sup>3</sup> Hed. 234. As to Qurans, all are agreed that they may be the subject of *waqf*, but Imam Muhammad (Abu Yusuf dissentiente, Hed. 235 col. i. l. 29) holds that other books may also be the subject of *waqf*. "Most lawyers have passed decrees according to the opinion of Imam Muhammad." *ib*

<sup>4</sup> Hed. 234; Bail. II. 213.

<sup>5</sup> Bail. II. 213 (a Shiah authority).

<sup>6</sup> Hence not an absconded slave.

<sup>7</sup> *E.g.*, trained dog or cat. Bail. II. 213.

<sup>8</sup> Hence not hogs, which are *extra commercium*. Bail. II. 213.

<sup>9</sup> Bail. II. 213. However see s. 476 (3), and the comment, below.

<sup>10</sup> Hed. 234, 235.

SECTION 476. (b) Others hold that all "movables which constitute the subject matter of every-day transactions and dealings between people are valid."<sup>1</sup> This view is stated to be—

- (i) Abu Yusuf's opinion as stated in the 'Mujtaba',<sup>2</sup>
- (ii) of Shams-ul-aimma as-Sharakhsi as stated in 'Qazi Khan',<sup>3</sup>
- (iii) of Imam Muhammad,<sup>4</sup>
- (iv) of the majority of jurists as stated in the 'Zahiria',<sup>5</sup>
- (v) of the author of the 'Ramz-ul-Hakik',<sup>6</sup>
- (vi) of the author of the 'Wajiz-ul-Muht',<sup>7</sup>

(c) Another view is that "Custom and usage regulate what movables can be the subject of 'waqf'."<sup>8</sup>

Shafi'i law. (d) Shafi'i says that everything the sale of which is valid, and which can be renewed from time to time by its usufruct, or otherwise, can be validly dedicated and this is also the opinion of Malik and Ahmed Ibn Hanbal.<sup>9</sup>

Shi'ah Ithna 'Ashari law. (e) The Shi'ah Ithna 'Ashari authorities according to the 'Sharaya'-ul-Islam' permit everything to be the subject of 'waqf' from the use of which any benefit can be lawfully derived with the preservation of the thing itself, and clothes, furniture, lawful instruments, are given as instances.<sup>10</sup> It is also assumed that sheep may be the subject of 'waqf' and it is said if "a man should appropriate a sheep the wool and milk existing at the time are included in the 'waqf' unless specially excepted from a regard to custom, as would be the case if the animal were sold."<sup>11</sup>

Shi'ah Isma'ili law. (f) The author of the 'Dayam-ul-Islam,' a Shi'ah Isma'ili text, refers to the subjects of 'waqf' being liable to perish, (such as a slave or cattle or clothes or implements) and states that in that case the 'mutawalli' may sell the subject and replace it by others.<sup>12</sup> This may seem to imply that

<sup>1</sup> This is from Syed Ameer Ali's learned work, but Woodroffe, J., held in *Kulsoom Bibee v. Goleam Hassan* (1905) 10 Cal. W. N. 419, that the correct translation of the passages referred to by the learned author should be: "Everything which it is the practice to make *waqf* of." It thus is so (as seems likely) then clause (b) and (c) above should be amalgamated.

<sup>2</sup> Ameer Ali, I, 176 (par. 4), 177 (ll. 13-15) and *quatre*; cf. Hed. 234 (col. i, ll. 20). According to Imam Muhammad the *waqf* of movables is unrestrictedly valid, and according to Abu Yusuf the *waqf* of such movables as form the subject of business transactions is lawful—so stated in the *Mujtaba* on the authority of the

*Sagor*, cited in the *Fath-ul-Qadir* and in the *Bihar-ul-Haq*. Ameer Ali, I, 177.

<sup>3</sup> Ameer Ali, I, 178 (par. 5).

<sup>4</sup> Ameer Ali, I, 177 (ll. 5-6).

<sup>5</sup> Ameer Ali, I, 177 (ll. 9-11).

<sup>6</sup> Ameer Ali, I, 181 (par. 1).

<sup>7</sup> Ameer Ali, I, 181 (par. 2).

<sup>8</sup> Ameer Ali, I, 176 (par. 5), [citing *Qaz Khan*]; 181 (par. 2), [citing *Wajiz-ul-Muht*]; 184 (par. 1) [citing *Radd-ul-Mukhtar*].

<sup>9</sup> Ameer Ali, I, 180 (par. 5); also as to Shafi'i, *ib* 181 (par. 2) from *Wajiz-ul-Muht*.

<sup>10</sup> *Ibid.* II, 213 (*first*).

<sup>11</sup> *Ibid.* II, 212 (par. 3).

<sup>12</sup> *Dayam-ul-Islam* (Notes).

perishable articles may be made the subject of 'waqf'; SECTION 476. but it will be evident on consideration, that the author has in effect interpreted the dedication in a very practical manner, viz., as meaning that the proceeds of articles that are perishable (or such articles as are consumed by use) should be taken to have been handed over for investment in a suitable subject of 'waqf.' This view is commendable for its good sense and practicality.<sup>1</sup>

- (2) Next, coming to particular kinds of movables, we find it stated that —
- (a) The 'waqf' of shrouds and books is valid.<sup>2</sup> Particular kinds of movables.
- (b) The 'waqf' of the milk of a cow is valid if customary.<sup>3</sup>
- (c) "Ornaments can be dedicated: for Hafsa, the daughter of Omar (the 'Caliph) dedicated her ornaments, and such has been the practice."<sup>4</sup>
- (d) With reference to money—
- (i) "The author has stated in the 'Manah': 'In our time in the countries of Rum [Turkey], etc., it is customary to make 'waqf' of 'dirhems' and 'dinars'; so the 'waqf' of 'dirhems,' and 'dinars' comes within the dictum of Muhammad, which is that every article which forms the subject of business transactions, a 'waqf' 'thereof is lawful': and on this is the 'fatwa' and all this is patent."<sup>5</sup> "Ansari, who was a disciple of Imam Zaffar, was asked if the 'waqf' of money (original 'dirhems') and whatever can be weighed, or measured, is valid or not. He replied: Yes, a valid 'waqf' may be made thereof. Asked how such things can be made 'waqf,' he replied: Such money should be invested in some partnership business, and its profit applied to the purposes of the 'waqf,' and if it is an article it should be sold, and its price invested similarly."<sup>6</sup>
- (ii) In the 'Sharaya-ul-Islam' the Shiah law is thus stated: "Whether again 'dinars' and 'dirhems' can be validly appropriated is a question which some of our doctors have assumed in the negative; and their opinion is the most manifest, or best supported by traditional authority, because they are things from which no benefit

<sup>1</sup> See also *Banubi v. Narringrao* (1906) 31 Bom. 250, 257.

<sup>2</sup> *Ameer Ali*, I. 176 (par. 5).

<sup>3</sup> *Ameer Ali*, I. 176 (par. 5), 179 (II. 15).

<sup>4</sup> *Ameer Ali*, I. 180 (par. 3), citing *Fath-ul-*

*Qadir*, II. 636.

<sup>5</sup> *Ameer Ali*, I. 177 (II. 20-25).

<sup>6</sup> *Ameer Ali*, I. 180, par. 3, citing *Fath-ul-Qadir*, II. 636, *ib.* 182 (par. 2), citing *Tashil, Jowharat-ul-Nayereh*, and *Chait-ul-Bayan*, 37.

## SECTION 476.

can be derived except by spending them. Others, however, insist that the appropriation of them is valid, because some advantage from them may easily be imagined with preservation of the originals."<sup>1</sup>

Shafi'i law.

In the 'Minhaj' the Shafi'i law is thus stated: "and the foundation must be of such a kind that perpetual use may be made of it. Thus it may not consist of foodstuffs or odoriferous plants but with this exception it may be either movable or immovable, or even such things as are capable only of individual possession but not a slave or a coat unless a particular specified one."<sup>2</sup>

Money and shares as subject of 'waqf.'

In British India the controversy really lies around the question whether money, shares in joint stock companies, and Government promissory notes can be the subject of 'waqf.'

Reason why some jurists hold that money cannot be subject of 'waqf.'

It is submitted that in regard to a point of this nature, the maxim 'cessante ratione, cessat ipsa lex' is eminently applicable. It is necessary therefore to examine the reasons for the opinion of those Muslim jurists who hold that money cannot be the subject of 'waqf,' and then to consider whether those reasons continue, or have ceased to apply, at the present day, to money, and whether they can, in either case, apply to other classes of property (such as shares). Those reasons are not far to seek: as 'waqf' must be perpetual, its subject must necessarily be property of such a nature as is not consumed by use. Now the jurists who held that money could validly be the subject of 'waqf' did so because they considered it to be one of those articles that cannot be put to a productive use; and their ground for holding so was twofold; first it was assumed that there was only one means for using money so as not to consume it in the use, viz., to lend it on interest; and secondly that taking or giving interest is against the policy of law. The first part of the reasoning was traversed even by some of the earlier Muslim jurists immediately succeeding those who gave the first comprehensive expositions of the law, and it certainly is not correct in British India to assert as a fact that money cannot be productively employed when so many investments and methods for making money lawfully productive are known and recognised.<sup>3</sup> The second part of the reasoning is equally inapplicable, as is shown by the usages prevailing amongst Mussulmans, no less than by legislative enactments and decisions of the Courts.

1. Money consumed by use, unless lent on interest.

2. To lend on interest is unlawful.

These reasons have ceased to apply.

<sup>1</sup> Bail. II. 213 (*first*).

<sup>2</sup> *Minhaj*, 230 (Bk. 23 s. 1).

<sup>3</sup> The moneys of minors are frequently

ordered to be invested. As to interest, see comment 'o s. 4, above, and footnotes thereto.

For these reasons it may have been expected that the British Courts would hold that money may lawfully be the subject of a ‘waqf.’ The more so as the difference of opinion amongst the ‘Mujtahids’ leaves an option of following either view.<sup>1</sup> But some of the decisions of the Courts not only assume that money cannot be the subject of ‘waqf,’ but have even proceeded to extend the invalidity to shares and securities.<sup>2</sup> Thus in the case of *‘Fatima Bibi v. Ariff Ismailji,’* Wilson, J., after saying (1) that all the authorities agree in holding that land may be the subject of ‘waqf,’ and (2) that the validity has been extended to certain other kinds of property, though the authorities are not agreed as to the exact degree of the extension, concluded: (3) “but it is agreed that it does not apply to such things as perish in the use under which head money appears to be included, and if money cannot be appropriated, it seems to me clear that the possibility of receiving money hereafter in the form of dividends cannot be.” Thus it will be seen that that very able and learned Judge proceeds on the basis that where a ‘waqf’ is declared of shares in a Company, its subject consists of the right to receive the dividends—whereas in reality it consists of the shares themselves. The income of the subject of the ‘waqf’ is confused (it is submitted with the greatest respect) with the corpus. If that reasoning were correct, might it not be equally held that the possibility of receiving money as the rents of a house cannot be the subject of a ‘waqf’ and consequently that the ‘waqf’ of a house which is to be rented out is invalid. Yet all authorities are agreed that land may be the subject of ‘waqf’ without excluding the case where its produce or income or benefit takes the shape of money. Again it is submitted that it is incorrect to say that shares in a Company are to be classed as money:<sup>3</sup> if it is necessary to bring this quite modern transaction under one of those known to the Muslim jurists who wrote half a dozen centuries ago, it would be more correct analogy, it is submitted, to include it in ‘muzaribat’—for the subscribers to a Company are partners and some of them contribute labour (with capital) and others only capital, and the profits are divided by all.

For the reasons above referred to, it is submitted, with respect, that a ‘waqf’ with money as its subject ought to be upheld in British India, and that in any event the ‘waqf’ of shares is not invalid.<sup>5</sup>

<sup>1</sup> See comment and footnotes to s. 111A, above.

<sup>2</sup> See s. 476 (3), below.

<sup>3</sup> (1881) 9 C. L. R. 66.

<sup>4</sup> “Savigny, *Oblig.* II. 112, truly observes that ordinary shares in companies are not obligations but parts of ownership, producing,

therefore, not interest but dividend is.” Holland, “*Jurisprudence*,” 275 n. 3, cf. *Colonial Bank v. Whinney* (1885) 30 Ch. D. 261; (1886) 11 App. Ca. 426.

<sup>5</sup> See the footnotes to s. 476 (3).

Hence it might have been held that money may be subject of ‘waqf.’

Wilson, J.’s reasons for holding that shares cannot be subject of ‘waqf’ considered.

Shares distinguishable from right to receive money.

## SECTION 477.

'Waqf's'  
ownership and  
possession.

477. The subject of 'waqf' must be owned<sup>1</sup> by and in the possession<sup>2</sup> of the 'waqif' at the time when the 'waqf' is made.<sup>3</sup>

## Illustrat.

(1) A usurps certain property belonging to B, and purports to make a 'waqf' of it; he thereafter purchases it from its rightful owner. The 'waqf' is invalid.<sup>4</sup> But if B, the rightful owner, ratifies the 'waqf,' it is valid.<sup>5</sup>

(2) A bequeaths certain land to B. B purports to make a 'waqf' of it in A's lifetime, and then A dies. The 'waqf' is not valid.<sup>6</sup>

(3) A makes a lease of his land, and then makes a 'waqf' of it before the term of the lease expires, or is otherwise determined; subject to the lease, the 'waqf' is valid.<sup>6</sup>

(4) A pledges (gives a mortgage with possession of) his land, and then declares that it is subject to a 'waqf'; subject to the pledge (mortgage) the 'waqf' is valid.<sup>7</sup>

(5) The right to recover money under a decree cannot validly be the subject of 'waqf'.<sup>8</sup>

'Musha'  
subject of  
'waqf.'

478. The subject of 'waqf' may consist of a 'musha'<sup>9</sup> (undivided part of property) notwithstanding that the property is divisible,<sup>10</sup> and, *semble*, the subject of 'waqf' may consist of a charge upon property;<sup>11</sup> provided that according to Hanafi law where the object of the 'waqf' is a 'masjid' or a tomb, an undivided part of any property<sup>12</sup> cannot validly form the subject of the 'waqf'.<sup>10</sup>

Charge on  
property.

As to Hanafi law this section is in accordance with Abu Yusuf's exposition thereof.<sup>13</sup> Imam Muhammad held that an undivided part

<sup>1</sup> Cf. *Masihuddin v. Balabh Das* (1912) 35 All. 68; 10 All. L. J. 501, in which the obvious principle was the basis of Griffith, J.'s decision.

<sup>2</sup> Hence an absconded slave cannot be the subject of a *waqf*: Ball. II. 213.

<sup>3</sup> Ball. I. 554; II. 213, 214 (l. 1).

<sup>4</sup> The Transfer of Property Act, s. 43, may conceivably apply in some cases.

<sup>5</sup> Ball. I. 554 (ll. 3-10), II. 214 (ll. 1-4): *Masihuddin v. Balabh Das* (1912) 35 All. 68; 10 All. L. J. 501.

<sup>6</sup> Ball. I. 555 (ll. 16-21). The lease is determined under Muhammadan law by the death either of the lessor or lessee (ib. ll. 35-35).

<sup>7</sup> Ball. I. 555. In ll. 25-2, instead of: "it should remain for two years in the hands of the pledger," read "some years." See 4 Beng. L. R. (A. O. J.). 90.

<sup>8</sup> *Kadir Ibrahim Roster v. Mahomed Rahumulla Roster* (1900) 33 Mad. 118 (per Benson and Munro, JJ.), following *Kuloom Bibee v. Golam Hossain Cassim Arif*, (1906) 10 Cal. W. N. 449, 494, on which see s. 476, above, and comment thereto.

<sup>9</sup> See s. 374, above, and comment to it.

<sup>10</sup> Hed. 233; Ball. I. 564, II. 214 (par. 1). In *Mahomed Hamidulla Khan v. Lotful Huj*, (1881), 6 Cal. 744; 8 Cal. L. R. 164, the *waqf* property consisted of a four-anna share.

<sup>11</sup> See s. 464, explanation, above.

<sup>12</sup> Whether or not it is capable of division.

<sup>13</sup> "The moderns decide according to Aboo Yousuf, and that is approved": Ball. I. 564 (par. 2). Cf. Clavel, *Droit Musulman: Des Statut Personnel et Des Successions*: 1895) Tome II, 176, § 761.

of property which is capable of division cannot lawfully be the **SECTION 478.** subject of ‘waqf,’ “because actual possession is held by him to be *illustrations.* essential . . . so also that, without which possession cannot take place, is also an essential, namely, division; and this can only be in a thing capable of division.”<sup>1</sup>

When property is endowed in favour of a mosque, the waqf does <sup>Property subject to charge,</sup> not become void by the charge, upon the profits, of items which must lapse in the course of time, leaving the whole benefit to the mosque.<sup>2</sup>

**479.** Where a ‘waqf’ is purported to be made, <sup>Certainty,</sup> but its subject is not defined with certainty, the ‘waqf,’ is void.<sup>3</sup>

(1) A ‘waqf’ is purported to be made of land on which there are *illustrations,* trees, excepting the trees. The ‘waqf’ is invalid according to Hanafi law, as its subject is not certain.<sup>4</sup>

(2) A ‘waqf’ purported to be made of “a horse” or “a mansion” without specifying which, is void.<sup>5</sup>

(3) W purports to make a ‘waqf’ [for the benefit of his family<sup>6</sup>] and provides that concurrently a sum to be fixed by the ‘mutawalli’ at his discretion should be given to charity. The gift to the charity is void because its subject<sup>7</sup> is uncertain.<sup>8</sup>

It must be observed that certainty is required in the subject of <sup>Subject and object,</sup> ‘waqf’; but not in the object of ‘waqf’; for if a general charitable intention is disclosed the Court will apply the property to charity.<sup>9</sup>

#### § 4.—Object or Purpose of ‘Waqf.’

##### (1) Objects that are Valid.

**480.** The law relating to ‘waqfs’ not governed by the Waqf Act is as follows:—

(1) To constitute a valid ‘waqf’ the property forming <sup>Substantial dedication to charity,</sup> its subject must be substantially dedicated to a charity.<sup>10</sup>

<sup>1</sup> Hed. 233 (col. ii.)

<sup>2</sup> *Mahmood Beg v. Buhraj Dilarey Mohapatra* (1870) 13 W. R. 235; cf. s. 477, *ill.* (5), above.

<sup>3</sup> *Bail. I.* 555-556; *II.* 213; *Fatmabibi v. Advocate-General of Bombay* (1881) 6 Bom. 42.

<sup>4</sup> *Bail. I.* 556. Cf. as to the mushta doctrine, *ss.* 374, *et seq.*, above, and s. 382, below.

<sup>5</sup> *Bail. II.* 213.

<sup>6</sup> See s. 480, below.

<sup>7</sup> As to its object see s. 481, below.

<sup>8</sup> *Mujibunnissa v. Abdur Rahim* (1900) 23 All. 238.

<sup>9</sup> See s. 481, below.

<sup>10</sup> See s. 456 above; *Bail. II.* 215 (par. 2); *Mahomed Ahannulla Chowdhry v. Amarchand Kunda* (1880) 17 Cal. 498; 17 I. A. 28; *Abul Fata Mahomed Ishaq v. Rasmaya Dhur Chowdry* (1894) 22 Cal. 619; 22 I. A. 76; *Mujibunnissa v. Abdur Rahim* (1900) 23 All. 238; 28 I. A. 15; 5 C. W. N. 177. See *ill.* (1) (p.), below, and footnote thereto.

## SECTION 480.

Provisions for  
the family.Settlement  
perpetuity  
family with  
ultimateProvisi  
objects

*Explanation I.*—It is consistent with the constitution of a valid 'waqf,' to make provisions out of the 'waqf' property, for the family of the 'waqif' but so that the 'waqf' property is substantially dedicated to charitable purposes,<sup>2</sup> and the charity is not illusory either by the small proportion that it bears to the whole property made 'waqf' of, or from the uncertainty and remoteness of the time when the provisions relating to charity are to take effect.<sup>3</sup>

*Explanation II.*—A settlement in perpetuity on the family of the 'waqif' (unless governed by the Waqf Act) cannot validly form the object of a 'waqf'; and a provision for the benefit of the poor or other charitable object<sup>4</sup> on the extinction of the 'waqif's' family does not make the settlement unless governed by the Waqf Act.<sup>5</sup>

*Explanation III.*—A declaration of 'waqf' containing provisions for the benefit either of specified individuals other than the 'waqif' and the members of his family, or for the benefit of objects that are not charitable, is governed in British India by the rules contained in *Explanations I. and II.*, above, with the necessary changes.<sup>6</sup>

<sup>1</sup> As to the validity of provisions in favour of the waqif himself, see s. 486, below.

<sup>2</sup> *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1889), 17 Cal. 498; 17 I. A. 28 approving *Muthurool Huj v. Pukraj Detarey Mahopattur* (1869) 13 W. R. 235; *Deohi Prasad v. Inait Ullah* (1892) 14 All. 375; *Bastul Ghani Mia v. Adak Patari* (1913) 17 Cal. W. N. 1018-19 Ind. Cas. 896.

<sup>3</sup> *Abul Fata Mahomed v. Ramnaya* (1894) 22 Cal. 619, 634; 22 I. A. 76; it may be "illusory" whether from its small amount, or from its uncertainty and remoteness," (followed *Mukhammad Menawer Ali v. Rasulan Bibi* (1899) 21 All. 359. *Mahomed Ibrahim v. Abdul Latif* (1912) 3 Bom. 447; 14 Bom. L. R. 98). These decisions are over-ruled by the Waqf Act so far at least as waqfs made after the Act are concerned.

<sup>4</sup> *Abul Fata Mahomed Isak v. Ramnaya Dhur Chowdhry* (1894), 22 Cal. 619; 22 I. A. 76; *Murtuzai Bibi v. Jamuna Bibi* (1890), 13 All. 261 (testamentary waqf by a Shiah, but no Shiah authority cited); *Munawwar v. Rasia Bibi* (1905) 27 All. 320; 32 I. A. 86; *Hamid Ali v. Munawwar Hussain Khan* (1902) 24 All. 257; *Fazlur Rahim Abu Ahmed v. Mahomed Abdul Azim Abu-*

*Ahsan* (1903) 30 Cal. 606, 7 C. W. N. 016 *Mujib-un-nissa v. Abdur Rahim* (1900) 23 All. 233 (P.C.); *Bikoni Myn v. Shuk Lal* (1892) 20 Cal. 116; *Fazlur Rahim v. Mahomed Obdul Azim* (1903) 30 Cal. 606.

<sup>5</sup> For there the settler used the word *waqf* as merely a "veil to cover arrangements for the aggrandisement of the family, and to make the property inalienable", *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 Cal. 498, 611; 17 I. A. 28; cf. *Abdul Ganne Kasam v. Hussein Aliya Rahimulla* (1873) 10 Bom. H. C. R. 7.

<sup>6</sup> "The mere charge upon the profits of the estate of certain items which in the course of time must necessarily cease (being confined to one family) and which after they lapse, will leave the whole property intact for the original purposes for which the endowment was made does not render the endowment invalid under the Muhammadan Law"—per Kemp J.; *Muthurool Huj v. Pukraj Detarey Mahopattur* (1869) 13 W. R. 235, cited with approval by the P. C. in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1889) 17 Cal. 498; 17 I. A. 28.



The Shafi'i law relating to such 'waqfs' has been held to be the SECTION 480. same as regards making provisions for the family of the 'waqif' as Shafi'i law, the Hanafi law.<sup>1</sup>

For illustrations and comment see s. 480A, below. Section 480 has been retained in this edition as it has been held that the Waqf Act is not retrospective.

**480A.** (1) Under the Waqf Act, to constitute a valid 'waqf,' its subject must be permanently dedicated for any purpose (or object) recognised by the Mussalman law as religious, pious or charitable: in particular, it may be dedicated,—

- (a) for the maintenance and support wholly or partially of his family, children or descendants, and,—
- (b) where the person creating a 'waqf' is a Hanafi Mussalman, also for his own maintenance and support during his lifetime, or for the payment of his debts out of the rents and profits of the property dedicated,—

provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

(1) The following are valid objects of 'waqf,'—<sup>2</sup>

- (a) to perform 'haj' every year out of the income, (if the ultimate destination is a perpetuity for the poor) <sup>Illustrations.</sup>
- (b) to bestow every year in charity in atonement of my sins or omission (if the ultimate destination is a perpetuity for the poor),<sup>3</sup>
- (c) to pay my debts, with an ultimate dedication to the poor,<sup>4</sup>
- (d) 'jihad,' or religious wars,<sup>5</sup>
- (e) endowing a teacher for a school,<sup>5</sup>
- (f) the salary of an imam or leader of prayers,<sup>5</sup>

<sup>1</sup> *Mahomed Abdulla Jstaker v. Abdul Rahiman Jstaker* (1907) 9 Bom. L. R. 908 (per Macleod, J.). In regard to Shiah Law the right to create life-interests in the form of dispositions which the Courts do not class as *waqfs*, have been recognised. See ss. 446, et seq., above. See also *Mahomed Ibrahim v. Abdul Latif* (1912), 14 Bom. L. R. 987.

<sup>2</sup> *Bail. I. 566.*

<sup>3</sup> *Bail. I. 566; Hod. 240; Fatmabibi v. Adoo-*

*cato-Gienard of Bombay* (1891) 6 Bom. 42; *Asadab v. Noorba* 8 (1903) 8 Bom. L. R. 245. *Keddiagan v. Mamunnaas Ravathan* (1912), 35 Mad. 681.

<sup>4</sup> *Bail. I. 566; Luchmiput Singh v. Amir Alum* (1882) 9 Cal. 176; 12 Cal. L. R. 22.

<sup>5</sup> *Hod. 240; Bail. I. 565; Abdur Rafey Khan v. Bannai Begum* (1912) 15 Ind. Cas. 36; *Mazhar Hussain Khan v. Abdul Hadi Khan* (1911) 33 All. 400.

## SECTION 480A.

## Illustrations

- (g) shrouds for the dead, or for digging their graves,<sup>1</sup>  
 (h) funeral expenses<sup>1</sup> of or distributing food to poor people,<sup>1</sup>  
 (i) sinking wells or tanks,<sup>1</sup>  
 (j) celebrating the birth of 'Ali, the third Khalifa and son-in-law of the Prophet,<sup>2</sup>  
 (k) making 't'azias' in the month of Muharram,<sup>2</sup>  
 (l) celebrating the anniversary ('barsi') of the death of the 'waqif,' and the members of his family,<sup>2</sup>—*sed quaere*,<sup>3</sup>  
 (m) the performance of the 'qadam-i-sharif,'<sup>4</sup>  
 (n) reading the Quran in public or in a private house,<sup>5</sup> *sed quaere*,<sup>6</sup>  
 (o) works of general utility,<sup>7</sup>  
 (p) a feast for the community,<sup>8</sup>  
 (q) the<sup>9</sup> performance of 'Fatiha'<sup>10</sup> (in the sense of distribution of alms to the poor accompanied with prayer for the welfare of the souls of deceased persons) which, so far as it involves the expenditure of money, consists in feeding the poor.<sup>9</sup>  
 (r) the kindred of the Prophet.<sup>11</sup>  
 (s) travellers [but it is to be applied to the poor among them excluding the rich].<sup>11</sup>  
 (t) the due and proper observance of the annual "festival" (*quaere*) of the 'Muharram'<sup>12</sup>  
 (2) The following are not valid objects of 'waqf':  
 (a) for lawyers,<sup>13</sup>

<sup>1</sup> See p. 583, n. 3.<sup>2</sup> *Biba Jan v. Kalb Hussain* (1900) 31 All. 136; *Ramanadham v. Vada* (1910) 34 Mad. 12, affirmed (1916) 40 Mad. 116 (P.C.); *Mazhar Hussain Khan v. Abdul Haid Khan* (1911) 33 All. 400, (See cases cited in the footnote, to s. 480, explanation III, and to s. 480a, *tit.* (1)(h)).<sup>3</sup> *Katoolia v. Nussurdeen* (1894) 18 Mad. 201; *Fakhruddin v. Kifayatulla* (1910) 7 All. 1, J. 1095, 1100-1103.<sup>4</sup> *Phul Chand v. Akbar Yar Khan* (1896) 19 All. 211.<sup>5</sup> *Mazhar Hussain v. Abdul Hadi Khan* (1911) 33 All. 400. Cf. *Nizamuddin v. Abdul Hafiz* (1888) 13 Bom. 264, affirmed (1892) 17 Bom. 1, 19 L. A. 170.<sup>6</sup> See *tit.* (3) (e), below. Cf. *Asobai v. Noorbai* (1905) 8 Bom. L. R. 245, 246, 2 (e).<sup>7</sup> Bail. II. 215, bridges and masjids are given as instances.<sup>8</sup> So held in *Heptulla Abdul Ali v. Sharaf Ali Mamooji*, Suit 334 of 1900 O.S., decided by Macleod, J. in Chamber on 22nd June 1900 in theBombay High Court: see also *Asobai v. Noorbai* (1905) 8 Bom. L. R. 245, 246, and *Salehbaai Abdul Kader v. Bai Safinbee* (1911) 36 Bom. 111.<sup>9</sup> (*Mululana Ana*) *Ramanadham Chettiar v. Vada Leval Marakayar* (1909), 34 Mad. 12; affirmed (1916) 40 Mad. 116 (P.C.).<sup>10</sup> *Fatiha* primarily means opening. Secondly the word refers to the opening sura or chapter of the Quran. Reading the *Fatiha* forms part of almost every religious ceremony of the Mussulmans. Mr. Lane-Poole refers to it as the Lord's Prayer of the Mussulmans. Hence such ceremonies are frequently referred to as *Fatiha* ceremonies. In *Fakhruddin v. Kifayat-ullah* (1910) 7 All. L. J. 1093, 1097, Karamat Husain J. gives a description of what are popularly styled as the *Fatiha* and *Ura* ceremonies; pp. 1097-1099, and 1104, *et seq.*<sup>11</sup> Bail. I. 566.<sup>12</sup> *Ramchurni Luv v. Fatima Begam* (1915) 42 Cal. 938. See comment as to *Muharram* ceremonies.<sup>13</sup> Bail. I. 566 (*tit.* 31-32 of par. 2).

(b) for reading the Quran at graves,<sup>1</sup>—*sed quære*;

(c) for the rich alone;<sup>2</sup>

(d) for the performance of the 'Fatiha' and 'Urs' ceremonies.<sup>3</sup>

(3) According to the decisions prior to the Waqf Act "the creation of a family endowment" was held not to be "a religious and meritorious act"; nor "the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate, a charitable purpose," and neither was considered a valid object of a 'waqf.'<sup>4</sup> That view of the law is however not applicable to 'waqfs' made after the passing of the Waqf Act.

(4) The following are stated in the 'Fatawa 'Alamgiri' <sup>5</sup> not to be valid objects of 'waqf'; *sed quære*:<sup>6</sup>

(a) for mankind,<sup>6</sup>

(b) for the people of Baghdad and when they fail for the poor,<sup>6</sup>

(c) for reading the Quran,<sup>7</sup>

(d) for the students in a school,<sup>6</sup>

(e) for the teacher in a 'masjid.'<sup>6</sup>

(5) W transfers property to his son upon trust to support, out of its income, such of his descendants and kindred as might be in great want and in need of support, and subject thereto for certain charitable objects. The object of the 'waqf' being charitable, the 'waqf' is not invalidated by the provisions in favour of W's descendants and kindred.<sup>8</sup>

(6) W purports to make a 'waqf' of property yielding Rs. 850 per year, for the benefit (a) of his family, (b) for charities according to the custom of the family. Prior to the Waqf Act, it was held that if (i) the customary charities required the expenditure of Rs. 500 per year, the 'waqf' would be valid,<sup>9</sup> but if (ii) they did not entail more expense than was becoming in a Muslim family of the same social position as that of W to give in charity, then the 'waqf' would be void;<sup>10</sup> similarly it was held that it would be void if the amount to be expended

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*Illustrations.*

<sup>1</sup> *Kuloolia v. Nussardeen* (1894) 18 Mad. 201. Cf. *Zoolick Bibi v. Syed Zynud Abidin* (1904) 6 Bom. L. R. 1058; *Salehah Abdul Kader v. Bai Safah* (1911) 36 Bom. 111; *Bibi Jan v. Kalb Hussain* (1908) 31 All. 136.

<sup>2</sup> *Ball* 1, 566.

<sup>3</sup> *Fakhruddin v. Kifayat-ullah* (1910) 7 All. L. J. 1053, 1097-1099. *Urs* is separately dealt with on p. 1104 *et seq.*

<sup>4</sup> *Mujibunnissa v. Abdur Rahim* (1900) 23 All. 233; 28 L. A. 15.

<sup>5</sup> *Ball* 1, 566.

<sup>6</sup> The reason apparently is that rich and poor are alike to benefit under it; see ss. 483, 483, below.

<sup>7</sup> *Ball* 1, 566 (*ll.* 21-22 of *par.* 2), but it has been held otherwise, see *ll.* (1), (ii), above.

<sup>8</sup> *Deoki Prasad v. Masuduloh* (1892) 14 All. 375.

<sup>9</sup> *Phul Chand v. Albar Yar Khan* (1896) 19 All. 211, see next footnote.

<sup>10</sup> *Mahomed Ahmudulla v. Amarchand Kunda* (1880) 17 Cal. 198; 17 L. A. 23.

SECTION 480A. in charities is left entirely to the discretion of the 'mutawalli.'<sup>1</sup> These

*Illustrations.*

'waqfs' would be valid if governed by the Waqf Act.

(7) W purports to make a 'waqf' of four houses valued at Rs. 1,50,000, and appoints his son M 'mutawalli.' The declaration of 'waqf' provides (i) that W should have a right of residence in the largest house (valued about Rs. 1,10,000); (ii) that M and all succeeding 'mutawallis' (who were to be members of W's family) should have the same right; (iii) that W's wife, F, and her children should, subject to clause (vi) below, have the same right; (iv) that the rates, taxes, etc., be paid out of the income of the 'waqf' property; (v) that the net income should then be divided into three equal parts, to be spent respectively for (a) the repairs and maintenance of the 'waqf' property, (b) expenses of a mosque, (c) feeding of learned men from Mecca, Medina, Baghdad, Samargand, Bukhara and other places noted for learning; (vi) that the said house should, subject to the rights under clauses (i) and (ii) above, be for the accommodation of the said learned men; *held*, that the 'waqf' is valid.<sup>2</sup>

(8) W and Wa executed a deed purporting to be a 'waqfnama.' It commenced with an invocation to God, and proceeded to describe the objects of the 'waqf' as follows: "For the benefit of our children, the children of our children and the members and relatives of our family and their descendants in male and female lines, and in their absence for the benefit of the poor, and beggars and widows and orphans of Sylhet on valid conditions and true declarations hereinafter set forth below." Then W and Wa declared themselves to be the first 'mutawallis,' and that the 'waqf' properties were thenceforth taken out of their ownership and enjoyment in a private capacity, and that in order to maintain the name and prestige of their family they would make reasonable and suitable expenses according to their means and position in life. It was expressly stated that the objects of the 'waqf' was that "the properties may be protected against all risks and the name and prestige of the family, maintained," etc. There was no reference to religion except the invocation to God to perpetuate the family, and preserve the property and the casual mention of religious purposes, etc. There was a gift to the poor and to widows and orphans, but they were to take nothing,

<sup>1</sup> *Murjunnissen v. Abdul Rahim* (1900) 23 All. 235, 28 I. A. 15.

<sup>2</sup> *Kutson Bibi v. Golam Hossain* (1903) 10 U. W. N. 449, 485. Under Shiah law clause (i) would have invalidated it. See s. 486 (2), below. If there is a lack of learned men, and the object

of the *waqf* fails, "the court will, on being invited to do so, doubtless apply it *cy pres*. If the learned men come, and F and her children do not vacate the house for their accommodation, there would be a breach of trust for which the *mutawalli* may be removed."

not even surplus income, until the total extinction of the blood of the settlers, whether lineal or collateral. It was held prior to the Waqf Act *Illustrations*, SECTION 480A.

(a) that Muhammadan law was applicable to the case, but (b) the texts cited by Ameer Ali, J., in 'Mahomed Israel Khan v. Shasti Churn Chose' <sup>1</sup> and in 'Bikani Mia v. Shuklal Poddar' <sup>2</sup> were of an abstract nature and the precedents very imperfectly stated; and that there was not material enough to judge whether they would be applicable at all; (c) that there was no answer to the question how it came about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions, that is, of inalienable life-interests, were forbidden; and whether it was to be taken that the very same dispositions which were illegal when made by ordinary words of gift, became legal if only the settlor says that they are made as 'waqf' in the name of God, or for the sake of the poor, (d) that a charity postponed till all the members of a family are extinct cannot be held to be any real charity, or to validate a 'waqf' <sup>3</sup> without making words of more regard than things, and form more than substance, (e) hence, that in this case there was no substantial gift to the poor; for (f) a gift may be illusory whether from its small amount <sup>4</sup> or from its uncertainty and remoteness. <sup>5</sup> The 'waqf' would be saved by the Waqf Validating Act and would be declared valid if it were now before the Court and were governed by the Act (which is not retrospective).

(8) The income of property purported to be made 'waqf' of prior to the Waqf Act was Rs. 1,500 per annum, out of which Rs. 600 were to be devoted to charity and the rest to the family and descendants of the grantors. Their Lordships of the Privy Council upheld the 'waqf,' remarking that though only two-fifths of the income was devoted to charities, and three-fifths to the members of the family, yet (a) the figures may vary; (b) the income may fluctuate; (c) the number of people usually relieved may increase (as the only necessary qualification was that they should be Muhammadans and be poor; and they were not required to be inhabitants of any particular locality; and the

<sup>1</sup> (1892) 19 Cal. 412.

<sup>2</sup> (1892) 20 Cal. 116.

<sup>3</sup> As is done by Syed Ameer Ali, J., in the two cases cited above, and by West, J., in *Fatma Bibi v. Advocate-General of Bombay* (1881) 6 Bom. 68; and Farran, J., following it in *Amrullah Kalidas v. Shah Hussein* (1887) 11 Bom. 492.

<sup>4</sup> "As if a man were to settle a crore of rupees and provide ten for the poor, that would be at once recognized as illusory": P.C.

<sup>5</sup> *Abul Fata v. Rasmaya* (1894) 22 Cal. 619;

22 I.A., 76. Remoteness and uncertainty are thus referred to: "It is equally illusory to make provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position."

**SECTION 480A.** number would depend upon the distress prevailing amongst the Muham-  
*Illustrations.* madan population); (d) the expence of the 'fateha' would be increased by the death of the two grantees; (e) "the contention that because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is to give the property in substance to the family, and that, therefore, it is invalid as a deed of 'waqf' is, their Lordships think, entirely unsound." (f) Their Lordships also refused to accede to the argument that inasmuch as no particular sum was named which the trustees were required to spend on any or on all of the charitable objects mentioned in the deed, they may spend on them as much, or as little, as they pleased, and may, if they felt inclined, starve these charitable trusts and that, therefore, the provisions for charities were illusory: the Advocate-General or other authority having control over the administration of charities could in a Court of law compel them to do their duty and surrender administration of the trust fund.<sup>1</sup>

Judicial  
 decisions prior to  
 Waqf Act :  
 1. Charity  
     necessary.

The following dicta may be of interest as showing the trend of decisions leading up to 'Abul Fata's' <sup>2</sup> case: (1) "To constitute a valid 'waqf' there must be a dedication of the property solely to the worship of God or to religious or charitable purposes."<sup>3</sup> (2) There must be a substantial dedication to charity some time or the other.<sup>4</sup> (3) The instrument would not operate to establish 'waqf' as it did not devote a substantial part of the property to religious or charitable purposes; the property must be substantially and not merely colourably dedicated to such purposes.<sup>5</sup> (4) A mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the 'waqif' is not sufficient to validate the 'waqf'.<sup>6</sup> (5) A 'waqf' the "purpose of which is merely to create a family settlement without a charitable object is void."<sup>7</sup> (6) Questioned whether a family trust is invalid without express mention of a charity in favour of beneficiaries who cannot fail.<sup>8</sup> (7) Family settlements can only be valid when the term 'sadaqa' is used and even supposing they were then valid, the 'waqif' must reduce himself to a state of absolute poverty.<sup>9</sup> (8) If the condition of ultimate dedication to a pious and unfulfilling purpose be satisfied, a

2. Ultimate  
 charity will  
 validate  
 family  
 settlement.

<sup>1</sup> *Ramanadhan Chettiar v. Vasa Leelai Marakayar* (1916) 40 Mad. 119, 123, 121 (F.C.)

<sup>2</sup> See p. 557, n. 5.

<sup>3</sup> *Mahomed Hamidulla Khan v. Lotful Huq* (1881) 6 Cal. 744; 8 C.L.R. 164, in identical words; *Abul Ghaous Karam v. Hussain Miya Rahim-ullah* (1873) 10 Bom. H. C. R. 7.

<sup>4</sup> *Abdul Gafur v. Nizamuddin*, 17 Bom. 1; 19 L. A. 170.

<sup>5</sup> *Mahomed Ahsanulla Chowdhry v. Amarchand*

*Kundus* (1889) 17 Cal. 498; 17 I. A. 28.

<sup>6</sup> *Muhammad Munawar Ali v. Ramlal Bibi* (1899) 21 All. 329.

<sup>7</sup> *Fatma Bibi v. Arif Ismailjee Bhow* (1881) 9 C. L. R. 66.

<sup>8</sup> *Phale Sahab Bibi v. Damodar Premji* (1879) 3 Bom. 84; see s. 463, comment.

<sup>9</sup> *Mahomed Hamidulla Khan v. Lotful Huq* (1881) 6 Cal. 744; 8 Cal. L. R. 164.

'waqf' is not rendered invalid by an intermediate settlement on the founder's children and their descendants.<sup>1</sup> The 'Waqf' Act has now taken the law back to the ancient texts. SECTION 480A.

Dedication of one-third of the income to charitable purposes has been held to be a substantial dedication to charity.<sup>2</sup> Dedication of one-third.

The reservation of a life-interest in favour of the 'waqif' himself, and his creating life-interests in favour of others, fall under distinct heads; and different considerations apply to them: (1) The reservation of any benefit whatever, (whether consisting of a life-interest or otherwise) in favour of the 'waqif' is not permissible under any system of Muhammadan law except the Hanafi; and even under the Hanafi law it is valid only according to the exposition of Abu Yusuf—whose opinion, however, prevails, and is given effect to in the Waqf Act. According to all other schools he cannot participate in the benefit of the 'waqf' property, but must part with all interest in it. (2) Secondly, the creation of life-interests in favour of others than the 'waqif' have been attacked on two grounds: (a) on the erroneous assumption that life-interests are a kind of estate not known to Muhammadan law at all. But it is quite clear, apart from the question of the validity of life-interests created in modes other than by way of 'waqf,' that where a 'waqf' is declared for the purpose of making a family settlement, a series of life-interests are permitted under strict Muhammadan law. It might, prior to the Waqf Act, have been argued, however, that such life-interests are an integral part of the special branch of law relating to 'waqfs' for family settlements, and that the Privy Council ruling that a family settlement with an ultimate charity was not a valid object of 'waqf' abrogated all the law relating to family settlements, including the rule permitting the creation of life-interests in a 'waqf.' This would have been an extreme view, and it would not have been necessary to mention this argument but for some unguarded statements of an absolutely general nature about life-interests which are occasionally encountered in the reports. Another point suggested by some remarks in *Cassamally v. Currimbhai*<sup>3</sup> is (b) whether the creation of a series of life-interests would of itself have made the 'waqf' illusory or colourable under the decisions of the Privy Council. That would have depended on the extent and duration of the interests in each case. The 'waqf' would, in the words of the Privy Council, have been held to be valid, "if the effect of the deed is to give the property in substance

<sup>1</sup> *Fatmabibi v. Advocate-General of Bombay*  
(1881) 6 Bom. 42; followed *Amrutlal Kahidas*  
*v. Hussain* (1887) 11 Bom. 402.

<sup>2</sup> *Basul Ghann Mia v. Adah Patari* (1913)  
17 Cal. W. N. 1019.

SECTION 480A. to charitable uses. It will not be so if the effect is to give the property in substance to the family,"<sup>1</sup> or to individuals, or to objects that are not charitable.

After the passing of the Waqf Act the remarks in '*Cassamally v. Currimbhay*'<sup>2</sup> and the discussion in the last paragraph except with reference to the first point mentioned in it, are only of academical interest, at least as regards 'waqfs' to which the Act is applicable. It was submitted in the first edition of this work that some of the remarks in the last cited case required reconsideration. The Legislature has now set most of the questions at rest.

Muharrum  
ceremonies.

In illustration (1) (s) the expression "annual festival of 'Muharram,'" has been retained, as it occurs in the deed that the Court had to consider in '*Ram Charan Law's*' case.<sup>3</sup> But the word festival is singularly inappropriate for referring to the commemoration of the tragedy that took place in Muharram; and of which, in the words of Arnould, J.,<sup>4</sup> "the narrative" "is among the most pathetic in all history." "The noble son of Ali and Fatima, the favourite grandson of the apostle of God, after deeds of valour romantic even in an Arab of that age, fell pierced through and through with the arrows and javelins of the cowardly assailants who did not dare to come within the sweep of his arm. One of his sons and a nephew had already been slain in his sight. His other son, his wife and his sister were carried away captive to Damascus. They smote off the head of the son of Ali and paraded it in triumph through the streets of Cufa. As it passed along, the brutal Obeidollah, the Governor of the city, struck the mouth of the dead man with his staff. 'Ah' cried an aged Mussulman whom horror and just wrath made bold, 'What a foul deed is that!—on those lips I have seen the lips of the apostle of God.'"<sup>5</sup> In '*Ram Charan Law's*' case,<sup>3</sup> however, though the object of the 'waqf' seems to have been described as the celebration of a festival, the real purpose of the 'waqf' was the "observance of the Muharram," "the keeping up of Muharram as an institution with all its moral effect on the general public," which, as Imam, J., mentions in his judgment "entails the feeding of the poor, and the distribution of alms to the needy." He adds: "The dedication of the property to such use constituted the service of man and the good of humanity though to a limited section. Apart from the help to the poor and the needy, the commemoration of the historic events of

<sup>1</sup> *Majidunnisa v. Abdur Rahim* (1900) 23 All. 233, 242; 28 I. A. 15; *Ramanadan Chettiar v. Vasa Levedi Marakayar* (1910) 40 Mad. 110, 121, (P.C.).

<sup>2</sup> (1911) 36 Bom. 214, 247; 13 Bom. L. R.

717, 762, 763.

<sup>3</sup> (1915) 42 Cal. 933.

<sup>4</sup> *Advocate-General v. Muhammad Husen Huseni* (1896) 12 Bom. H. C. R. 323, 331.



Karbala, keeping alive as it does some of the best traditions of Islam, SECTION 480A. is to my mind as good a purpose as the followers of a faith can have."

Where, however, property is sought to be dedicated for the purpose of festivities being held during Muharram, that would not, it is submitted, be a valid object for a 'waqf' as it would be opposed to the sentiments of the followers of Islam.

481. When a 'waqf' is purported to be made expressing a general charitable intention, but either particularising no objects, or particularising objects that have failed, the property may, by an order of the Court, be devoted to the poor,<sup>1</sup> or to charitable objects as near to those that have failed, as possible.<sup>2</sup>

*Explanation I.*—A 'waqf' may be validly made generally for charity or for good objects, without specifying them, and it will be given effect to by the Court framing, if necessary, a scheme for a charity.<sup>4</sup>

*Explanation II.*—Where the object of a 'waqf' is to benefit a community of persons, holding particular religious tenets, it will enure for the benefit of the persons professing the religious tenets held by the said community in its origin, so long as they exist; and the secession of a number of persons originally forming part of the said community does not mean that the said object has failed, and will not affect the operation of the 'waqf,' notwithstanding that the said seceders form the vast majority of those who originally formed the said community.<sup>5</sup>

<sup>1</sup> *Muthukana Ana Ramnaadpan v. Vada Leveni* (1900) 34 Mad. 12, 17, where it was apparently left to the discretion of the trustees to fix portions of income to be spent in charity; and it was held that the law provides that each object should benefit equally.

<sup>2</sup> *Salehbi v. Bai Saliabu* (1911) 38 Bom. 111; 13 Bom. L. R. 1026; and see comment to s. 481. See also *id.*, to s. 480, above. Cf. "When the purpose of a *waqf* fails, it is lawful to apply the income of the *waqf* property to an object nearest in its nature to the original purpose (*qins-i-qarib*). For example, if the object of a *waqf* is a fountain the income may be applied to a tank or canal; if it is a mosque the income is to be applied to another mosque, or to fasting, prayers, etc."—

*Fatwa Qazi Khan*, III, 298; see also *Radd-ul-Mukhtar*, III, 574.

<sup>3</sup> *Bail*, I. 553 (II, 9-12), 558 (last 3 lines), 559 (par. 1, last 3 lines), II. 216 (last line), 217 (II, 1-2), *Fatmahbi v. Advocate-General of Bombay* (1881) 6 Bom. 42; (after specifying objects: the income to be spent in such other manner "as the trustees may think fit"); *Gangbai v. Thapar Mulla* (1863) 1 Bom. H. C. R. 71 (to be disposed of in charity as my executors shall think right).

<sup>4</sup> See s. 475, above.

<sup>5</sup> See *id.* (2) to this section; *Mahomed Ismail Arif v. Ahmed Moolia Dawood* (1916) 43 Cal. 1043, 1001.

## SECTION 481.

*Illustrations.*

(1) In the will of a Khoja Muhammadan, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects, by analogy to Act 43 Eliz. c.<sup>1</sup> Where, however, the will is in the native language, and the word 'dharm' or 'dharam' is used, the word is held too vague and uncertain for the gift to be carried into effect by the Court, the word 'dharm' or 'dharam' including many objects not comprehended in the word "charity" as understood in English law.<sup>2</sup>

(2) A<sup>3</sup> Shiah Isma'ili missionary, Pir Sadraddin, came to India about the middle of the 15th century, and converted to Islam a number of persons, who called themselves 'Khojas,' which means both "the honourable and worshipful persons" and "the disciples" [343].<sup>4</sup> The Khojas transmitted voluntary offerings out of religious feeling to the 'Imam' for the time being of the Isma'ilis, whom they revered as their 'murshid' or religious head, and made pilgrimages to Persia. They also paid to the 'Imam' fees on births, deaths, marriages, at new moons, etc., and people outside Bombay paid a percentage of their income, but out of these offerings and contributions (which were primarily paid to the 'Imam') the necessary local expenses of the various Khoja 'jam'ats were defrayed. With a few exceptions, the Khoja community would make no contributions at all for public or caste purposes except in the name and primarily on account of the 'Imam' [347].<sup>4</sup> The Aga Khan claims and is recognised by the Khojas to be the present 'Imam' [363]. Some of the Khojas having refused to pay the said percentage, they were outcasted; and re-admitted only on payment of it. Later the same members were out-casted a second time, as they opposed the Aga Khan on the question whether the Hindu or the Quranic law of inheritance governed the Khojas. In 1861 the Aga Khan published a paper asking the Khojas to profess openly the Shiah Imami Isma'ili creed, and no more to perform their "marriages, ablutions, and funeral ceremonies" [349]<sup>4</sup> in accordance with the Sunni forms, as they had hitherto done [350]<sup>4</sup> out of 'taqia,' i.e., mental reservation, or rather concealment of their own religious opinions, and adoption of alien

<sup>1</sup> See p. 591, n. 5.

<sup>2</sup> *Ganapathi v. Thavar Mulla* (1863) 1 Bom. H. C. R. 71. See the paragraph of the comment to s. 481, headed "Waqf in the way of God."

<sup>3</sup> *Advocate-General of Bombay, ex relatione, Daya Muhammad v. Muhammad Husen* (1866) 12 Bom. H. C. R. 328, known as the *Aga Khan's (First) Case*; cf. the "Scotch Kirk Case,"

*i.e., Free Church of Scotland v. (Lord) Overton* [1904] A. C. 515, 613-617, (per Lord Halsbury); 643-645 (per Lord Davey); *Ibrahim Esmail v. Abdul Carrim Furmamed* (1908) 13 Cal. W.W. 26 (F.C.); and *Mahomed Ismail Ariff v. Ahmed Moolle Daswood* (1916), 43 Cal. 1085, 1101 (F.C.).

<sup>4</sup> Pages of 12 Bom. H. C. R. are cited in [ ].

religious forms, either from a desire to avoid giving offence, or from dread of persecution [335, 355-357], and to sign in a book their adherence to that sect. The vast majority of the Khojas signed accordingly; the only exceptions being (a) a few families in Bombay who said that they were Sunnis, and (b) others in Bhavnagar who said they were already Shiah, and there was no need to sign the book. The former were excommunicated, after being given an opportunity to pay the fees, and to agree to abide by the rules framed by the whole Jama'at, and they accordingly instituted a suit for an account against the 'mukhi' (treasurer) and 'kamaria' (accountant) of the Khoja community of all property held in trust by them for or belonging to the Khoja community, for their removal; for a declaration that no person professing Shiah opinion in matters of religion can share in the said property, or have any voice in its management; for a scheme; and for an injunction against the Aga Khan interfering with the said trust property, and in the affairs of the Khojas. *Held*,<sup>1</sup> that when the Court in the exercise of its charitable jurisdiction is called upon to adjudicate between the conflicting claims of dissident parties in communities held together or distinguished by some religious profession or denomination, the rights of the litigants will be regulated by reference to what, upon inquiry, turn out to have been the religious tenets and opinions held by the community in its origin, or at its foundation. A minority, however numerically small, holding fast by these opinions, will be entitled to prevail against a majority, however numerically large, which can be shown to have seceded from, or renounced them [329]. Hence the suit was dismissed with costs.<sup>2</sup>

1. 'CY PRÈS' DOCTRINE IN MUHAMMADAN LAW.

With illustration (1) to this section compare the following: "Where a person has made an appropriation 'in the way of God' it is applied to whatever is productive of reward in a future state, such as religious warfare, the greater and lesser pilgrimages, and the erection of 'musjids' or places of worship, and bridges. So also, if he should say, 'in the way of God, and way of rewards, and way of good,' the purposes are all considered as one and the same, and there is no necessity for dividing the proceeds of the 'waqf' into three different parts."<sup>3</sup> "The 'Sirajul-Wahaj' states that 'when a person constitutes a 'waqf' generally without designating the object to which it should be applied, it is lawful—and this is correct,'—and then goes on to say that there are several words

the way of God or for charity in general.

The object of the 'waqf' need not be mentioned, and where a clear intention is shown to make a 'waqf' it will be

<sup>1</sup> Citing *Shore v. Wilson* (1839) 9 Cl. & Fin. 355.

<sup>2</sup> *Advocate-General v. Muhammad Hussain*

(1866) 12 Bom. H. C. R. 323.

<sup>3</sup> *Ball. II. 220.*

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applied for  
the benefit of  
the poor.

which are express in their meaning and the use of which clearly constitutes a 'waqf' because they convey in themselves the intention to dedicate, for example, 'waqafto,' 'haramto,' 'habasto,' 'sabalto,' etc. 'I have dedicated,' 'I have consecrated,' 'I have tied up,' 'I have given in the way of God'<sup>1</sup> . . . According to the 'Wajiz-ul-Muhit,' if a man were to say "this my land is 'mouqoofa' (dedicated) or 'muharrama' (consecrated) or 'mahhoosa' (tied up)," it would constitute a valid 'waqf' according to Abu Yusuf, and this is most correct, for he (the 'waqif' ) has mentioned 'waqf' unrestrictedly<sup>2</sup> and an unrestricted 'waqf' is for the poor by custom and practice, and what is customary is as if conditioned."<sup>3</sup>

'Cy près'  
doctrine.

The first sentence of the following passage from the 'Sharaya'-ul-Islam hardly differs from a statement of the 'cy près' doctrine of English law: "If one should make an appropriation for a 'maslahat,' or object of general utility, which has ceased to be used, it is to be applied to any good and pious purpose, and if it is for such purposes generally, it is to be expended on the poor and indigent and in any other way by which an approach is made to Almighty God."<sup>4</sup> Mr. Justice Abdur Rahim has stated the same principle in the following terms as applicable to Hanafi law: "If however the specified objects be limited or happen to fail, but a general charitable intention is to be inferred from the words of the grant, the waqf will be good and the income or profit will be devoted for the benefit of the poor, and in some cases to objects as near to the objects which failed, as possible. This rule is analogous to the doctrine of 'cy près' of the English law."<sup>5</sup>

'Waqf' for  
specified object  
of general  
utility.

In 'Muthukana Ana) Ramanaidham v. Vada Levvai'<sup>6</sup> there is a careful and instructive judgment (by Benson and Abdur Rahim, J.J.) citing texts and stating the result of the law of 'waqfs' prevailing in India under the decisions of the Privy Council<sup>7</sup> prior to the Waqf Act. It was held, in effect, that the 'waqf' purporting to be for family purposes, and concurrently for charities, (1) it must be assumed that each object was intended to benefit equally, (2) that benefiting the family not being a valid object of 'waqf' under the said Privy Council decisions it cannot be given effect to, and (3) therefore the whole benefit must accrue to the charity. On the second point the judgment will not prevail with reference to 'waqfs' governed by the Waqf Act. As to the third

<sup>1</sup> Amerr Ali, I. 149.

<sup>2</sup> *Id.*, without defining its objects.

<sup>3</sup> Amerr Ali, I. 150 (par. 2).

<sup>4</sup> Bail. II. 216 (par. 3).

<sup>5</sup> Abdur Rahim, "Muhammadian Jurisprudence," 305, cited with approval in *Salehahi*

*v. Sufiaba* (1911) 36 Bom. 111; 13 Bom. L. R. 1025, and see illustrations to c. 481.

<sup>6</sup> (1090) 34 Mad. 12.

<sup>7</sup> *Abul Fata v. Ramaswami* (1891) 22 Cal. 619; 22 I. A. 76.

point, with the greatest deference it is submitted whether the judgment is correct. On the view of the law which the Court had to follow, the texts that are cited in the judgment were, it is submitted, not directly applicable—inasmuch as they proceed on the basis that provisions for members of the family are not only valid objects of 'waqf' but show a general charitable<sup>1</sup> intention. Now in view of the law laid down by the Privy Council prior to the Waqf Act, where and in so far as such provisions were concerned, the property charged with them ought to have been held not to be the subject of a 'waqf' at all—and no general charitable intention being shown about such dispositions, the doctrine of 'cy près' ought not to have been applied to them. Were the Madras decision correct, the subject of all the 'waqfs' which had been upset by the Privy Council would have been totally and exclusively applied for the benefit of the poor, or the other illusory ultimate charity for which they were purported to be made. There are decisions of the Calcutta and Bombay High Courts<sup>2</sup> which support the view submitted above; they do not seem to have been brought to the notice of the Madras High Court, nor is the decision of that Court cited in the last case on the point decided in Bombay.

The following illustration taken from the 'Fatawa 'Alamgiri,' seems to be directly opposed to the principle on which are based the rulings that bequests to 'dharam' by Hindus are void: "Suppose a non-Muslim makes a 'waqf' for 'good objects,' now in his opinion building temples, or repairing a fire temple, or giving by way of 'sadaqa' to the poor, would equally be good objects; hence the proceeds will be devoted to the poor, and the other objects will be rejected. This is in the 'Havi.'"<sup>3</sup> This difference again illustrates the distinction between the powers of the Qazis and of the British Courts. The Courts constituted in British India are apt to renounce jurisdiction in such cases on the ground that their function is to construe and to give effect to dispositions, and not to draft grants or make wills for individuals. The 'cy près' doctrine is, however, a recognized exception even in England to this self-denying ordinance.<sup>4</sup>

<sup>1</sup> This word is misleading: strictly we should say "general intention to make a waqf." The argument underlying the Privy Council decisions was that waqf implies charity, hence an intention to make a valid waqf must include a general charitable intention, and where it is clear that the only intention is to make family provisions, it was held by the Privy Council that no charitable intention is shown—hence no intention to make a waqf is shown. Under the Waqf Act, however, providing for the family is a charitable object; hence waqfs making provisions for the

family are not obnoxious to this requirement of the law.

<sup>2</sup> *Bikani Mia v. Shuk Lal Poddar* (1892) 20 Cal. 118 (F.S.); *Mahomed Hassan v. Mahomed Ibrahim* (1908) 5 Bom. L. R. 324; *Abdul Rajak v. Bai Jeevatbai* (1911) 14 Bom. L. R. 295.

<sup>3</sup> *Fatawa 'Alamgiri, Waqf*, Ch. I.; Cf. Ball. I. 563 (II, 5, 10 et seq.) See *id.* (1) to s. 481 and *Runchordas v. Parvatibai* (1899) 23 Bom. 735.

<sup>4</sup> See *Lewin on Trusts*, Ch. IX., s. 7, *seventhly*, which is referred to more particularly in the comment to s. 481, below.

Quæres whether 'cy près' doctrine can apply where and in so far as 'waqf' for family.

Bequest to 'dharam' void for uncertainty.

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Muhammadian law permits diversion of funds for any kind of benefit to the poor.

## 2. DISTINCTION BETWEEN ENGLISH AND MUHAMMADAN LAW.

A distinction must be observed between Muhammadan and English versions of the doctrine of 'cy près,'—the former requires the income allotted to objects that have failed to be devoted to the poor;<sup>1</sup> whereas the doctrine of English law is that it will be applied as near as possible to the object specified by the donor.<sup>2</sup>

The distinction might in itself not have been of great importance, for the rule of Muhammadan law that the 'waqf' property should in certain events be devoted to the poor, may be paraphrased as implying that the property may be applied in any charitable manner whatever; thus merely leaving a wider discretion to the 'Qazi,'<sup>3</sup> as is the case in most other matters.<sup>4</sup> Even under the rule of English law, where no charity can be found bearing a similarity to the original object, the fund will be devoted to a purpose that has no trace of resemblance to it.<sup>4</sup> The distinction, however, leads to the consideration which is more fully dealt with below, viz., whether the Muhammadan law (so far as its enforceability in the Courts of British India are concerned) defeats its purpose by being so wide as to be incapable of being enforced by the Courts as constituted in British India.

## 3. OPERATION OF 'WAQF' FOR GOOD OBJECTS GENERALLY.

Trust for unspecified charity.

Sir Roland Wilson remarks, with reference to the consideration just referred to, as follows:—"The assertion in Ameer Ali's 'Mahomedan Law,' note i, p. 325, that the principle laid down in 'Morice v. The Bishop of Durham' is not applicable to trusts or consecrations under that law, seems to be founded on a misapprehension of the principle, which, if rightly understood, is seen to be involved in the very nature of civil jurisdiction."<sup>1</sup> Then he says that if a trust "for good purpose unspecified" is construed as exempting the trustee from all judicial control, it is no trust at all, but a beneficial bequest to him personally. If, on the other hand, it is construed (with Syed Ameer Ali) as empowering the 'Hakim' (ruler or Court) to frame a scheme at his own discretion, "it is to confer upon the officer so designated a function which is not

<sup>1</sup> Cf. ss. 469, 472, above.

<sup>2</sup> *Re Lambeth Charities* (1853) 22 L. J.; (C.R.) 959; *Mogridge v. Thakwell* (1802) 7 Ves. 36, 69; *Mills v. Farmer* (1815) 1 Mer. 55. *A.-G. v. Bristol Corporation* (1820) 2 Jac. & W. 294, 308; *Chamberlayne v. Bruckett* (1872) 8 Ch. 206; *A.-G. v. Price* (1908) 24 T. L. R. 768, *Re Prison Charities* (1878) L.R. 16 Eq. 129, 146.

<sup>3</sup> See the Introductory chapter of this

work, and comment to s. 11A, above, and cf. Ameer Ali, I. 300: "If there are no provisions in the *waqf-nama* for the carrying out of the purposes of the trust, the Kazi or Judge has absolute discretion to frame a scheme"—citing *Kinaiat-ul-Munir*.

<sup>4</sup> *A. G. v. Boulton* (1794) 2 Ves. 388; *Olepham v. Edinburgh Corporation* (1869) L.R. 18c. & Div. 417, 421.

judicial but administrative; it is to make the so-called 'waqf' in effect SECTION 481. a bequest to the State—only that the State is to estimate the goodness of different purposes by a Muhammadan standard. If this is really the Muhammadan law it is outside the province reserved for that law in British India." But it is submitted that illustration (1) to this section shows both that it is the Muhammadan Law, and that it is enforceable in British India. And, quite apart from the question whether or not the Muhammadan law is capable of being enforced in British India there is a great distinction under strict Muhammadan law between giving a person an absolute beneficial interest in property, and giving it to him by way of 'waqf,' leaving it at the same time to his discretion to spend it in good purposes unspecified, or even for his own benefit; for, as soon as property becomes 'waqf,' it becomes inalienable, and the interest of the trustee—or rather, in the case in point, of the grantee—would then be restricted to his life-time. It becomes something like an entailed estate. This portion of the law is no doubt a dead letter in India owing to the decisions of the Privy Council. But what Sir R. Wilson refers to as the second horn of his dilemma, appears to the present author to be based on an oversight of the "distinction [which] was taken by Lord Hardwicke, Chancellor, that where the devise is to a superstitious use, and made void by statute, or to a charity, and made void by statute of mortmain, there it should belong to the heir at law; but where it is in itself a charity but the mode in which it is to be disposed, is such that by the law of England it cannot take effect, . . . there the Crown, by sign manual, directed to the Attorney-General, may give orders in what charitable manner it shall be disposed."<sup>1</sup>

The point is made very clear in Lewin on Trusts,<sup>2</sup> Ch. IX, s. 1, under the last (seventh) remark applicable to resulting trusts generally where it is 'noticed that settlements to *charitable* purposes are an exception from the law of resulting trusts;<sup>3</sup> for upon the construction of instruments of this kind, . . . (i) where a person . . . expresses a general intention of charity, but either particularises no objects, or such as do not exhaust the proceeds, the Court . . . will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied; (ii) where . . . in consequence of an increase in the value of the estate an excess of the income subsistently

General  
intention  
of charity  
but no object  
particularised

<sup>1</sup> *DeGosse v. DePas* (1754) Amb. Part I. p. 228.

<sup>2</sup> Lewin, "Trusts" (12th Ed. 1911), 481.

<sup>3</sup> *Morice v. Bishop of Durham* (1805) 10 Ves. 522, having been cited for the proposition that when the intention not to benefit the grantee

is expressed on the trust, but no trust is declared, there is a resulting trust, Lewin, 198. In that case Lord Eldon carefully distinguished *liberality* (the word used by the testatrix) from *charity*, saying at p. 530: "the meaning of liberality is so extensive that it is impossible to define it."

**SECTION 481.** arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner, with the original amount; (iii) but even in the case of charity, if the settler does not give the land or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir at law, or will belong to the donee of the property subject to the charge, if the donee be [as in the case of a charitable corporation] itself an object of charity."<sup>1</sup>

Settlement of  
scheme.

Lord Hardwicke's remark cited above and the first of the exceptions referred to in *Lewin on Trusts*, seems to cover the case under consideration where the general intention to devote the property to 'waqf' is expressed but the particular objects are not specified. It is submitted that the Muhammadan law does not differ on this point from English law; nor does the difficulty that the State should estimate the goodness of different purposes by a Muhammadan standard seem unsurmountable. The Advocate-General is the guardian of all charities, and he has the power, or, if he has not, he can be empowered, to take the assistance of the community in arriving at a decision, and in preparing the scheme which he has to lay before the Court; or the Court can take evidence on the point.

Resulting  
trusts and  
doctrine of  
'cy près.'

Referring to the exceptions cited above, it has been said<sup>2</sup> "that they were established [in England] at an early period when the doctrine of resulting trusts was imperfectly understood. The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and the trustee. Were the subject still unprejudiced by authority there is little doubt but the Court would at the present day follow the general principle, and hold a trust to result."<sup>3</sup> These remarks apply perhaps with less force to the Muslim doctrine of 'cy près' in a 'waqf' for here the case may be considered more nearly analogous to that of a gift to a charitable corporation to which *Lewin* refers in the last sentence of (iii) cited above.

## (2) What are not Valid Objects of 'Waqf.'

**482.** A 'waqf' cannot be made for an object that is prohibited by Islam.<sup>3</sup>

*Explanation I.*—A 'waqf' cannot be made for the

Object  
prohibited by  
Islam.

Erection of  
churches and  
temples forbidden.

<sup>1</sup> See p. 597, n. 2.

<sup>2</sup> *Lewin*, ("Trusts," 12th Ed. 1911) 188.

<sup>3</sup> See comment.



erection, repair or support of a place of worship in accordance with the tenets of a religion other than Islam.<sup>1</sup>

*Explanation II.*—The benefit of no human being is prohibited by Islam, notwithstanding that the said person be a non-Muslim, or an apostate; provided that he is not the subject of a hostile State.<sup>2</sup>

Benefit of human being always lawful object.

The section is based on the following passages: "It is a further condition that there be a nearness, that is, some relation between the appropriator ('waqif') and the objects of the appropriation,"<sup>3</sup> and then as instances it is mentioned that a Muslim cannot make a 'waqf' for a church or a temple: nor a 'zimmi' for the enemy. As the Muhammadan law applies only to Muslims in British India, they alone can make 'waqfs,' and therefore 'waqfs' must have 'nearness' to Islam. But according to strict Muhammadan law non-Muslims may make a 'waqf' for purposes "which have nearness to themselves"—though they may not for a temple or "house of fire."<sup>4</sup> "Even though he should make the 'wukf' to his son and his descendants, and then to the poor, on condition that if any of his children become Mooslims they shall be excluded from the charity, the condition would be binding; so also if he should say whoever turns to any other religion than Christian is excluded, regard would be paid to the condition. It is stated in the 'Fatawa' of Aboo Leith that when a Christian makes a settlement ('wukf') upon his children and his children's children for ever, so long as there are any descendants, or makes the ultimate destination to the poor as is customary, and some of his children become 'Mooslim' they are nevertheless to receive."<sup>5</sup>

Necessity of 'nearness' between the 'waqif' and the object of 'waqf.'

'Waqf' by a non-Muslim.

"A 'Muslim' cannot make a settlement on an alien enemy, though a blood relation; but he may make it on a 'zimmi' or infidel subject, even though a stranger or in no way related to him. Yet an appropriation by him for Jewish synagogues or Christian churches is not valid. So also if he should make an appropriation in favour of fornicators or highway robbers, or drinkers of wine or for the copying of what are now called the 'Towreet' and 'Injeel' (the Law and Gospels), for they are altered and perverted versions. But if the appropriation were by an infidel it would be lawful."<sup>6</sup> See comment to s. 456, above.

Valid so long as object not opposed to Islam.

<sup>1</sup> See comment

<sup>2</sup> Ball. II. 215; see comment

<sup>3</sup> Ball. I. 552, 553.

<sup>4</sup> Ball. I. 523 (H. 27-30).

<sup>5</sup> Ball. I. 552.

<sup>6</sup> Ball. II. 215 (par. 3).

**SECTION 482.** *Explanation II* is based on the first sentence above cited, and the following passage: "A 'wukf' in favour of a 'zimmee' or infidel subject is lawful, because it is a transfer of property, and is like a permission to take the usufruct. Some say, however, that it is not valid because it implies a pious intention, and is good only when made for the benefit of a parent; while others maintain that it is good when for the benefit of any relative. But the first opinion (which sustains it generally) is the most approved. So also a settlement in favour of an apostate is valid, while there is some doubt as to one in favour of an alien enemy, the more approved opinion being entirely against it."<sup>1</sup>

If no objects  
mentioned: in  
Shiah law void.

483. (1) Where a declaration of 'waqf' is purported to be made, but its objects are not mentioned, under Shiah law the 'waqf' is void.<sup>2</sup>

Quers in  
Sunni law:

(2) According to Abu Yusuf's exposition of Hanafi law, making a declaration of 'waqf' is conclusive proof for inferring a general charitable intention under s. 481, above; but, *semble*, the Hanafi law as enforced in British India<sup>3</sup> is to the same effect as the Shiah law above referred to.<sup>4</sup>

The first subsection is based on the following translation from the 'Sharaya-ul-Islam': "If a man should make an appropriation without mentioning its objects, the appropriation would be void. So also where the objects are not distinctly specified, as if he should say, 'for one of these two, or for one of the two "nashids";' or 'two "fureeks,"' the whole would be void."<sup>5</sup> And it has been held by the Punjab Chief Court that the object of a 'waqf' should be certain, otherwise it will fail.<sup>6</sup>

Option to the  
'mutawalli' to  
give to one of  
several objects.

On the other hand it is laid down in the 'Fatawa'Alamgiri' that where "a man makes a 'wukf' of his estate, on condition that the administrator may give the produce as he pleases, this is lawful, and he may give it to rich and poor. If he should say 'on condition that such an one may give the produce to whomsoever he pleases,' it is lawful, and the power may be exercised during the life of the appropriator, and after his death."<sup>7</sup> A disposition in such terms would no doubt have been construed in British India under the decisions of the Privy

<sup>1</sup> Ball. II. 217 (par. 2).

<sup>2</sup> Ball. II. 217 (par. 3); cf. s. 36, above.

<sup>3</sup> Cf. s. 458, above.

<sup>4</sup> *Shahabuddin v. Sohan Lal* (1907) 42 Punj. Rec. 389 (No. 75, Civ. Juts.). See also *Advocate*

*General v. Hormusji* (1905) 29 Bom. 375; *Salehahai Abdul Kader v. Bai Saifabu* (1911) 36 Bom. 111.

<sup>5</sup> Ball. II. 217 (par. 3).

<sup>6</sup> Ball. I. 588.

Council prior to the Waqf Act as an absolute gift to the donee with SECTION 483. void conditions against alienation, etc., though in a case where a general charitable intention is declared, the doctrine of 'cy près' would be applicable. The principle of Hanafi law, at least as expounded by Abu Yusuf, is (to paraphrase it into the language of English law) that by the very declaration of 'waqf' a general charitable disposition is shown. Prior to the Waqf Act this was not the law enforced in British India; but even apart from the 'Waqf' Act, where there are other circumstances besides the mere declaration of 'waqf' showing a general charitable intention, the question might be considered open. It cannot, however, be pressed too far without an argument in a circle; for, if once it is held that there is the intention to create a 'waqf,' it must imply that there is an intention to devote the property ultimately to some purpose recognised by the Musulman law as religious, pious or charitable. Abu Yusuf is inclined to consider the mere use of the word 'waqf' as conclusive evidence of the intention to make a 'waqf'; and that is not the law in British India.<sup>1</sup> On the other hand, Abu Yusuf's view that the ultimate benefit of the 'waqf' property need not be expressly reserved for the poor, but may be impliedly so reserved, has been accepted by the Legislature, and it may be argued that inasmuch as in the case of a 'waqf' commencing with provisions for the 'waqif' and his family, the Legislature permits the benefit to be impliedly reserved for the poor, the same rule should be applied to a 'waqf' where there are no individual beneficiaries. These questions are however not likely to arise in British India in the form in which they are considered in the ancient texts.

484. A 'waqf' cannot be made for the repairs and upkeep of a private tomb;<sup>2</sup> provided that the tomb of a saint may be the object of a 'waqf.'<sup>3</sup>

W purports to dedicate certain movable and immovable properties for the upkeep of her husband H's tomb, and for the expenses of lighting,

<sup>1</sup> See s. 458, above.

<sup>2</sup> *Kaloolah Sahib v. Nuseeruddeen Sahib* (1894) 18 Mad. 201; *Maon. App.* 423, No. 36, citing *Bel. Rep.* L. 17. (1867); cf. *Zoolaka Bibi v. Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058; followed in *Salehbi v. Bai Saifabu* (1911) 36 Bom. 111; (*Muthukana Ana*) *Ramanatham v. Vada Lina* (1909) 84 Mad. 12, 16, 17; (*Musamat*) *Zinat Bibi v. (Musamat) Ainna & Karam Din* (1917) 52 Punj. Rec. 421, 423 (No. 107); *Kheaja Mahomed v. Kheaja Muhammad*

*Hamid* (1917) 52 Punj. Rec. 120, 137 (No. 33). Cf. "If the waqif purports to direct that the Quran be read for ever over his grave, the direction may be disregarded." *Bahr-ur-Raiq*, V. 246.

<sup>3</sup> Cf. *Futloo Bibi v. Bhurru Lal Bhukul* (1868) 10 W. R. 290; *Deiroos Banoo Begum v. Asghur Ali* (1875) 15 Bom. L.R. 167; (*Musamat*) *Zinat Bibi v. (Musamat) Ainna & Karam Din* (1917) 52 Punj. Rec. 421, 423 (No. 107).

Private tomb  
not valid  
object.

Illustration.

**SECTION 481.** frankincense, flow etc. and salaries of repeaters of the Quran, and readers of benediction, etc., as well as for the annual 'fatiha' ceremonies of H. and after W's death for her annual 'fatiha' ceremony. A traveller's inn was erected by W as an appurtenance to the tomb, and the performance of the ceremonies necessarily involved the distribution of charity and the lights at the tomb were of use to the passers-by; held (reversing Davies, J.) that no valid 'waqf' was created.<sup>1</sup>

**Tombs as property.** Tombs, as such, cannot under Muhammadan law, be owned. While Islam exacts special reverence for the remains of the dead, it strongly disapproves of any proprietary rights in them, and rejects as superstitions, ceremonials, etc., on the tomb. Tombs, however, are occasionally spoken of even in the reports of judgments as property.<sup>2</sup> This may be excusable as tombs do sometimes produce a sort of income, consisting of the offerings made at them by visitors or so-called pilgrims. It is clearly in the interest of those having some kind of connection with or control over tombs to encourage such offerings being made. But there is no doubt about the attitude of Muhammadan law with regard to such practices.<sup>3</sup>

### (3) 'Waqf' for Individual Beneficiaries.

#### (a) Competence to be Beneficiaries under a 'Waqf.'

1. Individual beneficiaries under 'waqf.'

**485.** (1) According to Shiah and Shafi'i law, subject to ss. 480 and 482, above, the beneficiaries under a 'waqf' must be (a) in existence,<sup>4</sup> (b) competent to hold property,<sup>5</sup> and (c) distinctly indicated,<sup>6</sup> at the time when the 'waqf' is made, otherwise it is void.<sup>4</sup>

*Explanation.*—Where the 'waqf' purports to be for

<sup>1</sup> *Kaleetola Sahib v. Nuseerudeen Sahib* (1894) 18 Mad. 201; cf *Zoolekha Bibi v. Zeinul Abidin*, (1904) 6 Bom. L. R. 1058.

<sup>2</sup> See, e.g., *Musamat Zinat Bibi v. (Musamat) (Aisina) & Karam Din* (1917) 52 Punj. Rec. 421. (No. 107).

<sup>3</sup> See, e.g., the *Mishcat-ul-Masabih*, cited in *Kaleetola Sahib v. Nuseerudeen Sahib* (1894) 18 Mad. 201.

<sup>4</sup> *Ball. II.* 214-215. The following passage from *Amr al-Il.* § 22 (based on Hanafi authorities) illustrates the point: "The object of a *waqf* may be non-existent in two ways:—Firstly, the beneficiary may be non-existent when the *waqf* is made, when it is called *waqf muntaka-ul-awwal* (cut off initially); and secondly, the persons for whom the *waqf* is made, may cease to exist after the creation of

the *waqf*, when it is called *waqf muntaka-ul-wasat* (cut off in the middle). Examples of both classes are given by *Kazi Khan*, e.g., a man makes a *waqf* for the children born of his loins; if he has no children at the time, it is *waqf muntaka-ul-awwal*, and the rents and profits will be applied to the poor." (*Kazi Khan* IV. 87) "If children are born to him afterwards then the rents and profits will be paid to them." "Similarly as stated in the *Amd* where a settlement is made in favour of one's *walat* (child) and there is no *walat* existing at the time, but there is a grandson, the income of the *waqf* will be given to the grand-child until a child is born to the *walat*," citing *Raddul Mukhtar*, III. 341.

<sup>5</sup> *Ball. II.* 215 (II. 5-12).

<sup>6</sup> *Ball. II.* 217 (par. 3).

the benefit of a series of persons succeeding one another, SECTION 485. it is (in accordance with Shiah and Shafi'i<sup>1</sup> law) valid if the person who is entitled to its benefit in the first instance is at the time of its declaration<sup>2</sup> in being, and competent to take beneficially under a 'waqf,'<sup>3</sup> and notwithstanding that a succeeding beneficiary is not in being or otherwise not competent to take beneficially under a 'waqf.' Where the said person is not in existence at the same time, or is incompetent to own property<sup>4</sup> [or is incompetent to be a beneficiary under a 'waqf,' under this section<sup>5</sup>] in accordance with what is stated in the 'Sharaya'-ul-Islam' to be the more approved Shiah opinion, the 'waqf' fails, notwithstanding that the next succeeding beneficiary under it is in existence,<sup>6</sup> or is competent to own property [and to be a beneficiary under a 'waqf,'] *sed quere*.<sup>7</sup>

(2) According to Hanafi law, where a 'waqf' is pur- (Hanafi law).  
ported to be made in favour of a person who is not in being, or who cannot be ascertained at the time of the declaration, the benefit of the 'waqf' will, until the time (if any) when the said person comes into being, or can be ascertained, go to the poor or to the other religious, pious or charitable object to which the 'waqf' property is dedicated, or, *semble*, to the next object mentioned in the dedication as being entitled to succeed to the benefit on failure of the said person. After the time when the said person comes into being or can be ascertained, it will accrue to the benefit of the said beneficiary.<sup>8</sup>

*Explanation.*—According to Hanafi law a child is con- sidered to be in existence at the time of the declaration

<sup>1</sup> *Musaj*, 231 (Bk. 23, s. 1) where it is said that a *wasf* made without designating an original beneficiary capable of enjoying it immediately is void; (e. g., "in favour of the child I shall have"); but a *wasf* is valid when one of the intermediary beneficiaries does not exist.

<sup>2</sup> See p. 602, n. 4.

<sup>3</sup> Cf. *Mahomed Ahsanulla v. Amarchand*

*Kand* (1889), 17 Cal. 408; 17 I.A. 28.

<sup>4</sup> The instance given is that of a slave.

<sup>5</sup> This is not expressly stated.

<sup>6</sup> See the footnotes to s. 485 (1).

<sup>7</sup> There might be great difficulty in taking this view of the law and the Court may elect to follow a different view as it is empowered to do: see s. 11A, above.

<sup>8</sup> See comment.

SECTION 485. of 'waqf' if it is born six months thereafter ;<sup>1</sup> *quaere* whether the Shiah law is to the same effect.<sup>2</sup>

(3) *Quaere* whether in regard to 'waqfs' to which the Waqf Act does not apply the rules mentioned above apply to any, and if so, to what extent.

Subsection (2), above, states what seems to be the principle of the following: "If one should make a settlement on the heirs of Zeyd, and Zeyd is living, there is nothing for his heirs, and the whole produce passes to the poor. But if Zeyd should die, the whole of the produce must then be divided among his existing heirs, according to the number of them, males and females sharing alike, and if some of them should die, their shares would belong to those alive at the time of the coming of the produce; while if only one survived, half of the produce would be for him and the other half to the poor."<sup>3</sup> If instead of the heirs, he should say 'the children of Zeyd, being such an one, and such an one,' naming them up to five, none but the five would be entitled, and if a child were born subsequently he would have no share."<sup>4</sup>

(b) *The 'Waqif' as a Beneficiary.*

2. The 'waqif' may be beneficiary under his own 'waqf' under Sunni law.

486. (1) A 'waqf' may, subject to s. 480, above, be validly constituted according to Hanafi law in favour of the 'waqif' in the first instance,<sup>5</sup> and then for other beneficiaries, or in favour of the 'waqif' after other beneficiaries named therein.<sup>6</sup>

Not under Shiah law.

(2) According to Shiah law the 'waqif' cannot reserve to himself any benefit under the 'waqf';<sup>7</sup> provided that

<sup>1</sup> Bail. I. 568 (par. 3 last sentence).

<sup>2</sup> The *Shariya-ul-Islam* seems to point the other way: Bail. II. 214-215.

<sup>3</sup> Bail. I. 574 (par. 3). Cf. "Where a *waqf* is declared for the benefit of Zaid's children, (and Zaid has no children existing at the time) or for a *masjid* which has not been erected, the appropriation is valid, and the rents and profits will be applied to the support of the poor, until children are born to Zaid or the *masjid* is erected."—*Fatawa Qazi Khan*, III. 316. Syed Ameer Ali (I. 322) cites a passage to the same effect from the *Raddul Mukhtar*, 641, which refers to the *Imadis* for the proposition, and then continues: "In the *Nahr-ul-Fakih* it is stated further, that when the object for which the settlement is made has not come into actual existence, but the purpose can be carried into effect, the rents and profits will be applied to that purpose so far as it is possible to do so. For example, when a man makes a grant

for the support of students of a *madrasa* which has not been erected, if lectures are given to students in any other building, such students are entitled to support from the *waqf*."

<sup>4</sup> Bail. I. 574-575

<sup>5</sup> *Fatmabibi v. Advocate-General of Bombay*, (1881) 6 Bom. 42.

<sup>6</sup> Bail. I. 567, 585-586; Hod. 237 (col. 1, par. 6); *Zuchmiput v. Ameer Alum* (1882) 9 Cal. 176; 12 Cal. L.R. 22.

<sup>7</sup> Bail. II. 128 (par. 3) Imam Muhammad held the same view: Hod. 237. In *Kalib Hussein v. Mehrum Beebe*, (1872) 4. N. W. 155; the *waqif* purported to reserve to herself for life two-thirds of the income of the *waqf* property, and devoted the rest to charitable and religious purposes; the reverendary *waqfs* as to the two-thirds were held void. The decision would be different under the Waqf Act unless the transaction is governed by Shiah law.

where the beneficiaries consist of a class of persons, and after the declaration of the ‘waqf,’ the ‘waqf’ comes under the description by which the said class is identified, he may participate in its benefit, and the ‘waqf’ does not thereby become void.<sup>1</sup>

(1) The following are illustrations of valid dedications by way of *Illustration*. ‘waqf’ according to Hanafi law:—

- (a) “My land is a ‘sadaqa’ settled on myself.”<sup>3</sup>
- (b) “I have settled my land on myself and after me on such an one and then upon the poor.”<sup>4</sup>
- (c) “My land is settled on such an one and then upon me.”<sup>3</sup>
- (d) “My land is settled upon my child, and after him on the poor.”
- (e) “My land is settled on my child, and the children that may be born to me, and when they fail, upon the poor.”<sup>5</sup>

(2) According to Shiah law the dedications (a) and (b) above are void;<sup>6</sup> (c) is void so far as it is a settlement on the ‘waqf’ himself;<sup>7</sup> (d) and (e) are valid.<sup>8</sup>

(3) W makes a ‘waqf’ for the benefit of the poor, or for lawyers, and W subsequently becomes poor or a lawyer. The ‘waqf’ is valid, and W may participate from its benefits.<sup>9</sup>

(4) W, a Shiah, makes a ‘waqf’ with a condition that the ‘waqf’ property is to revert to himself in case of need; the ‘waqf’ is void, but the property will remain in the condition of ‘hoobs’<sup>8</sup> until the occasion should arise, while if W dies it will devolve on his heirs.<sup>8</sup>

It was stated prior to the Waqf Act that appropriations in the nature of a settlement of property on a man and his descendants can only be treated as validly falling under the designation of ‘waqf’ when the term ‘sadaqa’ is used; “even supposing they could be so treated, it would be necessary in order to validate such a ‘waqf,’ that the ‘waqf’ should reduce himself to a state of absolute poverty.”<sup>9</sup>

<sup>1</sup> Ball. II. 219 (par. 1).

<sup>2</sup> Ball. I. 567-568.

<sup>3</sup> This is in accordance with Abu Yusuf’s opinion, who takes a dedication in perpetuity to the poor as implied. According to Abu Hanifa and Imam Muhammad it would have to be expressed.—Ball. I. 557. But see s. 480, above.

<sup>4</sup> *Fatimabibi v. Adorate-General of Bombay*, (1881) 6 Bom. 42. But see s. 480, above.

<sup>5</sup> In which case, the child who may be in existence at the time of the produce, enters into the benefit of the *waqf*, whether or not he were born at the time of the dedication, But

see s. 485, above.

<sup>6</sup> Ball. II. 218 (par. 3).

<sup>7</sup> Ball. II. 220 (*Third*).

<sup>8</sup> Ball. II. 219 (par. 2): Baillie spells the word *Hoobs*: it seems however that it should be pronounced *habs* (with a *kasra* as the vowel). The word is said to mean “detention.” The distinction between *habs* and *waqf* seems to be that the former is not perpetual, nor does its creation involve a religious motive.

<sup>9</sup> *Mahomed Hamidulla Khan v. Lutfi Huz*, (1881) 6 Cal. 744; 8 C.L.R. 164.

## SECTION 487.

Grant for  
subsistence  
not valid  
object.

## (c) Other Individuals as Beneficiaries.

487. It was held, previous to the Waqf Act, that grants to an individual in his own right for the purpose of furnishing him with the means of subsistence, could not validly form the object of a 'waqf.'<sup>1</sup> *Semble*, they are valid under the Waqf Act.<sup>2</sup>

Grant for  
rich alone  
not valid

488. A 'waqf' purported to be made in favour of the rich alone is not valid. Where the beneficiaries consist of a class of persons some of whom may be poor and others rich, *semble*, the benefit of the 'waqf' property must be applied for the poor alone out of the said class.<sup>3</sup>

It is stated as an exception to the rule, above, that the kindred of the Prophet may validly be made the beneficiaries under a 'waqf.'

On the other hand, it is said in the 'Fatawa 'Alamgiri' that a 'waqf' for travellers is valid, but it is to be applied for the poor amongst them to the exclusion of the rich.<sup>4</sup> Syed Ameer Ali however cites the following from the 'Fath-ul Qadir': "The 'wakif' may give the produce to whomsoever he likes, and the reason of it is that though a desire to approach the Deity should form the ultimate motive of all 'wakfs,' yet if without such an (immediate) desire, a person were to dedicate a property in favour of the affluent, the 'wakf' would be valid in the same way as a 'wakf' in favour of the indigent, or for the purposes of a mosque, for in giving to the affluent there is as much 'kurbat' (nearness<sup>5</sup>) as in giving to the poor, or to a mosque, and though the profits may not have been [expressly] given in charity [to the poor] on the extinction of the affluent, yet it is 'wakf,' and will be treated as 'wakf' before their extinction."<sup>6</sup>

## § 5.—Administration of 'Waqf.']

## (1) The 'Mutawalli.'

## (a) Competence to be 'Mutawalli.'

489. (1) Competence to be 'mutawalli' is not affected

A female,  
non-Muslim,  
or 'waqf'  
himself  
competent.

<sup>1</sup> *Kunez Fatima v. Saheba Jan* (1867) 8 W. R. 713.

<sup>2</sup> See comment to s. 457A, above.

<sup>3</sup> *Ball*, I. 566. The rule seems to be subject to the rule that objects of public or general utility are valid objects of waqf and no person is disqualified from benefiting under

*waqfs* for such objects on the ground of his being possessed of riches; the rule is further made difficult of application as the expression "rich" is not capable of precise definition.

<sup>4</sup> Or "approach to God."

<sup>5</sup> *Ameer Ali*, I. 194 (par. 1). The ( ) and { } are those of learned authors.



by sex or religion,<sup>1</sup> nor by the fact of being the SECTION 489  
‘waqif.’<sup>2</sup>

(2) Subject to sub-section (3), below, where an infant Minor or  
or person of unsound mind is purported to be appointed lunatic  
as a ‘mutawalli’ his appointment is void. incompetent

(3) Where the office of ‘mutawalli’ devolves upon a person who is a minor,<sup>3</sup> the Court may appoint another Mutawalli  
‘mutawalli’ to act in his place during his minority. during minority  
of incumbent.

(1) The ‘waqif’ may appoint himself mutawalli.<sup>4</sup>

(2) A female is competent to be ‘mutawalli’<sup>5</sup>

(3) A non Muslim is competent to be mutawalli

(4) A body of persons constituting a committee may be entrusted  
with the administration of the waqf.<sup>7</sup>

(5) A Shah may be the ‘mutawalli’ of a waqf made by a Sunni.<sup>8</sup>

(6) The Official Trustee may (with his consent) be appointed  
‘mutawalli’ of a ‘waqf’ which has no religious purpose by the deed  
containing the declaration of ‘waqf’, provided first that the consent of  
the Official Trustee is cited in the declaration,<sup>9</sup> and secondly that the  
Official Trustee cannot lawfully be appointed ‘mutawalli’ along with  
any other person but he shall, whenever appointed, be sole ‘mutawalli’.<sup>9</sup>

Illustrations.

<sup>1</sup> *Rahim Baksht Moll v Hays Ahmed* (1912)  
16 Ind. Cas. 0

<sup>2</sup> In other words being a female, or a  
non-Muslim, does not make a person in-  
competent to be the *mutawalli* and the *waqf*  
may declare himself to be the *mutawalli*.  
See all (1), (2), (3) below and the footnotes  
thereto. But where the administration of the  
*waqf* involves the possession of qualifications  
having reference either to sex or religion, or  
to any other matter, a person who does not  
possess the said qualifications cannot if it is  
obvious, satisfactorily perform the duties of  
*mutawalli*. If in the case of such a *waqf* the  
Court has to choose from rival competitors  
the less qualified person will certainly not be  
selected, and the tenure of such a person may  
be peculiarly liable to attack by rivals.  
For a male may be practically disqualified  
to be the *mutawalli* of an institution peculiarly  
for the benefit of females. Cf. all 8 as to when  
female is disqualified. Cf. Indian Trusts Act s. 10.

<sup>3</sup> See *quere* as to infant, (*Syed Hassan*)  
*Raza v (Hassan) Ali* (1916) 40 Mad. 941. 31  
Mad. L. J. 348, 355. Cf. the Indian Trusts Act  
s. 10.

<sup>4</sup> See comment *Ejaz Ahmad v Khatoon*  
*Begam* (1916) 30 All. 288 (the head note does  
not state that the office had to all intents

and purposes devolved upon the minor) (*Syed*  
*Hassan Razi v (Hassan) Ali* (1916) 40 Mad.  
941, 948.

<sup>5</sup> *Bail I* 591 II, 314. Muhammad ibn  
Alfid is stated (*Bail I* 591) to have said this  
(viz. that the *waqif* may lawfully declare himself  
*mutawalli* according to all). The author of the  
*Hudaya* (Hed. 238 col. 11) states that  
it is considered very doubtful whether Imam  
Muhammad's view was to the same effect. In-  
much as that exponent of Hanafi law requires  
transfer of possession to the *mutawalli*.  
Comment to s. 430 below.

<sup>6</sup> *Wahid Ali v Ashraff Ali* (1882) 8 Cal.  
732. 10 Cal. J. R. 529. Even for the temporal  
affairs of a mosque see in *Hussain Bibi v Hussain*  
*Sherrif* (1867) 4 Mad. H. C. 23. *Shahoo Banoo*  
*v Aga Mahomed* (1906) 34 Cal. 118. *Hyat*  
*Khanum v Kholsoom Khanum* (1907) 19 D. J.  
214. *Dwyer v Jaun Bebe v Alder's Barber*  
(1913) 11 All. 144.

<sup>7</sup> As in the case of *Tam's Masjid* Bombay,  
see s. 492. *Explanation I* (1).

<sup>8</sup> *Doyal Chand Mull et al v Karamat Ali*  
(1871) 16 W. R. 116. But see *Shahoo Banoo*  
*v Aga Mahomed* (1906) 34 Cal. 118 (P. O.)  
Babi lady not incompetent but not proper to  
be *mutawalli* of *Shah's* endowment.

<sup>9</sup> Official Trustee's Act XXVII, of 1864  
ss. 8-13.

## SECTION 489

Illustrations

(7) Property<sup>1</sup> which is dedicated by way of waqf for a charitable purpose<sup>2</sup> may vest in the Treasurer of Charitable Endowments<sup>1</sup> (in the same manner as in a mutawalli) by order of the Local Government made on an application by the waqf on such terms as to the application of the property or the income thereof as may be agreed on between the said Government and the waqf provided that the duty of administering the waqf property will not be imposed upon the said Treasurer by the vesting order nor unless the said Government with the concurrence of the waqf settles a scheme for the administration of the property so dedicated or proposed to be so dedicated. On the scheme being so settled the said Treasurer becomes the mutawalli of the waqf<sup>3</sup>

(8) When the office of mutawalli entails the performance of religious or spiritual duties which cannot be performed by females<sup>4</sup> or minors or non-Muslims they are disqualified from acting as mutawalli or sajjadnashin<sup>5</sup> but where females<sup>4</sup> are excluded<sup>7</sup> it does not necessarily imply that the male descendants of female members of the family of the waqf or of the last mutawalli will also be excluded<sup>8</sup>

(9) A mutawalli who has been once removed from his office for neglect or misconduct in his office may be re-appointed by the Court<sup>9</sup>

(10) If the duties attached to the office of a particular mutawalli are such that he is in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which in course of time has become vested by descent in more persons than one in such a case in order to avoid confusion or an unseemly scramble it is not unusual and certainly not improper for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence<sup>10</sup>

<sup>1</sup> Charitable Endowment Act VI of 1890

<sup>2</sup> Charitable purpose in legal relief of the poor, education, medical relief and the advancement of any other object of general public utility but does not include a purpose which relates exclusively to religious teaching or worship. Act VI of 1890

<sup>3</sup> Charitable Endowment Act VI of 1890

<sup>4</sup> Hussaini, *Bee v Hussain Sherif* (1887)

<sup>5</sup> Mad HCE 3 *Mujawar Ibrahim Bibi v Mujawar Hussaini Sherif* (1880) 3 Mad 9 (female disqualified from being *mujawar* of a *dargah*)

<sup>6</sup> Cf. as to minor being *sajjadnashin* of a *darghah* or shrine *Pirani v Abdul Karim* (1891) 13 Cal 203 210 220

<sup>7</sup> Cf. *Shahoo Banoo v Aga Muhomed Jaffer Bundanem* (1906) 34 Cal 118

<sup>8</sup> Through a female is always competent to her

sex may make her incapable of performing the duties hence unfit for the office. See s 489 (1) and footnote thereto

<sup>9</sup> *Shekh Karimod v Alam Khan* (1889)

10 Bom 119

<sup>1</sup> Bail I 598 599

<sup>2</sup> *Rana ulshan Chel v Murugappa Chetty* (1906) 2 Mad 84 3 F 4 139 144 affirm

<sup>3</sup> 7 Mad 139 198 This is a case referring to the manager of a Hindu temple who by virtue of his office was the administrator of the property attached to it. Where the *waqf* provides for individual beneficiaries or where a *jahrg* is given in perpetuity to a person and his descendants it is not unusual amongst the parties concerned to come to arrangements similar to that which was approved by the Privy Council

“The last incumbent can on his deathbed nominate his successor, SECTION 489, and such nomination would be valid without any judicial order. But in order that the nomination may be effective, it is necessary that the person so appointed should be adult and possessed of understanding. In the ‘Fatawa’ Alamgiri’ the rule is thus stated: ‘and it is a condition to the validity (of the appointment of a ‘mutawalli’) that he should be adult, and possessed of understanding; and thus it is stated in the ‘Bahr-ur-Raik.’ Mr. Baillie in the first edition of his Digest did not give the meaning of this passage, but it appears in the second edition in the following words: ‘But puberty and understanding are essential in all cases to a valid appointment’<sup>1</sup>. . . The office of ‘mutawalli’ is an office of personal trust, and a person who cannot discharge the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy. The same condition is laid down in the ‘Durul Muhtar,’ and the ‘Fatawa’ Kazi Khan’ that a minor cannot be appointed a ‘mutawalli.’ The learned pleader however contends upon the authority of a passage in the ‘Mangni’ that the appointment of a minor ‘mutawalli’ is not invalid, but remains in abeyance until he attains his majority.<sup>2</sup> But that passage must be read with the previous condition which insists upon puberty as a *sine qua non*. As a matter of fact, however, it refers not to a case of express appointment, but to the devolution of the office by virtue of some provision in the trust deed, or otherwise.<sup>3</sup> For example a ‘waqfnama’ may provide that the ‘tandiat’ should be confined to the male descendants of the ‘waqif’ or the members of a particular family, and it may happen that at some time the person on whom the office devolves by virtue of this provision, is a minor. The law therefore provides that in such cases the Kazi should appoint somebody to discharge the duties during the minority of the ‘mutawalli,’ who should get the office on attaining majority.’<sup>4</sup>

In England according to the Trustees Act 1850, s. 22 the Court is

<sup>1</sup> See also (*Syed Hasan*) *Raza Sahib v. (Hasan) Ali, Sahib* (1916) 40 Mad 941, 948; 33 Maul. L. J. 318, 355.

<sup>2</sup> Where it is laid down that if the *waqif* appoints a minor, as sole *mutawalli* without there being an adult joined to him, the Qazi shall appoint some other person to officiate during the minority of the said *mutawallis*, and where an adult and a minor are joint *mutawallis*, the Qazi may either appoint some person to represent the minor who should act with the adult *mutawalli*, or may empower the latter to represent the minor.”—*Bahr-ul Raik* V. 224. Cf. also *Amir Ali*, I, 317, citing *Radd-ul Muhtar* III, 596. See also *Laz Ahmad v.*

*Khatun Begum* (1916) 39 All 288, (*Syed Hasan*) *Raza v. (Hasan) Ali* (1916) 40 Mad 941.

<sup>3</sup> *Paran v. Abdul Karim* (1891) 19 Cal. 205, 219 (*Amir Ali*, J.). *Ejaz Ahmad v. Khatun Begum* (1916) 39 All 288; (*Syed Hasan*) *Raza v. (Hasan) Ali* (1916) 40 Mad 941. The judgment in *Mahomed Ibrahim v. Abdul Latif* (1912) 37 Bom. 447, 454, refers to the fact that the executors of the last *mutawalli*, acted as such during the minority of his son who was entitled to be the next *mutawalli* and gave over charge to the said son when he attained majority, cf. “*Mahomedan Law*” by *Amir Ali* I 317, citing *Raddul Muhtar*, III, 596.

Nomination  
by ‘muta-  
walli’ of his  
successor,

Appointment  
of minor  
‘mutawalli’.

Devolution of  
office by  
‘tandiat’  
upon minor.

**SECTION 489.** empowered "whenever it shall be expedient to appoint a new trustee or new trustees" to appoint new trustees "in substitution for or in addition to any existing trustee or trustees;" and under this power the Court may appoint a trustee in the place of an infant trustee appointed by will, but the order is to be made without prejudice to an application by the infant on his coming of age to be restored to the trust.<sup>1</sup> Compare the Indian Trustees Act, 1866, s. 17, and the Probate and Administration Act, ss. 32-34.

Appointment by Court.

Analogy of English law.

Competence and qualification.

Competence to be 'mutawalli' must be distinguished from being qualified to discharge its duties satisfactorily. When the question is brought before the Court, there is usually some dispute or competition and in such cases, of course, the person best qualified is chosen; and though the power to appoint a deputy is specially recognised, a person who can personally discharge the functions has no doubt a qualification which one who must necessarily employ a deputy cannot have. But because a person is not appointed by the Court, it does not follow that he or she is incompetent to be 'mutawalli'.<sup>2</sup>

Management by turns.

Attention is drawn to illustration (10), above, referring to arrangements for the management of 'waqfs' properties in rotation.

English law.

The position of infant trustees in England is far from clear,<sup>3</sup> and it seems that there is a similar doubt in Muhammadan law as applicable in British India.

#### (b) Appointment and Removal of 'Mutawalli' and his Successor.

##### (i) Failure to Appoint a 'Mutawalli' when 'Waqf' Declared.

Failure to appoint or nominate 'mutawalli,' Hanafi law

**490.** When a 'waqf' is purported to be created but no 'mutawalli' is appointed or nominated,<sup>4</sup>—

(1) According to Abu Hanifa's and Imam Muhammad's exposition of Hanafi law, the 'waqf' fails; according to Abu Yusuf's exposition the 'waqf' takes effect and the 'waqif' becomes the 'mutawalli'.<sup>5</sup>

Shiah law.

(2) According to Shiah law the 'waqf' takes effect and the beneficiaries under the 'waqf' are authorised to administer it.<sup>6</sup> *Quære*, whether according to Shiah law where

<sup>1</sup> *Re Shetlerdine* (1861) 33 L.J. (N.S.) Ch. 471; *Re Trust* [1883] W.N. 220; *Re Tallott* [1885] W.N. 191. Cf. *Rakes v. Rakes* (1861) 32 Beav. 403.

<sup>2</sup> Cf. *Nahoo Banoo v. Aga Mahomed* (1906) 34 Cal. 118.

<sup>3</sup> Cf. *Inman v. Inman* (1863) 15 Eq. 260.

<sup>4</sup> "If the *waqif* appoints as *mutawalli* a person who is absent, the *Kazi* has the power

of nominating in his place another for the time being, and when the *mutawalli* appointed by the *waqif* arrives, the trust will revert to him." — *Amcer Ah*, I. 348, citing "*Fatawa-i-Ankari* II. 217 from *Asnaf*."

<sup>5</sup> Ball, I. 501. See comment and the table showing the differences of views held as regards *waqfs*; in the comment to s. 457A, above.

<sup>6</sup> Ball, II. 214. See comment.

the object of the ‘waqf’ is not to benefit specified individuals, SECTION 409. but to promote works of general utility, and the ‘waqif’ has not appointed any ‘mutawalli’ he himself becomes the ‘mutawalli.’

Though the strict law is as laid down in s. 490, above, the significance of the fact that no ‘mutawalli’ has been appointed must not be overlooked. For, in a great number of cases, if no ‘mutawalli’ is appointed there is no agency for giving effect to the declaration of ‘waqf.’ It may therefore be a question in such cases whether the ‘waqif’ did intend to take effect, notwithstanding that he appointed no one to be administer it. The author of the ‘Hidayat’ has pointed out the connection between the question of transferring possession to the ‘mutawalli,’ (some considerations referring to which matter are mentioned in the comment to s. 462, above) and to the present question.<sup>2</sup> It is obvious, however, that when the ‘waqif’ has himself been giving effect to the ‘waqf,’ the fact that he has not formally appointed any one ‘mutawalli’ has no such significance as is above mentioned. These considerations explain the view that in the absence of any one else being appointed ‘mutawalli,’ the ‘waqif’ must himself be considered such, and show the connection between s. 490 and the rule of equity that a trust never fails for want of a trustee.

(d) *Appointment of successor to a ‘Mutawalli.’*

491. (1) The ‘waqif’ may validly provide in the declaration of ‘waqf’ for the manner in which, the person by whom, the conditions on which, and the period for which, the ‘mutawalli,’ and his successor may be appointed.<sup>3</sup>

(2) The rules for the appointment of a successor to the ‘mutawalli’ may be laid down by the ‘waqif’ orally or in writing; and, in the absence of writing, they may be inferred from the evidence of prevailing usage.<sup>4</sup>

(3) The Muhammadan law is strongly opposed to the

\* Ifed. 238; see *id.* (i) to s. 489, above, and footnote thereto. It will be observed that the Shiah law agrees on a great many points with Imam Muhammad’s exposition of Hanafi law.

<sup>2</sup> Ball. I. 592; (*Khajeh*) *Sahmullah v. Abdul Khair* (1900) 37 Cal. 263 11 Cal. W.N. 407. Cf. *Advocate-General v. Fatima Sultan Begum* (1872) Bom. H.C.R. 19. “If the *waqif* or *Kazi* makes a condition at the time of appointing a *mutawalli* that he should have the power of transferring the trust to another and substituting that other in his own place, by a *saund-i-waqf* or *wasail*, should necessity

arise for it, such a condition would carry with it the power, on the part of the *mutawalli*, to appoint another *mutawalli* during his life-time, or in death-illness”: *Ameer Ali*, I. 337 citing the *Anfas-ul-Wasail*.

<sup>4</sup> (*Shah*) *Qulam Rahmatulla Sahib v. Mahomed Akbar Sahib* (1875) 8 Mad. H.C.R. 63. Cf. *Abdulla Edrus v. Zain Sayad Hassan Edrus* (1888) 13 Bom. 555. *Imam Miya Banemiyah v. Wahadani Begum* (1911) 36 Bom. 398; 14 Bom. L.R. 120; *Sayed Muhammad v. Fatteh Muhammad* (1894) 22 Cal. 324, 22 I. A. 4; *Court of Wards v. Hakeem Baksh* (1912) 40 Cal. 297 (P.C.).

Provisions by ‘waqif’ for appointment of ‘mutawalli’

Oral directions.

Usage.

Inheritance

## SECTION 491.

Hereditary  
Devolution of  
'mutawalliship'

attaching of any right of inheritance to the administration of the 'waqf' property; and where a custom is alleged to the effect that the right to be 'mutawalli' devolves by primogeniture, it must be proved not only that each successive 'mutawalli' has been uniformly the eldest son of his predecessor, but also that he succeeded by right of primogeniture and not by right of appointment.<sup>1</sup>

Sajjada-nashin \*

(1) Where the object of a 'waqf' is a religious institution, and it is essential that the 'mutawalli' or 'sajjada-nashin' should have certain qualifications which succession by descent would not always ensure, it will be presumed that the succession is not to go by descent.<sup>2</sup>

Illustration.

'The dedication may validly provide that M should be 'mutawalli' till A arrives, or that M should be 'mutawalli' so long as he remains in Rasrah, or M should be 'mutawalli' till he marries, or that he should be 'mutawalli' for life, and on M's death M's should be 'mutawalli'.<sup>3</sup>

Persons  
with power  
to appoint  
successor to  
'mutawalli'.

**492.** In the absence of any express or implied provision in the declaration of 'waqf' for the appointment of successive 'mutawallis,'—

1. 'waqif'

(1) the 'waqif' is entitled to make the appointment;<sup>3</sup>

2. His  
executor.

(2) after the death of the 'waqif' the executor, or the survivor of several executors, of the 'waqif' is so entitled;

3. Court

(3) on the death of the said executor or surviving executor it is within the jurisdiction of the Court <sup>4</sup> to appoint a 'mutawalli.'<sup>5</sup>

<sup>1</sup> *Abdulla Edrus v. Zahir Sayid Hussain Edrus* (1888) 13 Bom. 555; *Phatmabi v. Hajo Abdulla Musu Sahib* (1913) 38 Mad. 191; *Atmanessa v. Abdul Sobhan* (1915) 43 Cal. 467, 473; *Nyamat Ali v. Ali Raza* (1916) 13 All. J. 26; *Macnaghten*, 313, Ch. X §§ 5, 6; *Presidents on Endowment Cases* ix. & x. Macn.

<sup>2</sup> *Syedun v. Allah Ahmed* (1861) W. R. 327; *Cf. Piran v. Abdul Karim* (1891) 19 Cal. 203, 219-220. See also *Sauvrambal Ammal v. Vengraha Gnyakkal* (1914) 38 Mad. 850, 863 *et seq.* the judgment in which applies equally to *waqfs*, *Sadista Ali's judgment* 38 Mad. at p. 851 has been dissented from.

<sup>3</sup> *Bail. I. 592* (par. 2), *Ramzan Mistr v. Zahir Hussain* (1913) 18 Ind. Cas. 241; *Phatmabi v. Hajo* (1913) 38 Mad. 191.

<sup>4</sup> Sections 192 to 192n should be read together in the first edition of this work they all together formed s. 192.

<sup>5</sup> *Advocate-Genera vs. Fatima Sultan Begum*, (1872) 9 Bom. H. C. R. 19; *Ramzan Mistr v. Zahir Hussain* (1913) 18 Ind. Cas. 241.

<sup>6</sup> See as to powers of the District and Subordinate Judges, *Atmanessa Bibi v. Abdul Sobhan* (1915) 43 Cal. 467, 474; *Ramzan Mistr v. Zahir Hussain* (1913) 20 Cal. W.N. 111. As to small Causes Court, (Presidency) Act XV. of 1882 s. 19 (d), (e), (f), (Provincial) Act IX. of 1887, second Sched. 4, 11, 18.

<sup>7</sup> *Bail. I. 533*; *Phatmabi Bibi v. Damodar Premji* (1879) 3 Bom. 81, *Phatmabi v. Hajo* (1913) 38 Mad. 191, *Atmanessa Bibi v.*

The plaintiff had been duly appointed as the 'mutawalli' of the 'dargah' attached to the tomb of a saint, Shaikh Muhammad Ali Hazzen, and had acted for 30 years as such. Certain properties were attached to the 'dargah,' the profits of which were about Rs. 400 a year. The defendant alleged that the plaintiff had abused the trust, and that he (the defendant) had the right to displace the plaintiff. The defendant's claim was based on the fact that his father was the executor of the saint, and had apparently placed the plaintiff in possession of the 'dargah' and the properties. The plaintiff died pending the suit. The Court of first instance held that the defendant should confer the 'mutawalli-ship' on either of the sons of the plaintiff, and should not dismiss him except on proof of misconduct to the satisfaction of the Court: the lower appellate court reversed this decision. Upholding the reversal, the *Sadr Diwani Adalat* held, (1) that as it was proved that the plaintiff had, on his death-bed, nominated both his sons to be 'mutawallis' after him, they were entitled to act as such; (2) that the defendant, as the son of the saint's executor, had no right of interference; and he was directed to indemnify the plaintiff's sons for all loss sustained by them or their father in consequence of being molested by the defendant.<sup>1</sup>

**492A.** Subject to the provisions of s. 492, above,<sup>2</sup> and of s. 492F, below, it will generally be presumed that the 'mutawalli' is empowered by the 'waqf-nama' to appoint a successor to himself; and, *semble*, in the absence of appointment by competent authority,<sup>3</sup> the executor of the last 'mutawalli,' as his legal representative, may administer the 'waqf' property after his death.<sup>5</sup> *Quære*, whether a 'mutawalli,' unless he is appointed under s. 492, above, or by a person authorized by the declaration of 'waqf' to appoint, is entitled to any remuneration without an order of the Court.<sup>5</sup>

*Abdul Soban* (1915) 43 Cal. 467, 374; 20 Cal. W.N. 111. In *Niamat v. Ali Raza* (1914) 15 All.L.J. 26, where no breach of trust was alleged, the Court said the Civil Procedure Code, s. 92, was not applicable, and added: "Suits relating to disputes between parties as to who is entitled to be *mutawalli* on the ground of family relationship are not brought under this section." See *quære*.

<sup>1</sup> *Moohammad Sadik v. Moohammad Ali* (1798) 1 Sel. R. 17 (Sudder Diwani Report ('a.l. edition of 1827). The real points decided in this case are numbered (1) and (2), above.

<sup>2</sup> Thus the *Fatawa Qazi Khan*, III. 300 expressly mentions that the *waqif* may provide that no *mutawalli* shall have the power to appoint his successor.

<sup>3</sup> He need not appoint a relative of the *waqif*: *Amir Ali v. Wazir Hyde* (1905) 9 C.W.N. 876.

<sup>4</sup> *I.e.*, by the *waqif*, or his executor or the Court, under s. 492, above.

<sup>5</sup> Ball. I. 594 (par. 2): See comment. Hence the devotees or congregation as such have no authority to appoint a *mutawalli*: *Ramana Mistri v. Zahur Hussain* (1913) 18 Ind.

SECTION 492.  
*Illustration.*

Presumption that  
'mutawalli' is  
authorized to  
nominate  
successor.

**SECTION 492A.** The points covered by s. 492A are not quite clear : The general rule

Nomination by  
'mutawalli'  
of his  
successor.

is first stated in Baillie in the following terms :—

(1) "When the superintendent has died, and (a) the appropriator is still alive, the appointment of another belongs to him and not the judge; and (b) if the appropriator be dead, his executor is preferred to the judge. But (c) if he had died without naming an executor, the appointment of an administrator is with the judge."

This gives the authority to three persons successively : the 'waqif,' his executor and the Court<sup>1</sup>; and makes no mention of the last 'mutawalli' nominating a successor to himself. Nevertheless it is said by Baillie on the next page :

(2) "A superintendent may at death commit his office to another in the same way as an executor may commit his to another . . .

(3) "A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."<sup>2</sup>

Dying 'mutawalli'  
must give over  
charge to  
another—

The two statements numbered (1) and (2) above are not inconsistent, as the second statement means that though the 'mutawalli' has no right (in the absence of express directions in the 'waqf-nama') to appoint a successor to himself, any more than he has a right to appoint a substitute in his life-time; yet, just as in his life-time, when necessary, he may appoint a deputy,<sup>3</sup> so "at death" he may (or rather, 'ex necessitate rei,' he must) commit the administration of the 'waqf' to a successor, which, of course, cannot affect the power of the proper authorities to appoint his successors,—whether such proper authority is the 'waqif' himself, or his executor, or the Court: But in the absence of the proper authority taking any step to exercise the right of appointment, the appointment by the last 'mutawalli' must take effect—the more so as such an appointment far from 'feri non debuit,' was the last service that the dying 'mutawalli' could perform towards the 'waqf,' and was necessary in order that the 'waqf' property may not, pending an appointment by the proper authorities, remain entirely unattended to.

subject to  
appointment  
by proper  
authority.

Right during  
life-time to  
appoint another.

What then does the third passage above referred to mean?—In this connection the opinion of the law officers of the Sadr Diwani Adalat in '*Mohummud Sadik v. Moohummud Ali and others*' (1) may

Cas. 241, (dissenting from Syed Amir Ali's view); but presumably the fact that the great majority of the beneficiaries under a *waqf* favour the appointment of a certain person, would be a matter that the Court would consider in nominating a *mutawalli*.

<sup>1</sup> *Phatmabi v. Haji Abdulla* (1913) 38 Mad. 491.

<sup>2</sup> Bail. I. 593 (par. 3): See the comment to s. 492A with reference to the meaning of the words "in the nature of a general trust,"

<sup>3</sup> Bail. I. 591 (l. 5).



be first referred to. They say amongst other things:—“It is stated SECTION 492A. in the ‘Bahr-ur Raiq,’ the ‘Tatar khani,’ the ‘Zahiria,’ the ‘Himadiah,’ and the ‘Fusul ul-Amadia,’ that if the superintendent desire on his death-bed, to bequeath the superintendence to another, it is allowable for him to do so, but he would not be authorised to appoint a successor in his life-time and during health; unless the consignment of the superintendence to him have been general, that is, with permission (from the appropriator or his executor,—as he may have received it from either) to confer it on another; in which case he may be authorised to appoint a successor during health.” If this is all that is meant, then the texts in question would be tautological; for they would mean that the ‘mutawalli’ has power to appoint, if he is authorised to appoint, but not otherwise. It is submitted that the expression “general trust” in the present context is almost the equivalent of executorship.<sup>1</sup> The following explanation is therefore put forward: The right of the ‘waqif’ to appoint the ‘mutawalli’ devolves after his death on his executor: s. 492 (2); and the executor, by virtue of such power, and as the general representative in all matters of the ‘waqif,’ may himself undertake the duties of the ‘mutawalli.’ In such a case the executor has a general trust imposed on him, viz., of being the representative of the deceased in all matters including the administration of the ‘waqf’: he is not specifically appointed ‘mutawalli’; but his power of appointing the ‘mutawalli’ which emanates from his authority to represent the deceased in all matters, the waqf included, may be exercised by his expressly or impliedly appointing himself ‘mutawalli.’ Hence this point is noted under s. 492F, below.

If the views expressed above are correct, then a ‘mutawalli’ purporting to be appointed by the last ‘mutawalli’ (such appointer being neither the ‘waqif’ himself, nor his executor) would be like an executor ‘de son tort’ or a ‘de facto’ guardian, who in the words of the Privy Council<sup>2</sup> may assume important responsibilities but cannot clothe himself with legal power over the ‘waqf’ property. His position, however, is without doubt more favourable under Muhammadan law: since it is generally presumed that the ‘waqf-nama’ empowers

<sup>1</sup> The offices of *mutawalli* and of *wasī* (or executor) seem to be referred to as being of an analogous nature in the *Fatawa Qazi Khan*, III, 299, 301. It will be noted in the Chapter on Administration that the executor has the power of nominating his successor. An executor may be appointed for a specific purpose only, but the powers of appointing a *mutawalli* are

necessarily restricted to the “general” executor: for a “special” executor’s powers are limited to the specified terms of his authority. Cf. *Ahmaness Bibi v. Abdul Soban* (1915) 48 Cal. 467, 474; 20 Cal. W.N. III, *Nizamatali v. Ali Raza* (1914) 13 All. L. J. 26.

<sup>2</sup> See s. 280, above; Indian Succession Act, s. 286.

Analogy of executor ‘de son tort.’

**SECTION 492A.** each 'mutawalli' to appoint his successor; hence the *semble* to s. 492A, above. See also the cases cited in the footnotes to the section.

**Procedure.** **492B.** A suit for the appointment of a 'mutawalli' must be instituted in conformity with s. 475 (1) above.

**Preference to members of family of 'waqf.'** **492C.** In appointing a 'mutawalli' the Court will prefer a member of the family of the 'waqf' to others,<sup>1</sup> but not necessarily the eldest member;<sup>2</sup>—nor is a stranger disqualified.<sup>3</sup> It has been held<sup>4</sup> that those who are descended from females are not regarded (*semble*, in Sunni law<sup>5</sup>) as members of the family—*sed quaere*.<sup>6</sup>

**Official Trustee.** **492D.** The High Court may on petition appoint the Official Trustee (with his consent, previously obtained) to be the sole 'mutawalli' of a 'waqf' which is not for any religious purpose, (a) when there is no 'mutawalli' willing to act, or capable of acting in the administration of the 'waqf' property, who is within the local limits of the ordinary or extraordinary original civil jurisdiction of the High Court; or (b) when all the 'mutawallis' or the surviving or continuing 'mutawalli' and all the persons beneficially interested in the 'waqf' are desirous that the Official Trustee shall be appointed in the room of such 'mutawallis' or 'mutawalli'.<sup>7</sup>

**Scheme.** **492E.** The Court may frame a scheme and rules for the appointment of a 'mutawalli' and his successor.<sup>8</sup>

**'Mutawalli' appointing successor to himself.** **492F.** The 'mutawalli' may in accordance with

<sup>1</sup> Ball. I. 598-594. *Atmanassa v. Abdul Sobhan* (1916) 43 Cal. 467, 473; *Phatnab v. Haji Musa* (1913) 28 Mad. 401; *Niamat Ali v. Ali Raza* (1914) 13 All. L. J. 26. See the illustration to s. 492, above, and contrast *Shiekh Amer Ali v. Syed Wajir Hyder* (1905) 9 Cal. W.N. 876.

<sup>2</sup> *Gulam Rahimulla v. Mohammed Albar* (1876) 8 Mad. H.C.R. 68; *Abdulla Edrus v. Zain Sayed Hassan Edrus* (1888) 13 Bom. 565. Cf. also *Asheeroodeen v. Drobo Moys* (1876) 25 W.R. 567; *Shahoo Banoo v. Aga Mahomed* (1906) 84 Cal. 11.

<sup>3</sup> Cf. (*Shiekh*) *Amir Ali v. Syed Wajir*

(1905) 9 C.W. N. 876 (referring to an appointment by the last *mutawalli*).

<sup>4</sup> *Ahmed Hassan v. Mohiudddeen Ahmed* (1871) 16 W. R. 193.

<sup>5</sup> *Shiah Law* does not prefer agnates over cognates: cf. law of succession and of guardianship.

<sup>6</sup> Cf. (*Shiekh*) *Karimodra v. Alam Khan* (1885) 10 Bom. 119.

<sup>7</sup> Official Trustees Act, ss. 9, 13, 8.

<sup>8</sup> As in the case of the *Jumra Masjid*, Bombay. Cf. *Advocate-General v. Abdul Kadar Jitaker* (1894) 18 Bom. 401. Similar rules prevail for many big Mosques; e.g., *Jami Masjid* at Delhi.

s. 492A, above, appoint a successor to succeed him at his death, but cannot transfer his office to another during his life-time;<sup>1</sup> and any appointment or nomination purported to be made during the life-time of the ‘mutawalli’ is revocable like other testamentary dispositions.<sup>2</sup>

492G. The office of ‘mutawalli’ when it is attached to the conduct of religious worship and the performance of religious duties is not legally saleable;<sup>3</sup> and any custom to the contrary is void as being opposed to public policy.<sup>4</sup>

492H. The right of succession as ‘mutawalli’ of ‘waqf’ property cannot validly be the subject of arbitration, and the Court has no jurisdiction to entertain an application for filing an alleged award relating to it.<sup>5</sup>

493. When the ‘mutawalli’ is unfit for the office,<sup>6</sup> the Court may remove him, and appoint another in his place,<sup>6</sup> notwithstanding that the ‘waqif’ has appointed himself as the ‘mutawalli,’ and/or has purported to make the ‘mutawalli’ incapable of being removed.<sup>6</sup>

*Explanation.*—Neglect to repair the ‘waqf’ property though there is a surplus of the income in his hands, may be a cause for the removal of the ‘mutawalli.’<sup>7</sup>

With respect to the effect to be given to the wishes of the ‘waqif’ or founder, the following statement was made by Syed Sahib Ameer Ali delivering the judgment<sup>8</sup> of the Privy Council:—

“It has been further contended that under the Muhammadan law the Court has no discretion in the matter and that it must give effect

<sup>1</sup> Ball, I. 594 (par. 2) *Wahid v. Ali Ash-ruff Hossain* (1882) 8 Cal. 732; 10 C.L.R. 529. See ss. 493B and 499, below, and comment to s. 492A, above.

<sup>2</sup> *Abdulla Edrus v. Zain Sayad Hasan Edrus* (1888) 13 Bom. 555.

<sup>3</sup> *Sarkum Abu Torab Abdul Wahab v. Rahaman Buksh* (1890) 24 Cal. 77, 90-92; *Muhammad Ibrahim Khan v. Ahmad Said Khan* (1901) 32 All. 503. Cf. *Lakshmanaswami v. Rangamma* (1902) 26 Mad. 31; *Kuppa Gurukul v. Dora Sami* (1887) 6 Mad. 76.

<sup>4</sup> *Sarkum v. Rahaman* (1896) 24 Cal. 77, 96; cf. the comment to s. 493, below.

<sup>5</sup> *Muhammad Ibrahim Khan v. Ahmed*

*Said Khan* (1910) 32 All. 503; cf. *Sundarambal Ammal v. Yogasnanagurukul* (1914) 38 Mad. 850, 863, *et seq.*; 26 M.L.J. 315 and comment to s. 493, below; also s. 497A (2), above.

<sup>6</sup> Ball, I. 592, (par. 1); 593 (par. 2); Hed. 329 (col. 1, par. 1) Macn., 70, Endowment, case 8; *Hidayat-un-nisa v. Afzul Hossain* (1870) 2 N.W. 420 (Shiah parties); cf. *Gulam Hussain Saib Aji Ajam Taladah Saib*, and *vice versa*, (1898) 4 Mad. H.C.B. 44; *Bhurruck Chundra Sahoo v. Golam Shurruff* (1868) 10 W.R. 458. See also *Fatawa Qazi Khan*, III 299; *Bahr-ur-Raiq V.* 245, 253.

<sup>7</sup> See s. 501 (1), below.

<sup>8</sup> *Mahomed Ismail Ariff v. Ahmed Moolla Dawood* (1916) 43 I. A. 127, 43 Cal. 1085.

Office not  
saleable.

Removal  
by Court for  
unfitness.  
Power of  
Court  
cannot be  
derogated  
from

Neglect  
to repair.

Wishes of founder  
or ‘waqif’

**SECTION 493.** to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or 'mutawallees.' Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in the case of a 'waqf' or trust created for specific individuals, the 'Kazi,' whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the 'Kazi's' discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interest of the general body of the public for whose . . . benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interest of the institution.

Public and private trusts distinguished.

Public trusts : wide discretion in Court.

" Illustrations of this rule are to be found in almost every work on Mussalman law. And the authorities lay down that were the 'waqif' (the founder) to make a condition that the Kazi or 'Kazi' should not interfere in the management of the 'waqf,' still the 'Kazi' will have his superintendence over it, for his supervision is above everything. . .

Wishes of founder, past history, facilities for management.

" In giving effect to the provisions of the section<sup>1</sup> and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future."<sup>2</sup>

2. Removal by 'waqif.'

**494.** According to Imam Muhammad a 'mutawalli' once appointed cannot be removed by the 'waqif' unless in the dedication of 'waqf' he has expressly empowered

<sup>1</sup> I.e., the Civil Procedure Code, 1882, s. 539.

<sup>2</sup> *Mahomed Iemal Ariff v. Ahmed Moolla*

*Dutrood* (1914) 43 Cal. 1085; 43 I. A. 127.

himself so to do.<sup>1</sup> According to Abu Yusuf the ‘waqif’ may remove the ‘mutawalli’ without so expressly reserving the power to himself.<sup>1</sup> The ‘fatwa’ is stated in the ‘Fatawa ‘Alamgiri’ to be in accordance with Imam Muhammad’s opinion;<sup>2</sup> and the High Court of Madras has held to the same effect.<sup>3</sup> It has also been decided that the Shiah law is to the same effect.<sup>1</sup>

SECTION 494.

Power to be reserved in that behalf.

495. The ‘mutawalli’ cannot discharge himself from his office, without the permission of the ‘waqif’ or of the Court.<sup>5</sup>

Resignation by ‘mutawalli’ without leave of ‘waqif’ or Court.

“If the person who has been appointed ‘mutawalli’ says ‘I have discharged myself,’ then he will not be discharged, but if he tells the ‘waqif’ or the ‘Qazi’ then either of them can discharge him. This is in the ‘Qunin.’”<sup>6</sup> Cf. the Indian Trusts Act, s. 71.

495A. The ‘mutawalli’ cannot during his life-time transfer his office to another; much less sell it.<sup>7</sup>

Transfer.

495B. If the ‘waqif’ or his executor purports to appoint himself the ‘mutawalli,’ or acts as such, it does not deprive him of the power of transferring the office of ‘mutawalli’ to another under s. 492, above.<sup>8</sup>

(c) Remuneration of ‘Mutawalli.’

496. (1) The declaration of ‘waqf’<sup>9</sup> may validly authorise the ‘mutawalli,’ appointed by the ‘waqif,’ and each succeeding ‘mutawalli,’ to receive the remuneration specified therein;<sup>10</sup> provided that, in the absence of any-

Right to receive remuneration: provision in declaration.

<sup>1</sup> Ball. I. 591; cf. *Bhurruck Chandra Sahoo v. Gulam Shurruf* (1808) 10 W.R. 458.

<sup>2</sup> Ball. I. 592; *Fatawa* is explained by Sir B. Wilson as “apparently the practice in India under Aurangzeb”: But it means more than that. It means that the famous *Qazis* have been in the habit of deciding in that manner. “The word *Fatawa* is stronger than the word valid”—Ball. I. 518 (par. 3, last line); cf. Ball. I. pp. iv, 7; and comment to s. 11a, above.

<sup>3</sup> *Gulam Hussain Saib v. Aji Ajam Tadal-lah Saib* (1860) 4 Mad. H.C.R. 44.

<sup>4</sup> *Hidaitoonnissa v. Ajul Hossain* (1870) 2 N.W. 420 (no Shiah authorities were cited).

<sup>5</sup> (*Nawab, Khajeh*) *Saimulah v. Abdul Khair* (1909) 37 Cal. 263; 14 Cal. W. N. 407. See comment to ss. 495 and 492F, above.

<sup>6</sup> *Fatawa ‘Alamgiri, Waqf*, ch. 5. This passage has been omitted by Bailhe. Its proper place would be Ball. I. 594, par. 3, between the first and second sentences.

<sup>7</sup> Cf. s. 492D, above, and s. 499, below, *Rajah Vurma Valia v. Ravi Farra Kunki Kuti* (1877) 1 Mad. 235, where the P.C. observe that transfer is prohibited on the principle that *delegatus non potest delegare* (p. 248); and that sale is opposed to public policy (p. 252).

<sup>8</sup> Ball. I. 594 (par. 2.); see s. 489, above, and comment on it.

<sup>9</sup> Ball. I. 594 (par. 2); 597.

<sup>10</sup> *E.g.*, one-third of the income of the villages, the subject of *waqf*; *Jagatmoni Chowdrani v. Romjani Bibes* (1884) 10 Cal. 532,

**SECTION 496.** thing to show the contrary, the remuneration specified in the declaration of 'waqf' is payable only to the first 'mutawalli,' and the succeeding 'mutawallis' are not entitled thereto without an order of the Court.<sup>1</sup>

Nature of  
'mutawalli's'  
claims.

(2) The 'mutawalli' may lawfully take from the income of the 'waqf' such remuneration as the 'waqif' may have authorised him to take for administering the 'waqf';<sup>2</sup> but the 'mutawalli' does not thereby acquire such an interest in the 'waqf' property as to make it capable of being attached and sold in execution of a personal decree against him.<sup>3</sup>

Fixed by  
Court.

(3) Where no provision is made, in the declaration of 'waqf,' for the remuneration of the 'mutawalli,' the Court may on an application being made to it, fix the remuneration, and authorise the 'mutawalli' to take it.<sup>4</sup>

Official  
Trustee's  
remuneration.

(4) Where the Official Trustee is appointed 'mutawalli' by (a) the declaration of 'waqf,'—he is entitled to receive by way of remuneration in that behalf such sum or sums only as he is by the declaration of 'waqf' declared to be entitled to receive;<sup>5</sup> where he is appointed by (b) the High Court he is entitled to receive by way of remuneration the commission fixed in s. 11 of the Official Trustees Act.<sup>6</sup>

Salary as  
remuneration  
for trouble.

When the 'mutawalli' had to discharge active and troublesome duties (payment of cash doles and distribution of 'conjee' and clothes to the poor, and performance of 'fatiha'), and the salary allotted to the 'mutawalli' was Rs. 10 per month to each of the 'mutawallis,' their Lordships of the Privy Council said: "The trusts too are active trusts, troublesome to discharge, and the petty salary given to the trustees may accordingly well be held to have been given to them as remuneration for their trouble in this respect, and therefore as part of the expenditure on the charitable objects."<sup>7</sup>

<sup>1</sup> *Bail. I.* 594 (par. 2); 597.

<sup>2</sup> *Bail. I.* 597.

<sup>3</sup> *Bishen Chand v. Nadir Hossain* (1887) 15 Cal. 329; 15 I. A. 1; cf. (*Bibee*) *Kuneez Fatima v. (Bibee) Sahaba Jan* (1866) 8 W. R. 313; *Futtoo Bibee v. Bhurru Lal Bhukut* (1868) 10 W. R. (C.R.) 299.

<sup>4</sup> *Mohiuddin v. Sayiduddin* (1893) 20 Cal. 810.

<sup>5</sup> Official Trustees Act, s. 9.

<sup>6</sup> *I.e.*, a half per cent. on capital moneys received by him, and on capital moneys being invested by him; three-fourths per cent. on interest or dividends received by him; two and a half per cent. on rents collected; but the High Court may allow commission at a higher rate.

<sup>7</sup> *Ramanandan Chettiar v. Yusa Levees Marayyar* (1916) 40 Mad. 116, 122 (p. c.)

**497.** The rule of Muhammadan law is that the remuneration of a ‘mutawalli’ should not exceed one-tenth of the income, where the ‘mutawalli’ has no beneficial interest in the subject of the ‘waqf’;<sup>1</sup> provided that where, after the religious or charitable objects of the ‘waqf’ are duly maintained, there is a sufficient surplus left, and on a consideration of the nature of the ‘waqf’ the Court is of opinion that a higher remuneration would be just and proper, (*semble*) the rule stated above does not apply.<sup>1</sup>

Quantum  
of remun-  
eration.  
one tenth

See the illustration to s. 496, above.

(d) *Rights, Powers and Disabilities of ‘Mutawalli’*

**498.** The ‘mutawalli’ may do all acts that are reasonable and proper for the protection of the ‘waqf’ property, and for the administration of the ‘waqf’.<sup>2</sup>

General  
powers

(Cf. Indian Trusts Act, s. 36.)

Thus to keep the ‘waqf’ property in repairs is expressly enjoined.<sup>3</sup> But the ‘mutawalli’ has no authority to make or expend the income of the ‘waqf’ on mere improvements, *e.g.*, the addition of a minaret to a mosque, unless it is necessary for the call to prayers.<sup>4</sup>

Repairs,  
Improvements.

See the comment to s. 506, below.

**498A.** (1) Where the administration of a ‘waqf’ is entrusted to a body of persons (hereinafter referred to as a “committee”) so as to give them jointly the powers of the ‘mutawalli,’ the ‘waqif,’ or the court, or the person or persons in whom the authority to appoint the members of the committee is vested, may validly provide (by rules or otherwise) how the members of the committee may exercise their powers as such joint ‘mutawallis’; *e. g.*, it may be provided that the powers shall be exercised at a meeting at which a certain fixed number of them (called the ‘quorum’) is present, but so that, (a) the meeting must be held upon notice, giving every member of the committee the

Administration  
of ‘waqf’ by a  
committee.

<sup>1</sup> *Mohiuddin v Sayyiduddin* (1893) 20 Cal. (1879) 1 Bom. 81.  
810.

<sup>2</sup> *Phate Sahib Bibi v. Damodar Pranj*

<sup>3</sup> See s. 409 (1), above.

<sup>4</sup> *Bail. I.* 608 (par. 2).

SECTION 498A. opportunity of being present and, (b) that the majority of those present are in favour of the act or resolution.

(2) *Quaere*, whether power to exercise authority, as mentioned in sub-section (1) above, with the provisos thereto, will be presumed to exist in every committee where the usual course of business has been for the majority to exercise it.<sup>1</sup>

(3) Subject to sub-sections (1) and (2), above, members of a committee may exercise its powers only at a meeting at which a majority of the whole committee is present, and the majority of those present is in favour of the act or resolution.<sup>1</sup>

Powers of  
committee in  
absence of  
special rules, tot  
'quorum.'

Section 498A  
re-stated.

The rules contained in s. 498A may be stated in the language of common parlance as follows:—“In the absence of specific rules, the ‘quorum’ for a meeting of a committee consists of a majority of the whole. The ‘quorum’ must be fixed by the authority appointing the committee, and cannot be fixed by the committee itself.”

The subject of the present section is on the border line of the subject of the present work. It may perhaps be more fittingly looked for in the law applicable to committees, generally. That is a subject, however, on which it is difficult to find information, and it has seemed best to include the present section here, especially as the rules referred to were recently enunciated in connection with an endowment governed by Muhammadan law, a ‘waqf’ in the city of Madras.<sup>1</sup>

Employment  
of agents  
where  
necessary  
or customary

499. The ‘mutawalli’ may employ for hire agents or managers for the administration of the ‘waqf,’ wherever he is empowered by the declaration of ‘waqf,’<sup>2</sup> or it is necessary, or in accordance with the usual course of business, so to do.<sup>3</sup> The authority of an agent or manager so employed ceases on the death or removal of the ‘mutawalli’ employing him.<sup>4</sup>

<sup>1</sup> *Syed Hassan Raza Sahib v. Hasanali Sahib* (1916) 40 Mad. 910; 83 Mad. L. J. 318; citing *Re Taitstock Iron Works Co.* (1867) L.R., 4 14, 233; *R. v. Gippo* (1790) 2 Ed. Raym. 1232; *Sir Robert Salisbury v. Colton & Davies* (1795) 1 Rst. 57; *Mayor, &c. of the Staple of England v. Governor, &c. of Bk. of England* (1887) 21 Q.B.D. 160, 165; *Haseerd v. Somany* (1826) 1. Freem 501; *R. v. Monday* (1774) 2 Cowp. 530; *Shynth v. Imley* (1810) 2 H.L.C. 789; *R. v. Bellenger* (1792) 1 F.R. 810; *Hon beach v.*

*Trague* (1860) 4 H. & N. 151; *In re London & S. Counties Freehold Co.* (1885) 31 Ch. D. 23.

<sup>2</sup> As in *Ammattal v. Kalidas* (1887) 11 Bom. 492.

<sup>3</sup> Bail. I 608, 591, (l. 5); *Wahid Ali v. Ashraf Hussain* (1882) 8 Cal. 732; 10 Cal. L.R. 530.

<sup>4</sup> *Mohammeddeen Ahmed v. Elahes Buxsh* (1866) 6 W.R. 277. Cf. Indian Contract Act, s. 201.



The instance given in the ‘Fatawa ‘Alamgiri’ is that of employing SECTION 499. a person to sweep a ‘masjid.’ The principle is the same as that stated by Lord Watson: “Whilst trustees cannot delegate the execution of the trust,<sup>1</sup> they may, as was held by this House in ‘Speight v. Gaunt,’<sup>2</sup> avail themselves of the services of others wherever such employment is according to the usual course of business.”<sup>3</sup> The first concession made in England to trustees, in the direction of delegating their powers, was, where there was necessity, “legal,” or “moral,” for justifying the employment of agents. “Moral” necessity is from the usage of mankind: if the trustees act as prudently for the trust, as he would have done for himself, and according to the usage of business referring to bankers, stewards and agents.<sup>4</sup>

The ‘mutawalli’ is of course not empowered to transfer his office to another during his lifetime: see ss. 492E and 495A, above.

500. (1) In the absence of any express provision to that effect, the ‘mutawalli’ is not authorised to borrow money for any purpose whatever, but the Court may authorise him to borrow money for the payment of taxes.<sup>5</sup>

Borrowing not authorised without permission of Court.

(2) The Court may authorise the ‘mutawalli’ to borrow money for purchasing seeds (for the cultivation of ‘waqf’ lands), but it is doubtful whether the ‘mutawalli’ may borrow money for the said purpose without being authorised by the Court.<sup>5</sup>

501. (1) In the absence of a provision in the declaration of ‘waqf’ authorising the ‘mutawalli’ to sell<sup>6</sup> or mortgage<sup>7</sup> the ‘waqf’ property, he has no authority to do so, and where he does so, he is guilty of committing a breach of trust,<sup>5</sup> for which he may be removed;<sup>3</sup> provided first that the Court may order the sale of ‘waqf’ land where

Not sale or mortgage.

<sup>1</sup> Cf. Indian Trust Act, s. 47.

<sup>2</sup> (1883) 9 App. Cas. 1.; (22 Ch. D. 727).

<sup>3</sup> *Leahey v. Whiteley* (1887) 12 App. Cas. 727, 734.

<sup>4</sup> Lord Hardwicke, *Ex parte Belchier* (1754) Amb. 219.

<sup>5</sup> Bail. I. 597; cf. however, *Nimaj Chand Addya v. Golan Hossain* (1909) 37 Cal. 179, and s. 501 below. Sect. 500 does not run very coherently, but it represents the law as it is.

<sup>6</sup> Bail. I. 594 (par. 3); *Shama Churn Roy v. Abdul Kabeer* (1898) 3 C.W.N. 158 (sale not merely voidable, but void), *Doual Chand*

*Mulick v. Kesumt Ali* (1871) 16 W.R. 116 (mutawalli removed for unlawful alienation). Cf. *Bherunck Chaudh Sahoo v. Golan Shuruf* (1868) 10 W.R. 158, (plaintiff having no beneficial interest in waqf, could not sue to recover property alleged to be improperly sold by the mutawalli; he might have asked for his removal); *Jeevan Dass Sahoo v. Sheth Kabeeraddoon* (1840) 2 Moo. F.A. 390, 421, (par. 3), 423 (par. 2).

<sup>7</sup> (*Moulvie v. Abdulwahid v. (Mussammat) Roper Dossu* (1816) 7 S. D. A. 268.

SECTION 501. it becomes unfit for the objects of the 'waqf,'<sup>1</sup> [or may retrospectively confirm a mortgage made by the 'mutawalli' without the sanction of the Court, where such mortgage was for urgent necessity and was proper—<sup>2</sup> *sed quare*:<sup>3</sup>] [secondly, that according to Shiah law where dissensions arise amongst the beneficiaries, the 'waqf' property may be sold, (*semble*) without an order of the Court—*sed quare*.]<sup>4</sup>

(Shiah law)  
sale where  
dissensions.

sale for  
improvement  
not permitted.

(2) The 'mutawalli' is not authorised to sell a part of the 'waqf' land in order to improve the rest, notwithstanding that the part sought to be sold cannot be put to any profitable use; provided that such part of the 'waqf' property as is in ruins or is injurious to the said property as a whole,<sup>5</sup> may be removed.

Purchaser's  
duty.

(3) Where the 'mutawalli' is authorised to sell, it is not necessary for the purchaser to look further than to the power of sale under the declaration of 'waqf,' nor to see whether the discretion is wisely exercised by the 'mutawalli.'<sup>6</sup>

Following  
'waqf' property

(4) The subject of a 'waqf' may, like other trust property, be followed in the hands of a third person under circumstances referred to in the Indian Trusts Act, s. 63.

1. Sale not  
valid  
because  
mausoleum in  
ruins.

With reference to the second proviso to s. 501 (1) it is stated in the 'Sharaya-ul-Islam' as follows: "(1) If the mansion belonging to a 'wukf' should fall into ruins, the space would not cease to be 'wukf.'

<sup>1</sup> Bail I. 587, *Shama Churn Roy v. Abdel Kabeer* (1898) 3 C.W.N. 178. "In the ordinances of Abu Saoud, there is an order issued by the 'Sad-ush-Sharaya' of the time, in the year 951 Hegira, declaring that no sale or exchange of 'waqf' property should take place without an order of the Sultan (or his representative, the Judge)." *Ameer Ali*, I. 342.

<sup>2</sup> *Nizam Chund v. Gulum Hassan* (1900) 37 Cal. 179. The authorities cited in the case (of texts 2, 6, 7, 9-11) all seem to refer to the necessity of obtaining the *Qazi's* permission previous to the sale or mortgage.

<sup>3</sup> On unauthorised acts of the mutawalli see comment to s. 291, above, and *Mutawalli v. Sheikh Ahmed* (1912) 34 All. 213, 39 F.A. 49, 14 Bom. L. R. 192.

<sup>4</sup> Bail II. 221 '*De'ayam-ul-Islam* (Notes). See comment. The *mutawalli* would be wise not to use his powers such as they are under this section without an order of the Court.

<sup>5</sup> Bail I. 505 (par. 2). Cf. ib. 608 (par. 2): a *minaret* may be erected only if necessary for the mosque.

<sup>6</sup> "Trees in a vineyard cannot lawfully be sold when the fruit of the vines is not injured by the shade, and though it should be injured by the shade, they cannot be sold, if their fruit is more profitable than that of the vines; but if it be less profitable, the trees may be cut down and sold." Bail I. 595.

<sup>7</sup> *Gulum Ali v. Saadatunnissa Bibee* [1864] W. R. 212.

nor would its sale be lawful. (2) But if dissensions should arise among the persons for whom it was appropriated, inasmuch as to give room for apprehension that it will be destroyed, its sale would be lawful. (3) But even though there should be no such differences, nor room for such apprehensions, but the sale would be more for the advantage of the parties entrusted (i) some are of opinion that the sale would be lawful, but (ii) it would rather seem that it ought to be forbidden. And if palm trees are rooted out of appropriated ground, (i) the same persons would say that it may be sold on the plea that no benefit can be otherwise derived from it, (ii) but others are of opinion that it cannot lawfully be sold in such circumstances from the possibility of turning it to some use, by letting it on hire; and this opinion seems the more reasonable.<sup>1</sup>

The passage may also have a bearing on the application of the 'Cly prés' doctrine.<sup>2</sup>

**501A.** *Quaere*, whether the 'mutawalli' may obtain the sanction of the Court for the sale or mortgage of 'waqf' property, by an application under the Indian Trustee Act, XXVII. of 1866;<sup>3</sup> or he must proceed by way of a suit, on originating summons.<sup>4</sup>

**501B.** Where any person other than the 'mutawalli' is desirous of obtaining a decree for the sale, mortgage, or exchange of the 'waqf' property, he must proceed as provided in s. 475, above.

**502.** Where the 'waqf' property consists of a house dedicated to the poor or other charitable object, the 'mutawalli' may validly grant a lease of it for a year, and where it consists of lands, he may validly grant a lease for three years, and the lease is not determined by his death;<sup>5</sup> provided first that where the 'mutawalli' purports to grant a lease for a longer term than of a year or three years

<sup>1</sup> Bail. II. 221 (55th); *Sharaya-ul-Islam* 239, case 8.

<sup>2</sup> *Salehah v. Bai Safahu* (1911) 36 Bom. 111; 15 Bom. L.R. 1025; Abdur Rahim "Muhammadan Jurisprudence," 305.

<sup>3</sup> *Khandas Narandas* (1885) 5 Bom. 154 173 (per West, J.): English law (and the Act) applicable in all cases in which peculiarly equitable doctrines have obtained recognition as a means of ameliorating native laws,

<sup>4</sup> *Halima Khatun* (1910) 37 Cal. 870 (per Pugh, J.): "The powers and authorities given by the Act shall and may be exercised only in cases to which English law is applicable"; cf. Indian Trustee Act, s. 39.

<sup>5</sup> Bail. III. 506 (par. 1, 2); *Fatma Qazi Khan*, III. 303; *Re Woodcummins* (1908) 36 Cal. 21; cf. s. 11 A, above. See also comment to s. 493, above.

**SECTION 501.**  
Valid if dissensions arise.  
*Quaere*, if more beneficial to c. q. tr. to sell.

Procedure for obtaining leave of Court.

Sanction for alienation

Power to grant lease for a year or three years.

SECTION 502. respectively, it is not void but voidable;<sup>1</sup> and secondly that where it is necessary for the purposes of the 'waqf,' the Court may authorise a lease to be made for any longer term, notwithstanding that the declaration of 'waqf' expressly provides that the lease shall not be made for a longer term than a period therein specified.<sup>2</sup>

Rent for  
occupying  
waqf property.

502A. Except as provided in the declaration of 'waqf' no person may occupy the 'waqf' property without paying a reasonable rent for it, and if the 'mutawalli' purports to authorise any person so to do reasonable rent will nevertheless become due and payable by the said person.<sup>3</sup>

Erection of  
buildings.

503. The 'mutawalli' may erect buildings on the 'waqf' property, or cultivate lands appertaining to the 'waqf,' if doing so is beneficial to the objects of the 'waqf'.<sup>4</sup>

Illustrations.

(1) "When the 'qayyim' (or person in charge) of 'waqf' lands desires to populate a village in it so that the inhabitants may increase therein, that they may protect it, and that the produce of corn may increase (this being required), then he is permitted to do so. An instance of this rule is when a 'caravanserai' is dedicated by way of 'waqf' for 'faqirs' and it is necessary to have a servant for sweeping and cleaning the 'serai,' and for opening and closing the door: now the 'mutawalli' gives a room to some person for his residence who, by way of hire, is to do this work, and devote himself to it: this is valid. This is in the 'Zahir'.<sup>5</sup>

(2) "When the 'waqf' land is adjacent to the houses in a town and people are inclined to rent the houses and the income would be greater by letting out the houses than by cultivation, or planting trees then the 'qayyim' may validly build houses and let them out, but the reverse is the case when the land is distant from the buildings of the

<sup>1</sup> Ball. I. 596 (H. 121-23):—"unless it be for the benefit of the waqf to sustain them. But this varies with the change of places and times." In *Dairymple v. Khoondkar* [1885] 8 D.A. 586, a perpetual lease was allowed to be granted on the ground that the property was not all waqf, but "heritable estate burdened with certain trusts," (cf. s. 464 *supra* above), but in *Soojat Ali v. Zamerooddin* (1866) 3 W.R.

156, it was held that "trustees of an endowment cannot create a valid *miras* (perpetual and heritable) tenure, at a fixed rent by granting a lease of any portion of a waqf property."

<sup>2</sup> See p. 625, n. 5.

<sup>3</sup> Ball. I. 597 (par. 1).

<sup>4</sup> *Fatous Alimgiri, Waqf, Oh. V.* corresponding to Ball. I. 595. (par. 4).

town, in which case he is not entitled to build house and let them out. SECTION 30: This is in the 'Fatawa Qazi Khan.'<sup>1</sup>

(2) *Unauthorised Administration of 'Waqf.'*

503A. A person who is not validly entitled to act as <sup>A mutawalli</sup> the 'mutawalli' of 'waqf' property, may, by taking <sup>of his own</sup> charge of it, and purporting to manage it as such,<sup>2</sup> become a trustee 'de son tort,' and answerable as such.<sup>3</sup>

Thus where possession is taken of 'waqf' property, even though the trust has not been consciously accepted, responsibility may be incurred as a constructive trustee for the due application of the property.<sup>4</sup>

504. (1) When the existing conditions<sup>5</sup> relating to the appointment of a successor to the 'mutawalli' or to the administration of the 'waqf,' are no more applicable<sup>6</sup> owing to the altered circumstances of the 'waqf' property, or of society, or of the position of the parties; and persons are actually in the administration of the 'waqf' property, by the tacit consent of the beneficiaries; such persons, if acting without dishonesty and without improper dealings, with the funds of the 'waqf' property, will not be held responsible for mere errors of judgment in which the beneficiaries have acquiesced; but they are answerable for moneys actually received, and for defalcations which they would have discovered but for their default or neglect.<sup>7</sup>

(2) It is very doubtful whether persons so administering 'waqf' property without being legally authorised to do so, can be justified in assuming the power of purchasing property out of the 'waqf' funds; and when they do so,

<sup>1</sup> *Ib.* corresponding to Ball. I. 595. (par. 13).

<sup>2</sup> Or by "taking on himself to act as trustee (per Lord Cottonham, L.C., *Rackham v. Suddut* (1840) 7 M. G. 607, 521, cited in *Jugal Kishore v. Lakshman Das* (1899) 23 Bom. 659. See also s. 504, below.

<sup>3</sup> *Budecdas Mukim v. Chooni Lal Johutru* (1908) 33 Cal. 789, 808: cf. *Godefrol on Trusts*, 2nd ed., p. 30.

<sup>4</sup> *Manohar Ganesh Tambekar v. Lakshmanam Govindram* (1887) 12 Bom. 247, 263 (per West. J.).

<sup>5</sup> *I.e.*, they may be either the condition

laid down in the original declaration of *waqf*, or such as the Court may have in the general jurisdiction laid down, under a scheme or otherwise.

<sup>6</sup> *Attorney General v. Abdul Kadar Jilakar* (1894) 18 Bom. 101—(*The Jum'a Masjid Case*). The terms of the *waqf* provided that the Qazi of Bombay should be the *Nazir* and the office of Qazi of Bombay has been abolished.

<sup>7</sup> *Ibid.* cf. *Abdul Khalek v. Poram Bibee* (1876) 25 W. R. 543; *Mahomed Ismail Ariff v. Ahmed Moolla Darood* (1916) 43 Cal. 1085, 1101 (P.O.).

**SECTION 504.** and the property falls in value, the purchase may (*seemle*) be avoided.<sup>1</sup>

This section is based on the case known as the 'Jum'a Masjid Case' of Bombay. The position of an unauthorised 'mutawalli' may be compared with that of an executor 'de son tort,' or a 'de facto' guardian.<sup>2</sup> See also s. 503a, above.

- (1) Past history.
- (2) Existing conditions.
- (3) Founder's wishes.

The Privy Council have said<sup>3</sup> that the past history of a 'waqf' and the way in which its management has been carried on heretofore in conjunction with other existing conditions that may have grown up since its foundation, should be borne in mind in appointing now 'mutawallis' or settling a scheme for the management of a 'waqf'.<sup>3</sup> Taking the statement of their Lordships literally, it may even appear as though the past history and present conditions stand on a footing of equality with the wishes of the founder. This, it is submitted, is not so in the theory of the law : though it may be that the past history and the present conditions may be supported by the inexorable logic of necessity, and in that case, they may stand on a footing even superior to the impracticable wishes of the founder : and extreme inexpediency is not easy to distinguish from absolute impracticability, though occasionally this may depend upon the length of the Chancellor's foot.

### (3) *General Disciplinary Jurisdiction of the Court.*

**Disciplinary jurisdiction**

**505.** The Court may order the 'mutawalli' to do general and any of the things referred to in ss. 475, 481, 488, 491-504, above. In particular, a 'mutawalli' may (a) be deprived of his remuneration if he has been guilty of malversation in the discharge of his duties, (but not otherwise),<sup>4</sup> or (b) be ordered (when he has been guilty of waste) to file, at stated intervals, a true and complete account of his income, expenditure, and dealings with the 'waqf' property,<sup>5</sup> or (c) where by availing himself of his character or position as 'mutawalli,' he gains for himself any pecuniary advantage, he may be made to account for it for the benefit of the 'waqf'.<sup>6</sup>

<sup>1</sup> *Ibid.* See comment.

<sup>2</sup> See s. 294, above.

<sup>3</sup> *Mahomed Ismail Ariff v. Ahmed Moolla Dawood* (1916) 43 Cal. 1085, 1101 (P.C.).

<sup>4</sup> *Ball*, I. 508.

<sup>5</sup> *Imdad Hossein v. Mahomed Ali Khan* (1874) 23 W.R. 150 (S.P. every six months).

<sup>6</sup> *Budreeda Musim v. Chooni Lal*

§ 6.—*Interpretation of the Declaration of 'Waqf.'* SECTION 506(1) *General Rules of Construction.*

506. (1) A declaration of 'waqf' must be construed <sup>intention to be given effect to.</sup> in accordance with the intention of the 'waqif,' and not according to the strict interpretation of any particular word.<sup>1</sup>

(2) Evidence of prevailing usage may be indicative <sup>prevailing usage.</sup> of the directions of the waqif.<sup>2</sup>

507. In the absence of something showing a contrary <sup>Reference to three generations implies perpetuity.</sup> intention, where the declaration of 'waqf' refers to one or two generations of the descendant of a specified person, as being entitled to the benefit of the 'waqf,' the benefit is confined to the said generations; but where three generations or more are referred to, the benefit is for the descendants in perpetuity, so long as they exist.<sup>3</sup>

A 'waqf' being made by a Hanafi Mussulman in the first instance: <sup>Illustration.</sup> in favour of the 'waqif's child,' (a) if the 'waqif' had any child at the time of the declaration, the benefit will go only to the children in the first generation, and the grandchildren of the 'waqif' will be excluded in favour of the poor; (b) if, however, the 'waqif' had at the time of the declaration no child, all his children having predeceased him, then the child of a son (but not the child of a daughter) will take the benefit but should, thereafter, a child be born to the 'waqif' that child will take the benefit to the exclusion of the grandchild; (c) if there is no child in the first or second generations, but there happens to be a third and fourth generation and others besides, the third generation and those below them participate together even though there should be many of them.<sup>4</sup>

508. Where the 'waqf' is dedicated to the nearest <sup>Proximity of relationship how reckoned.</sup> relatives of a named person, nearness of relation is (in the

*Jahurly*, (1896) 33 Cal. 787, 806; *Manohar v. Ganesh Tambekar v. Lakshmiram Gorindram* (1887) 12 Bom. 217, 265; cf. Indian Trusts Act, s. 88. See also *Mahomed Ismail Ariff v. Molla Dawood* (1916) 43 Cal. 1085, 1100; 1102 (P.C.) and comment to s. 493, above.

<sup>1</sup> *Asheroodeen alias Kalla Miah v. Drobo Moyee* (1876) 25 W.R. 557; *Advocate-General v. Fatima Sultan Begam* (1872) 9 Bom. H.C.R. 10.

<sup>2</sup> See explanation I. to s. 491, above, and footnotes thereto for usage being called in aid for deciding how the appointment of the mutawalli is to be made. *Mahomed Ismail Ariff v. Molla Dawood* (1916) 43 Cal. 1085, 1100, 1102 (P.C.)

<sup>3</sup> Ball. I. 571. (par. 1. II. 2-6).

<sup>4</sup> Ball. I. 570 (par. 2).

**SECTION 507.** absence of anything to show a contrary intention) to be reckoned in the following order of priority, the members of each group excluding all those included in the groups that follow :—

**Hanafi law.**

(1) According to Hanafi law<sup>1</sup>—

- (a) sons and daughters,
- (b) father and mother,
- (c) grandchildren,
- (d) grandparents,
- (e) great-grandchildren,
- (f) [great-grandparents, and in the same order,]<sup>2</sup>
- (g) brothers and sisters.<sup>1</sup>

**Shiah law.**

(2) According to Shiah law<sup>3</sup>—

- (a) descendants how lowsoever together with the father and mother,
- (b) grandparents, and brothers (and sisters ?) together with the descendants of the brothers (and sisters?)<sup>2</sup> how lowsoever,
- (c) paternal and maternal uncles (and aunts ?)<sup>2</sup> in the order of inheritance.

**Females when included in masculine.**

**509.** *Semble*, in the absence of something to show the contrary, the masculine gender used collectively in a declaration of 'waqf' includes females, unless there are none of the male sex, in which case the benefit reverts to the poor.<sup>1</sup>

**Illustrations.**

(1) When a dedication is made for the benefit of the sons of a person collectively, his daughters share the income equally with the sons, so long as any sons are surviving, and if there are no sons surviving, then the daughters take no benefit under the 'waqf'<sup>5</sup> and the whole of the income of the 'waqf' property is for the benefit of poor persons.<sup>6</sup>

(2) A 'waqf' is dedicated for the benefit of A's sons—

- (a) if A has two sons, or more they take the profits equally.<sup>7</sup>
- (b) if A has only one son, he takes half of the profits and the other half is given to the poor;<sup>7</sup>

<sup>1</sup> Bail. I. 577.

<sup>2</sup> Not expressly mentioned, Bail. I. 577, or II. 217.

<sup>3</sup> Bail. II. 217 (par. 1).

<sup>4</sup> See Illustrations to s. 509.

<sup>5</sup> Bail. 572 (par. 2); cf. Bail. II. 217 (par. 4).

<sup>6</sup> See s. 469 (4), above.

<sup>7</sup> Bail. I. 572.



(c) if A has sons and daughters they all take equally <sup>1</sup>

SECTION 509.

(d) if A has no sons but daughters the whole benefit is for the poor <sup>1</sup>

(3) A waqf is dedicated for the benefit of A's brothers and A has brothers and sisters they all take <sup>1</sup>

**510** In the absence of something in a declaration of <sup>Per o</sup> 'waqf' to show a contrary intention, (a) where the bene <sup>le r p t o</sup> ficiaries are referred to or identified by some quality or <sup>w ap p l i c a b l e</sup> description which is of a permanent nature, <sup>2</sup> or which cannot be acquired again after it has once been lost or ceased to be applicable, <sup>2</sup> there those persons are alone entitled to benefit under the 'waqf' who, at the time that the declaration was made, could be identified or described in the manner referred to, but (b) where the quality or description is such that it may be lost or cease to be applicable, and thereafter it can again be acquired or become applicable, <sup>3</sup> there all those persons are entitled to take the benefit of the 'waqf' who can be referred to or identified in the said manner when the produce or income accrues

(1) A says my land is sadaqa (i) on my blind or one eyed children <sup>Illustrations</sup> or (ii) on my minor children or (iii) on my male children and on the children of my male children —then those children are alone entitled who were in existence at the time of the dedication answering to the description because s 510 (a) is applicable the quality or description in (i) and (iii) being of a permanent nature and (ii) being of such a kind that after it is lost it cannot again be acquired <sup>4</sup>

(2) A says my land is dedicate by way of waqf for my children (i) living in Basrah or (ii) professing Islam or (i) who are married or (iv) who are poor then all those who answer the description referred to at the time the income or produce accrues are entitled respectively of their doing so or not at the time of the dedication

**511.** (1) In interpreting a dedication of 'waqf'

<sup>1</sup> Bail I 57.

Bail I 569 *eg* blindness or belonging to particular sex.

<sup>2</sup> *Id* *eg* residence in a specific town

<sup>4</sup> Bail I 569

Bail I 569 570 The following instances are also given—(a) those who have

become poor among my children means (Imam Muhammad d a) all who are poor at the time the produce accrues (b) all who are in need of my children means the same But see ss 489 474 48) 481 483 488 above and comment See also s 114 above

- SECTION 511. unless there is anything contained in it to show a contrary intention, by "child of the 'waqif'" is to be understood not only the child actually in existence at the time when the dedication is made, but after born children.<sup>1</sup> Children whose paternity is not known to be in the 'waqif,' but is established in him merely by acknowledgment, are not included;<sup>2</sup> nor are grandchildren and remoter descendants; provided that where there is no child living at the time of the dedication, but the child of a son<sup>3</sup> [or other agnatic descendant] is living, (a) such child or descendant, but no person in a lower generation, is included;<sup>3</sup> (b) thereafter if a child is born to the 'waqif' then such later born child becomes entitled to the produce. Where there is no descendant in the first and second generation, all those who are in the third or any lower generation, participate together under the description of "child."<sup>3</sup>

*Exceptions.*

- (d) After third generation all take mutually, not jointly.

## 1A. 'Aulad'

(1A) The term 'aulad' includes males as well as females (but not the descendants of females).<sup>4</sup>

## 2. 'Ahfad' includes cognates.

(2) The term 'ahfad' is of the largest and most general signification, including the descendants of females as well as males.<sup>5</sup>

## 3. 'Aulad' or 'waris' excludes cognates.

(3) The sons of a daughter are not included in the term 'aulad dar aulad', or 'warisan'.<sup>6</sup>

(3A) The terms 'aulad' and 'khandan' 'prima facie' include only legitimate offspring, though there may be some cases in which 'aulad' includes illegitimate children.<sup>7</sup>

## 4. 'Nasab' excludes cognates.

(4) The word 'nasab' and its inflections refer only to agnatic descendants.<sup>8</sup>

## 5. 'Nasl' 'zari'at' include all descendants.

(5) The words 'nasl' and 'zari'at' include and refer

<sup>1</sup> Bail. I. 568, (H. 1-4).

<sup>2</sup> Bail. I. 568, (par. 2).

<sup>3</sup> Bail. I. 570, (par. 2); 571, (par. 2). See s. 507, *ibid.* The child of a daughter is not included according to the *Zahir Riwayat*; and this is correct: Bail. I. 571; *Hya-on-nisa v. Mafukkir-ol-Islam* (1805) 1 S. D. A. (Cal.) 106.

<sup>4</sup> Bail. I. 568 (par. 2).

<sup>5</sup> (Shekh) *Karimodas v. (Nawab) Mir Sayyid Alam Khan* (1880) 10 Bom. 119.

<sup>6</sup> *Abdul Ganne Karam v. Hussain Miya Rahimulla* (1873) 10 Bom. H.C.R. 7.

<sup>7</sup> *Bhaiya Sher Bahadur v. Bhaiya Ganpa Buxah Singh* (1913) 41 I. A. 1 (appeal from Oudh).

<sup>8</sup> Bail. II. 221.

to all descendants, male or female, near or remote,<sup>1</sup> and whether born at the time of the dedication or thereafter.<sup>2</sup> SECTION 511.

(6) The expression 'qarabat' (relationship) does not refer to the relation between a man and his descendants or ascendants;<sup>3</sup> nor the wife or husband; provided that where the context shows that it was intended in a wider sense, it may be extended so as to include [all blood relations and<sup>1</sup>] relations by affinity.<sup>1</sup> 'Qarabat refers to collaterals.

(7) 'Yatim' (orphan) means an infant child who has no father living, though the mother and grandfather may be alive. The condition of orphanage ceases on the attainment of puberty.<sup>5</sup> Yatim : minor whose father is dead.

For illustrations and comment see after s. 511A, below.

**511A.** Where the person to be benefited is referred to as the child of a named person, the rules contained in s. 511, above, apply with the necessary alterations.

(1) A 'waqf' is dedicated in the following terms: "This my land is settled on my children." Then, so long as there are any children of the 'waqif,' they, or he, or she, is entitled to the benefit of the whole of the 'waqf' property; after all the children are dead, the grandchildren (the children of his sons) are entitled, after the grandchildren are exhausted, those in the third and remoter generations all take, the nearer and the more remote sharing alike.<sup>6</sup> Illustrations.

(2) The dedication is in the following terms: "I have settled it on my children," and the 'waqif' has only one child surviving at the time when the produce accrues, half of it will be for the child and half for the poor. (If it were "for my child" the surviving child would have taken the whole).<sup>7</sup>

(3) The dedication is in the following terms: "'Sadaqa' on my two children S and D, and when they fail, then upon the children of both, for ever so long as there are descendants"; and S dies leaving two children SS and SD, (who are grandchildren of the 'waqif'), then, D

<sup>1</sup> Bail. I. 572 (par. 4); cf. Bail. I. 601; II. 217, (par. 4).

<sup>2</sup> Bail. I. 573.

<sup>3</sup> Bail. I. 576-577.

<sup>4</sup> *Advocate General v. Fatima Sultan Begum* (1872) 9 B.C.R. 19 : *agriba* (coll. *agriba*), which is a derivative of the same stem word as

(*qarabat*) does not include the widow. It was apparently assumed that all relations by blood were included in the term : hence the words in [ ] above.

<sup>5</sup> *Verbatim* from *Ameer Ali*, I. 285 (par. 5).

<sup>6</sup> Bail. I. 571, (par. 2).

<sup>7</sup> Bail. I. 571

**SECTION 511A.** takes half of the produce, and the other half goes to the poor, and the children of the deceased child (SS and SD) do not get anything so long as D survives. After D's death, the whole of the produce is to be expended upon (a) SS, (b) SD, (c) their children, (d) the children of D and (e) the children of D's children.<sup>1</sup>

*Illustrations.*

(4) A 'waqf' is dedicated for the benefit of A's child, and on A's 'nasl.' The 'waqf' is valid, and the beneficiaries will be all A's descendants, whether male or female, whether near or remote, whether agnates or cognates, and whether born at the time of the dedication or thereafter.<sup>2</sup>

(5) A 'waqf' is dedicated to A's "children in being, and the children of their children." A's children and great-grandchildren will take, but not his grandchildren.<sup>3</sup>

The provisions of ss 511 and 511A must be applied with caution to deeds of our times, which are not expressed in the language and phraseology contemplated by the ancient Arabic texts. But with caution they may be of application also in the case of ancient grants, or 'inams' by the Moghul Emperors (the construction of which is occasionally the subject of litigation,) or in the interpretation of rules or provisions, relating to succession to the office 'mutawalli' which it would seem must be interpreted in accordance with similar principles.

### (3) *Distribution of Benefit amongst those Entitled.*

**512.** (1) Where several objects or beneficiaries are referred to in a declaration of 'waqf,' they take the benefit of the 'waqf' in equal shares and concurrently (or simultaneously), unless there is anything to show an intention that they should benefit in a different proportion, or in succession to one another.<sup>3</sup>

(2) Where the beneficiaries under a 'waqf' consist of a

Equal and  
concurrent  
shares.

Share of an  
of a class  
accrues to  
each.

<sup>1</sup> Bail I. 571-572. Three points may be noted in *id.* (3): *First*, that as the *anqanims* mentions the two beneficiaries by name, they are each to have a half of the produce and have no right of survivorship: cf. s. 512 (2). *Secondly*, the children of both S & D are to take simultaneously, and only on failure of both, so that between the death of S and of D, the children of S do not take anything. *Thirdly*, the half share of S while D survives him is given to the poor and does not accrue to D.

<sup>2</sup> Bail I. 573. This is subject to s. 480, above, in the case of *waqfs* that are not governed by the Waqf Act.

<sup>3</sup> Bail I. 570-573; *Mynhai*, 231 (Bk. 23, s. 23); (*Muthkass Ana*) *Ramanadham v. Vaid Levrai* (1909) 34 Mad. 12, 17 (last 7 lines). See s. 459 illustration (1) (c) above; and comment to s. 512; and Bail I. 574 (*id.* 3-4 from the bottom); 572 (*id.* 13, 14, 24-27); 573, *id.* 5-7. See also s. 470 above.

class of persons who are individually identified, they are entitled to the benefit of the 'waqf' equally amongst themselves, and if one of them dies, his share goes to the poor, and the remainder to the survivors.<sup>1</sup>

(3) Where a 'waqf' is for the benefit of a person's son and his children, and the children of his children forever so long as there are descendants,"<sup>2</sup> the benefit according to the 'Fatawa 'Alamgiri' would be taken by them 'per capita,' males and females being on the same footing, and the children of daughters being included.<sup>3</sup>

(4) Where a declaration of 'waqf' purports to be in favour of the children of a named person, and in default of them, in favour of the poor, and some of the children die, the survivors are entitled to the whole of the profits of the 'waqf' property; provided that where the children are individually identified in the declaration, the share of each child lapses on his death to the poor<sup>4</sup> or other ultimate charity.

(5) Where the declaration of 'waqf' provides that the beneficiaries should take specified shares consisting of fractions of the total income of the 'waqf' property—

(a) If the said fractions added together amount to more than unity, the share of each beneficiary abates proportionately.<sup>5</sup>

(b) The residue (if any) left after giving to the beneficiaries their specified shares, is divided amongst each of them in equal shares<sup>6</sup> [semble this is subject to s. 471, above, and to the proviso that an intention is shown to give the whole of the income of the 'waqf' property to the said beneficiaries.<sup>7</sup>]

<sup>1</sup> Bail. I. 509 (par. 2), 600 (par. 2). Substances (2) & (3) of s. 512 are particular instances of the general rule contained in s. 512, subs. (1).

<sup>2</sup> See s. 480 *explanation II*, above.

<sup>3</sup> Bail. I. 572; (par. 3); II. 217 (par. 4).

<sup>4</sup> Bail. I. 574 (par. 2); cf. Bail. I. 600 (par. 2), below; s. 517, I have retained the "poor" as the reversioners: through any other object may

take their place—see s. 469 *explanation*, above.  
<sup>5</sup> Bail. I. 599 as by *income* in succession, the increase or *but* referring to the increase of the common denominator, cf. s. 605 (17), and s. 610, below.

<sup>6</sup> Bail. I. 509 (II 30-33), 660 (II. 8-11). Compare the *return* to the Quranic sharers in inheritance: s. 625, below.

<sup>7</sup> This is not expressly stated.

Benefit taken  
per capita,  
males and  
females alike.

Which share  
of deceased  
lapses to poor.

Abatement  
(*'but'*).

*'Return'*  
of residue.

## SECTION 512.

*Illustrations.*

(1) Where the beneficiaries under a declaration of 'waqf' are children of a named person, both males and females take in equal shares.<sup>1</sup>

(2) W makes a declaration of 'waqf' property for the benefit of W's or X's "children," and there is surviving, only one child of W or X (as the case may be), then half of the produce or income of the subject of 'waqf' will be for the benefit of the said child, and the other half will be given to the poor.<sup>2</sup>

(3) A 'waqf' is made for 'Abdulla and Zaid : they take the income equally ; after the death of one of them, half of the income, and when both die, the whole of it, goes to the poor.'<sup>3</sup>

(4) A 'waqf' is made for the child of 'Abdulla without mentioning the number, then so long as any child of Abdulla lives, he takes the whole income.<sup>4</sup>

(5) The 'waqf-nama' provides : --

(a) that 1/2 of the income should be given to A. and 2/3 to B ; then the A takes 3/7 and B 4/7 ;<sup>5</sup>

(b) that 1/2 should be given to A, and 1/3 to B ; then the 1/3 which is residue should be divided equally between them ;<sup>6</sup>

(c) that it should be given to A and B. and that 1/3 or 100 'dirhams' should be given to A ; then B takes the residue after giving 100 'dirhams' or 1/3 to A.<sup>7</sup>

Equality is  
equity.

The rule of an equal division amongst the beneficiaries prevails also in England, on the ground that equality is equity. and, on this ground, where the trusts declared were (a) in favour of A's relations, and (b) for such charitable uses and purposes as the trustees should think most proper and convenient, Sir J. Jekyll, M. R., directed that (a) one moiety should go to A's relations, and (b) the other moiety to charitable uses, the trust in favour of A's relations purporting to be for such of them as were most deserving, and in such manner as the trustees should think fit, all were directed to come in without distinction.<sup>8</sup> See also the Transfer of Property Act, s. 45.

#### (4) *Devolution of Rights upon Descendants or Heirs.*

Lapse of share  
of beneficiary

513. (1) In the absence of anything showing a contrary intention, the interest of a beneficiary under a

<sup>1</sup> Bail. I. 570 (par. 2) ; II. 217 (par. 1) 220  
(third appendage).

<sup>2</sup> Bail. I. 560-570—cf. ss. 469-471, above.

<sup>3</sup> Bail. I. 590.

<sup>4</sup> Bail. I. 599 (par. 2). But see s. 5c, above

<sup>5</sup> Bail. I. 599 (II. 30-33) 600 (II. 8-11), 1

<sup>6</sup> *Douley v. Attorney-General* (1735) 2

Eq. C. L. Ab. 195 ; 4 Vin. Ab., 485 pl. 16 ;

cf. *Re Douglas Obert v. Barron* (1887) 35 Ch.

D. 473, 483.

'waqf' lapses on his death and accrues to the benefit of the poor [or the other ultimate charitable object of the 'waqf'.]<sup>1</sup> SECTION 513.

(2) Where in a declaration of 'waqf' it is provided, either expressly or impliedly, that the descendants of the beneficiaries thereunder shall succeed to the respective interests of the said beneficiaries, and there is nothing to show a contrary intention, the said descendants succeed 'per stirpes' and not 'per capita';<sup>2</sup> and males and females take equal shares.<sup>3</sup> Per stirpes distribution

(3) *Semble*, where in the circumstances referred to in subs. (2), above, it is provided that the said interests should devolve not upon the descendants, but upon other relatives of the said beneficiaries, the rules contained in ss. 508-512, above, will apply, with the necessary changes. Distribution limited to other than descendant.

(1) W makes a declaration of 'waqf' in favour of "B. and his offspring, generation after generation;" (a) B has a son, P, and a daughter, B<sub>d</sub>. They will, after the death of B, take the benefit of the 'waqf' equally. (b) On the death of B, his children, if any, will take half of the benefit in equal shares; (c) then if B<sub>ss</sub>, the son of B, dies (whether he predeceases B, or survives him), the children of B<sub>ss</sub> will take the share to which B<sub>ss</sub> was entitled; (d) if the descendants of B or B<sub>d</sub> become extinct, then his or her share lapses to the descendants of the others (as the description "offspring of B" is general and not specific).<sup>4</sup> Illustration

(2) W makes a declaration of 'waqf' providing for "his lineal descendants." He has ten lineal descendants<sup>5</sup> at the time of the declaration. So long as these live, they will each be entitled to an equal share. But if four of them die childless, and two (*viz.*, A and B) die, leaving children, then the children of A and B will respectively take an equal share with the four surviving lineal descendants, *i.e.*, the said four will each take  $\frac{1}{6}$  of the benefit, and the children of A  $\frac{1}{6}$ , and the children of B  $\frac{1}{6}$ , *i.e.*, all the six lineal descendants will benefit equally 'per stirpes'.<sup>6</sup>

In illustration (2) above the "appropriation" is stated by Macnaghten to be "in favour of his lineal descendants who are ten in number." Sir R. Wilson notes on this: "'Sic' in Macnaghten; but

<sup>1</sup> See ss. 511, 511A, above; and the illustrations and authorities there cited.

<sup>2</sup> Macn. 341, case 8, Q. 2; *Amcer Ali*, I, 270-271, citing *Nadai Mulhar*, III, 672, *Majma-ul-Anhar*, Part II, 641.

<sup>3</sup> Macn. 342; *Bail* I 570.

<sup>4</sup> Macn. 341, case 8, Q. 2.

<sup>5</sup> See comment.

<sup>6</sup> Macn. 341, case 8, Q. 2.

SECTION 513. the context seems to show that they all belong to the first or at any rate to the same generation of descendants." It is submitted that this remark is based on some misconception. It makes no difference whether or not the descendants belong to the same generation, nor even whether some of the ten are children of the rest. The description being "his lineal descendants," it includes the ten persons who are alive at the time, answering that description—and "descendants" includes sons as well as grandsons; these ten persons take equally in accordance with s. 511 (1), above; and as the descendants are not individually identified, the shares of the deceased beneficiaries do not lapse, but accrue to the survivors of the ten descendants. This conclusion is based on the fact that the 'waqf' is in favour of his "descendants," which is evidently taken as sufficient to indicate that the provision is not limited to A, B, and the others, individually, (s. 512 (1)), but that it is to devolve on the descendants of A, B, and the others, hence on the death of any of the ten, the benefit neither lapses to the ultimate object of the 'waqf,' nor goes to the survivors of the ten, but devolves on the heirs of the deceased beneficiary.<sup>1</sup>

### § 7.—Special Rules Relating to Mosques.

#### (1) 'Waqf' for Mosque when Completed.

(Sunni law)  
Mosque property  
must be divided  
off and provided  
with way.

514. (1) According to Hanafi law where a person erects or specifies a building for the purpose of dedicating it as a 'masjid,' the 'waqf' is not completed, and his ownership of the land and building does not cease, until he divides them off from the rest of his property, and provides a way to go to it, and either permits public prayers to be said therein, or delivers possession of the mosque to a 'mutawalli,' or to the judge, or his deputy.<sup>2</sup>

(Shiah law,

(2) According to Shiah law the 'waqf' of a mosque is completed by the 'waqif' making a formal declaration of 'waqf,' and permitting prayers to be said in the mosque.<sup>3</sup>

Illustration.

(1) W purports to build a 'masjid' within his house, or boundaries, and permits the public to enter there and say their prayers, then

<sup>1</sup> See illustration (3) to s. 511A, above, and footnote thereto.

<sup>2</sup> Hod. 239; Ball. I. 604, 605 (par. 2, 3); *Takoob Ali v. Luchman Dass* (1874) 6 N.W. 80 (where it is said that two conditions are essentially requisite: (a) the site must be publicly appro-

priated, and (b) public prayer said); *Adam Sheikh v. Isha Sheikh* (1894) 1 C.W. N. 76; Mosque becomes consecrated by delivery to *mutawalli*, or declaration, or on performance of prayers).

<sup>3</sup> Ball. II. 220 (par. 1) see comment.



it becomes a ‘masjid’ according to the opinion of all, provided that he gives the public a right of way; but not otherwise, according to Abu Hanifa; and even without the right of way, according to the two disciples<sup>1</sup> and the Shiah law, (provided that according to Shiah law a formal declaration of ‘waqf’ is necessary).<sup>2</sup>

(2) W, a Hanafi, purports to build a ‘masjid’ and there is a basement underneath it, or a dwelling place, on the floor above the ‘masjid,’ then though there is an entrance to the ‘masjid’ from the highway, it does not validly become a ‘masjid’; but if the basement were dedicated to the use of the ‘masjid,’ it would be valid, as in the case of the ‘masjid’ at Jerusalem:<sup>3</sup> the reason being that the ‘masjid’ in the first instance is not divided off. That objection would not apply under Shiah law,<sup>4</sup> provided that a formal declaration of ‘waqf’ is made.<sup>5</sup>

(3) A man has an open space of building ground, and gives permission to a body of persons to say prayer there publicly; and the permission is without any condition, and for ever, without restriction of a time limit, then the ‘masjid’ is consecrated, and the property cannot form part of his estate on his death.<sup>6</sup>

According to Hanafi law “separation is necessary, [for completing the ‘waqf’ of a mosque] because without that the ‘masjid’ is not made special to Almighty God; and prayer is necessary, because delivery is requisite according to Abou Hanifa and Moohummud.”<sup>7</sup> On the other hand, the Shiah law is stated in the following terms: “If one should appropriate (i.e., purport to make a ‘waqf’ of a building for) “a ‘masjid’ or place of worship, it is valid, though only one person should pray in it, . . . but without the formal words of ‘waqf’ being pronounced,” it would not “pass out of the property of the original owner.”<sup>8</sup>

Delivery of possession may be evidenced by the fact that the subject of the ‘waqf’ is put to the use of the objects of the ‘waqf’; just as in the case of a gift, delivery of possession is proved by acts of ownership exercised on the subject by the donee.<sup>9</sup> The following is given by Syed Ameer Ali as a translation from the ‘Raddul Muhtar’: “As delivery of possession in the case of a ‘waqf’ is deemed necessary though Abu

<sup>1</sup> *Fatawa Alamgiri, Waqf*, ch. vi, in II. Ball. I. 604, Hed. 239 (col. II.).

<sup>2</sup> Ball. II. 220 (par. 1).

<sup>3</sup> Ball. II. 220, (par. 1).

<sup>4</sup> *Fatawa Alamgiri, Waqf*, ch. XI; Ball. I. 605 (par. 4); II. 220 (par. 1). *Masjid* is the derivative of *sajda*. *Sajda*=adoration, an inclination (in prayer) or prostration, the forehead

touching the ground; and *Masjid*=place for making *sajda* or place where prostration in prayer may be made: no structure or building is necessarily connoted in the expression *Masjid*.

<sup>5</sup> See footnote to s. 514 (1), above.

<sup>6</sup> Ball. II. 219-220.

<sup>7</sup> See s. 404, above.

Requisite for dedicating mosque, ownership as evidence of possession.

SECTION 514. Yusuf holds a contrary opinion, the nature of the delivery depends in each case upon the nature of the specific thing, for example, the delivery of a cemetery is by the burial of one person; of a tank or reservoir by one person drinking there; a guest-house ('mussaffir khânâh,' travellers' house) by one wayfarer or traveller alighting there. Similarly as the purpose of a mosque is that people should pray there in 'jamâat,' it is required that where there is no express dedication, prayers should have been offered there with the 'azân' or 'ikâmat.'"<sup>1</sup>

(2) '*Waqf*' cannot Participate in Benefit with Mosque.

Waqf cannot benefit under waqf for Mosque

515. Where the object of a 'waqf' is a mosque, the 'waqf' cannot reserve any benefit to himself under the 'waqf'; and a 'waqf' with any such reservation is void.<sup>2</sup>

This is in accordance with all the schools of law. For Abu Yusuf's exposition of the Hanafi law alone permits the 'waqf' to reserve any benefit to himself in a 'waqf' of any kind whatsoever. But even according to that exposition, where a mosque is the object of the 'waqf' the 'waqf' cannot be a beneficiary.

(3) *Whether Mosque can be Reserved for a Sect.*

Mosque can be restricted to locality etc.

516. It is stated in the '*Fatawa 'Alamgiri*' that where a 'masjid' is consecrated, and it is purported to be reserved for the people of a particular locality, the reservation is void, and persons not belonging to that locality are entitled to worship in it;<sup>3</sup> and it has been said in the course of decisions by the Courts<sup>4</sup> that a mosque cannot be dedicated with a reservation for a particular sect or class of people; but according to Shafi'i law a 'masjid' may be dedicated with such reservation,<sup>5</sup> and the effect of the rule of law above stated in British India is not free from doubt.

<sup>1</sup> Ameer Ali, "*Mahomedan Law*," I, 307, citing *Raddul Mukher*, Vol. III, 572. The present writer has not been able to trace the original in the work referred to, but the law seems to be laid down similarly in the *Fatawa Qazi Khan*, 296.

<sup>2</sup> *Ball*, I, 606, (l. 10). It is not quite clear whether the reservation alone is void, or the whole *waqf*. The ambiguity does not seem to be the translator's.

<sup>3</sup> *Ball*, I, 606 (par. 1).

<sup>4</sup> See cases cited in footnotes to ss. 520, 521, and cf. *Kuttayan v. Mamanna Ravulhan*, (1912), 35 *Mad.* 681.

<sup>5</sup> *Wilson*, "*Digest*," s. 417, says that according to Shafi'i law a Masjid may be dedicated with such a reservation, citing Van den Berg's *Manuel de Jurisprudence Musulmane (Munhaj-at-Talbin)* II, 286; but in Mr. Howard's translation of Van den Berg's version there is nothing to show such a rule of Shafi'i law: See *Munhaj-at-Talbin*, Book. 23, pp. 230, 233.

The following points have been laid down by the Privy Council.<sup>1</sup> SECTION 516.  
 (1) Among Sunni Muhammadans the followers of each of the four sects can properly worship with each other; (2) there was not produced any text to show that a follower of Abu Hanifa could do wrong in following a practice recommended by others of the four 'Imams';<sup>2</sup> (3) if the 'Imam' (leader at prayer) introduces the loud-toned 'amin' and the 'rafaidin';<sup>3</sup> (a) it does not disqualify him from officiating in a mosque where these ceremonies were not previously used, nor (b) does it justify a section of the worshippers in setting up another leader at prayer at the same time that the prayer is being conducted by the duly authorized Imam;<sup>4</sup> (4) there is no rule of law that when public worship has been performed in a certain way for twenty years, there cannot be any variation, however slight, from that way;<sup>5</sup> the question in each case of dispute must be as to the magnitude and importance of alleged departure;<sup>6</sup> (5) the Court ought not to declare that the 'imam' or 'mutawalli' of the 'masjid' has authority to eject the dissentients if and when they interfere: the plaintiffs must rely on the prohibitory order which can be enforced according to law if the occasion arises. (6) The remarks of Edgewood, C. J., to the effect that a mosque cannot be consecrated exclusively for the use of any particular sect or denomination of Sunni Muhammadans, that a mosque must be a mosque for all, it must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual, where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience;<sup>7</sup>—were referred to by the Privy Council, but the question was not decided whether a mosque cannot validly be reserved for the use of followers of a particular sect. The point is perhaps not likely to arise in British India in this exact form. But there are religious communities—'jama'ats' is the term applied to them—which possess property, including places of worship, and though it would be foreign to the ideas of a Mussulman to exclude another Mussulman from entering and offering up his prayers in any place of worship,—as a matter of practice no one, who is not a member of a particular 'jama'at,'

Fazi Karim  
v. Maula  
Buksh.

Can any  
Mussulman  
enter any  
mosque?

Mosques under  
the control of  
particular  
'jama'ats.'

<sup>1</sup> *Fazi Karim v. Maula Buksh* (1891) 18 Cal. 448; 18 I.A. 50, reversing the High Court.

<sup>2</sup> *Ib.*, cf. *Muhammed Ibrahim v. Gulam Ahmed* (1864) 1 Bom. H.C.R. 230.

<sup>3</sup> *I.e.*, raising the arms at the time of saying *Allah Akbar* in prayers.

<sup>4</sup> *Semble*, this refers to the authorized prayers. *Quære*, if it affects the principle of s. 516.

<sup>5</sup> *Ala-Ullah v. Azimullah* (1889), 2 All. 494.

<sup>6</sup> 509. These observations were *obiter*; it having been found that the mosque in question had been exclusively used by Hanafis; but it does not seem to have been claimed that they had any right to exclude others; the P. C. refer to it, however, as a ruling: *Fazi Karim v. Maula Buksh* (1891) 18 Cal. 448, 459; 18 I. A. 56; and cf. *Kuttayan v. Mamanna Ravathan* (1912) 35 Mad. 681.

SECTION 516. ever enters the mosque belonging to it, without being invited to do so, or obtaining leave, and without conforming, within the precincts of the mosque, to the amenities observed by the members of the 'jama'at' in possession of the mosque; and though these places of worship are always referred to as 'masjids' they are kept under the control of persons who obey the orders of the heads of their own community. The question would therefore arise most directly in India if the persons in charge of such a mosque, whose position is very different from that of a 'mutawalli,' were proceeded against in a court of law for a breach of trust on the ground that the doors of the mosque were locked up, and not opened except to members of the 'jama'at.' They would be guilty of a breach of trust if the real object of the 'waqf' were to benefit not their own 'jama'at' but all Mussalmans. That question is very different from whether persons habitually coming to a particular mosque can be prevented by the others from praying in their own way, which was dealt with in 'Fazl Karim's' case.

(4) *Mosque Property never Applied to Other Objects.*

Land on which mosque built passes out of private property.

517. The land where a 'masjid' has been erected does not become the property of its original owner, or his heirs, notwithstanding that the 'masjid' has fallen to decay, and is no longer used for prayers, nor can its old materials be used for building or repairing another 'masjid.'<sup>1</sup>

Imam Muhammad was of opinion that the land and old materials of a 'masjid' in ruins revert to the 'waqif' or his heirs. But this opinion is opposed to that of Abu Yusuf, according to which the 'fatwa' is given.<sup>2</sup>

English law.

The following statement of the English law relating to consecrated property may be compared with the rule of Muhammadan law under which property once dedicated as a mosque can never again be applied to any other use: "If it was a public chapel," said Sir Thomas Plumer, V. C., "it must have been consecrated, and by that solemn rite dedicated to the service of God and separated from all unhallowed uses, and could not be unconsecrated but by Parliament."

Provision for poor not necessary with mosque.

518. Where the object of the 'waqf' is a 'masjid,' all the exponents of Hanafi law are agreed that there need

<sup>1</sup> Hed 210; Bail. L. 606 (par. 2); IL 221 (fourth). *Kuttayan v. Mamanna Ravuthan* (1912), 35 Mad. 681.

<sup>2</sup> *Ex parte Greenhouse* (1815) 1 Maddock, 92.

108; reversed in the House of Lords on a point of procedure, *sub nom. Corporation of Ludlow v. Greenhouse* (1827) 1 Bligh, 17.

not be any ultimate dedication to the poor, and there may be provisions for expenses connected with the use of the 'masjid' as a place of worship.<sup>1</sup> SECTION 518.

A 'waqf' may be validly made in the following form. "I dedicate this my land" (specifying its boundaries) "with its rights and advantages as a perpetual 'waqf' during my life and after my death, on this condition, that it may be cultivated, and its produce be applied for the expenses or repairs of the buildings, and for the salaries of the attendants, and general maintenance, and that the surplus may be expended on the building of such and such a 'masjid,' and for the supply of its oil and all similar purposes, for the benefit and advantage of the 'masjid, with liberty to the 'mutawalli' to expend thereout in accordance with his discretion, and when the said 'masjid' is not in need of these expenses, then the said produce should be applied to the poor."<sup>2</sup> *Illustration*

This section brings out the point on which Abu Yusuf disagreed from Imam Muhammad and Abu Hanifa, viz., whether it is necessary to make express mention of the poor as beneficiaries under a 'waqf.'

#### (5) Endowment of Existing Mosque.

519. Property may be dedicated by way of 'waqf' for supplying an existing 'masjid' with its necessary expenses, and with a provision that (1) in case the said 'masjid' is not in need of the said expenses, then the income of the 'waqf' property should be expended on the poor,<sup>3</sup> or (2) with provisions for the benefit of objects that must in time cease, and the lapse of which will leave the whole benefit available for the 'masjid.'<sup>4</sup> *Provision for poor engraved on endowment for mosque*

By a 'sana' a gift is made of the income of certain villages, providing that one-third of it is for the defrayal of expenses of the servant of a mosque, and 'farsh' and light, etc., one-third for the expenses of a 'madrasa,' and the remaining one-third for the *Illustration*

<sup>1</sup> Bail. I. 607. See illustration.

<sup>2</sup> *Fatawa 'Alamgiri, Waqf*, Ch. XI., *fat* n. 1111; Bail. I. 607 (par. 1), does not bring out the fact that the object of the *waqf* in this illustration is to benefit another *masjid* which does not form part of the *waqf* property; and that the point is that the object of a *waqf* may be to provide oil, &c., for an existing *masjid*, with the reversion in favour of the poor.

<sup>3</sup> Bail. I. 607, see s. 518 *ill.*, s. 180, *ill.* 6; cf. *Asvobai v. Noorbai* (1905) 8 Bom. L. R. 243, 246.

<sup>4</sup> *Muzkurul Huq v. Pohraj Dattaraj Mohapatra* (1870) 13 W.R. 235; provisions to defray expenses of a mosque, alms to mendicants, and surplus for expenses of marriages, burials and circumcision of members of the family of the *mutawalli*.

SECTION 519 allowance of the 'mutawalli'; held, that the gift complied with the four essential conditions necessary to create a valid 'waqf.'

(6) *Legal Proceedings Relating to Mosque.*

(a) *Civil Proceedings.*

Person  
Interested in  
mosque may  
sue singly in  
case of breach  
of trust, &c.

520. Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager, or superintendent of such mosque, temple or religious establishment, or the member of any committee appointed under the Religious Endowments Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent, or member of such committee, in respect of the trusts vested in or confided to them respectively; and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent, or member of a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, superintendent, or member of a committee.<sup>2</sup> Such a suit will not be entertained without a preliminary enquiry under s. 18 of the Religious Endowments Act.

Powers of the  
Civil Court :  
(a) specific  
performance,  
(b) Damages  
(c) Removal  
of trustee,  
&c.

(b) *Criminal Proceedings.*

Disturbance  
in mosque.

521. Any person making any demonstration<sup>3</sup> oral or otherwise in any mosque, or saying his prayers in accordance with the ritual of his sect not in good faith, but with the intention of maliciously disturbing others in their devotions, is in British India guilty of committing a criminal offence.<sup>4</sup>

<sup>1</sup> *Jugtmoni Choudhary v. Romjani Bute* (1884) 10 Cal. 533.

<sup>2</sup> Religious Endowments Act, XX. of 1863.  
s. 11

<sup>3</sup> E.g., by bawling out the word *amin* in a noisy and disorderly fashion, causing a disturbance; *Stralight, J., in Atanullah v. Azimullah* (1889) 12 All. 291 (F.B.), explaining *Q-E. v. Ramson* (1885) 7 All. 461.

<sup>4</sup> *Ib.* (per Mahmood, J.); *Gangoo v. Ahmad-ulha* (1889) 13 All. 419; see also *Abdus Subhan v. Korban Ali* (1908) 33 Cal. 294; *Fazi Karim v. Masala Buksh* (1891) 18 Cal. 448, 18 I.A. 59; *Adam Sheikh v. Isha Sheikh* (1894) 1 C.W.N. 76; *Javehir v. Akbar Hussain* (1884) 7 All. 178; *Dawoodhuy v. Muhammad Abu Nasr.* (1911) 33 All. 660. *Ram Chandra v. Ali Muhammad* (1913) 35 All. 197.

(1) Members of the 'Muhammadi' or 'Wahabi' sect are **SECTION 521.** Mussalmans, and are therefore entitled to perform their devotions in a mosque, though they may differ from the majority of the Sunni Mussalmans on particular points.<sup>1</sup> *Illustrations.*

(2) S, a Shafi'i, may pronounce the word 'amin' loud in saying his prayers in a mosque, where the majority of worshippers are of the Hanafi sect, who pronounce it in a low tone, provided that S does it 'bona fide,' in accordance with his own rituals, and not for the purpose of disturbing the others, and notwithstanding that he may cause annoyance to them.<sup>1</sup>

<sup>1</sup>. Ball, L. 606; *Fazl Karim v. Maula Bulsh* v. *Gulam Ahmed* (1864) 1 Bom. H.C.R. 236; (1891) 18 Cal. 448; I. A. 59; *Muhammad Ibrahim* *Ata-Ullah v. Azimullah* (1899) 12 All. 494.

## PRE-EMPTION.

§ 1.—*Preliminary.*

Right of  
pre-emption.

Pre-emptor.

Subject of  
pre-emption.

"The land."

"The seller."

"The  
purchaser."

"The sale."

Right of  
pre-emption  
"arising."

Pre-emptors  
equal in degree;  
joint pre-emptors.

522. (1) Where a person<sup>1</sup> has the right to have any property transferred to himself on his paying the consideration for which the owner of the said property has agreed (or purported) to sell or barter it<sup>2</sup> to another, such right is called the "right of pre-emption";<sup>3</sup> the person having or claiming to have the said right is called "the pre-emptor," and the said property is called the "subject of pre-emption."<sup>5</sup>

(2) In this chapter unless there is anything in the subject or context showing a contrary intention—

(a) The subject of pre-emption is referred to as "the land"; its owner,<sup>4</sup> as "the seller or vendor"; the person to whom it was originally intended to be transferred, as "the purchaser or buyer or vendee"; the agreement for its transfer as "the sale", or the "ground for pre-emption"; its consideration as the "purchase money"; and the right of pre-emption is referred to as "arising from" the sale or from the ground of pre-emption.

(b) Where two or more persons are simultaneously entitled to pre-empt the same property, they are referred to as being on the same footing as regards the priority of their claims to pre-emption, or as being "equal in degree" or as "joint pre-emptors." In the illustrations and footnotes to this chapter the letters S, Sa, etc., refer to the

<sup>1</sup> Words importing the masculine gender include females, and words in the singular include the plural, and vice versa.

<sup>2</sup> The texts expressly refer both to a sale and to exchange, but for brevity only sale is referred to throughout, and that expression must be taken to include exchange or barter.

<sup>3</sup> Ball. I. 471. Pre-emption is called *shuf'a* in Arabic; and the pre-emptor *shaf'*. Mahmood, J., suggested that the land forming the subject of pre-emption should be called the "servient tenement": *Jai Ram v. Mahabir Rai* (1885) 7 All. 720, 728; see comment.

<sup>4</sup> I.e., the person who has agreed or purported to sell the property.



sellers or vendors; B, BA, etc. to the buyers or purchasers SECTION 522.  
or vendees; and P, PA, etc. to the pre-emptors. Italic letters refer to females.

(c) Where the right of one person to pre-empt arises Priority in the right to pre-empt.  
only in the absence, or on the disqualification, of another, or on that other waiving his right to pre-empt, the latter is said to have "priority in the right to pre-empt" over the former.<sup>1</sup>

(d) Where the personal law by which any person Persons governed by law of pre-emption.  
is governed includes the law of pre-emption, he is referred to as being "governed by the law of pre-emption."<sup>2</sup>

(e) The 'talab-i-muathibat,' 'talab-i-ishhad,' and 'Talab-i-muathibat' (or assertion),  
'talab-i-tamlik,' as defined or explained in s. 528, below, are 'Talab-i-ishhad' (or demand),  
in this chapter referred to as the "assertion,"<sup>3</sup> "demand," 'Talab-i-tamlik' (or enforcement),  
and "enforcement" of the claim to pre-emption respectively;<sup>4</sup> and the pre-emptor is referred to as asserting, demanding and enforcing his claim.

(f) A 'wajib-ul-arz' means a record of the informa- 'Wajib-ul-arz' or record of tenures, &c.  
tion obtained in regard to landed tenures, to the rights, interests, and privileges of various classes of the agricultural community, and to the local usages connected with landed tenures, by the Settlement Officer, originally under Regulation VII. of 1822, and subsequently under other enactments and Government orders.<sup>5</sup>

<sup>1</sup> The Civil Procedure Code, O. XXV. r. 14 (2) (b) speaks of superior and inferior pre-emptors.

<sup>2</sup> Persons governed in India by the law of pre-emption are: (a) all Mussulmans (except in places where the Courts refuse to enforce the law of pre-emption on the ground that it is against public policy, or that it has fallen into disuse); (b) those who have adopted it by custom; or (c) by contract.

<sup>3</sup> "The first formality technically called the 'immediate demand' "—per Ameer Ali, J. delivering the judgment of F.C. *Jadu Lal Sahu v. Maharam Janki Koor*, (1912) 36 Cal. 915; 39 I. A. 101; 14 Bom. L.R. 436, 444.

<sup>4</sup> These terms cannot be adhered to when the words of other authors are quoted, in which cases, or where otherwise necessary, the Arabic equivalents are given, or they are qualified as the

first, second, and third (claim), respectively.

<sup>5</sup> See comment, and *Chowdhree Brij Lal v. Raja Goor Sahai* (1867) Agra F.B. (N.W.P., F. B. RULING, July-Dec. 1867), 95, where the origin and effect of the *wajib-ul-arz* are explained in great detail. See also *Sadhu Sahu v. Raja Ram* (1893) 16 All. 40 (F.B.); *Raturaji Dubani v. Pakhan Bhapat* (1910) 33 All. 196, 204, 206 (F.B.); *Lali v. Murlidhar* (1908) 28 All. 488, at 492 (F.B.); *Murtaza Hussain Khan v. Moham-mad Yassin-Ali Khan* (1910) 31 Mad. L. J. 804 (F.B.). The following fuller explanation is to be found in Wilson's glossary:—"Wajib-ul-arz, lit. fit for, or worthy of, representation—a petition, a written statement or representation, a written agreement: in the North-West Provinces it designates what is considered to be the most important of the documents relating to the village administration, describing the

## SECTION 522.

Custom and  
'wajib-ul-arz'  
altering  
Muhammadian law.

(3) The rules stated in this chapter represent the general Muhammadan law; but that law may be altered by custom; and, in particular, where pre-emption is claimed in accordance with the 'wajib-ul-arz,' its construction governs the rights of the parties in the first instance.

Basis of right to  
pre-emption.

"The right of pre-emption is founded on contract and neighbourhood, confirmed by 'tulub' or demand, and 'ishhad,' or invocation; and is perfected by taking possession."<sup>1</sup>

Procedure

The procedure on a suit for pre-emption is given with some fullness in Baillie I. 485-487, (Book VII. chapter 3). It presents in a compendious form all the various matters and constituents for establishing the claim, and may therefore be referred to with advantage.

Definitions of  
pre-emption.

Pre-emption is defined in the 'Sharaya'-ul-Islam' as follows: "Shoofa is the legal title of one partner in joint property to the share of another partner in consequence of its transfer by sale."<sup>2</sup> Mahmood, J., defined it as "a right which the owner of certain immovable property possesses as such for the quiet enjoyment of immovable property to obtain in substitution for the buyer, proprietary possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person."<sup>3</sup> See also the definitions in the Punjab and Oudh Laws Acts, 1872 and 1876 respectively: s. 557, below.

Other definitions.

The definition contained in s. 522 (1) above is that of pre-emption as recognised in Muhammadan law; but the term has been more briefly defined as the right of purchasing property before, or in preference to, other persons.<sup>4</sup> This definition seems to have been the basis of the definitions in the Oudh and Punjab Laws Acts, which is as follows: "The gift of pre-emption is the right of persons hereinafter mentioned

established mode of paying the Government revenue, the actual shares or holdings, whether held in severalty or in common, and how separation or re-allotment takes place, the powers and privileges of the *Lambardars*, and how elected, what extra items of collection are recognised, the rules regarding fruit and timber trees on the estate, and how irrigation is maintained; the appropriation of waste lands, the village servants and their fees, and the pay of the village watchmen; it should be, in fact, a complete view of the organization of the village, and is to be attested by the signatures of all the *Lambardars* and as many of the shareholders as choose to sign, and by the signatures of the *Patwari* and *Kanungo*; it should be read aloud in open court in the hearing of the sub-

scribing parties, and the settlement officer, and be approved and signed also by him. The term seems to have been superseded of late years by *Khowat*."—Wilson's Glossary (1855). On the evidentiary value of the *wajib-ul-arz* see *Fazi Hussain v. Muhammad Sharif* (1914) 36 All. 47.

<sup>1</sup> Bail. I. 481; cf. Bail. I. 485-487.

<sup>2</sup> Bail. II. 175: "According to the Hanafites not only a partner in the property, but also in its rights, and a neighbour, have a legal claim to pre-emption," *ibid.* n. 1, citing Bail. I. 478.

<sup>3</sup> *Gobind Dayal v. Inayatullah* (1895) 7 All. 775, 799, adding, "I could easily support every word of this definition by original Arabic texts of the Muhammadan law itself."

<sup>4</sup> Sweet, "Law Dict." cited in "Encyclopaedia of the Laws of England," "Pre-emption" q.

or referred to, to acquire, in the cases herein after specified, immovable SECTION 522. property in preference to all other persons. See s. 557, below, and comment.

Imam Shafi'i is reported to have stated that the right of pre-emption is Shafi'i's view. "repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the law."<sup>1</sup> The right is justified, however, on the following grounds: (a) that so far as a joint owner is concerned, it is injurious to him to have a stranger as participant in the property to which he must be attached through associations, but which he may perhaps abandon, and that it would be a greater hardship on him than on the stranger, the more so as the stranger is compensated; (b) that inconveniences attend the division of property; (c) the author of the 'Sharaya'-ul-Islam' refers to division occasioning loss or damage as a cause why the right is given;<sup>2</sup> and (d) of the 'Hidaya,' to pre-emption "being a disseising another of his property merely in order to prevent apprehended inconveniences"; and (e) again he explains that "the grand principle of 'shaffa' is the conjunction of property and its object . . . to prevent the vexation arising from a disagreeable neighbour."<sup>3</sup>

Pre-emption justified.

The pre-emptor's position is distinguishable from that of an ordinary purchaser as regards the compensation payable to the purchaser if he erects buildings or plants trees, and it turns out that the vendor was not the owner of the land: the ordinary purchaser has a right to compensation for the improvements from the true owner; but the pre-emptor cannot recover it either from the seller or the purchaser or the true owner; for "[the ordinary purchaser] is deceived by the seller, and is empowered by him to take the ground,—whereas the Shafee (pre-emptor) is not deceived by the purchaser, nor can he be said to be empowered by him to take the ground, since the purchaser himself is compelled—the Shafee taking possession of the ground without his consent."<sup>4</sup>

Pre-emptor distinguished from ordinary purchaser.

"In all questions of pre-emption," says Mahmood, J.,<sup>5</sup> "there are three important points for consideration:—The first is the property which, by analogy, may be called the dominant tenement, that is to say, the property in virtue of which the pre-emptor's right exists. The second is the pre-emptors themselves. The third is the pre-empted property which, by analogy, may be described the servient tenement."<sup>6</sup>

<sup>1</sup> Hed. 548. Shafi'i therefore does not admit it in favour of a neighbour.

<sup>2</sup> Ball. II, 178 (par. 3).

<sup>3</sup> Hed. 550 (col. 4, par. 4); 558, col. II, par. 1, 2.

<sup>4</sup> Hed. 557 (col. II).

<sup>5</sup> *Jai Ram v. Mahabir Rai* (1885) 7 All. 720, 728; *Jadav Lal Sahoo v. Maharani Janki Koor* (1912), 39 Cal. 913.

**SECTION 522.** From the nature of the right, it is clear that its existence cannot be pleaded in defence to a suit for possession by the purchaser of the right and interest of another co-sharer.<sup>1</sup>

The question has been raised, but not decided, whether or not the right of pre-emption does create an interest in the land.<sup>2</sup>

### § 2.—Operation of the Law of Pre-emption.

#### (1). *Persons and Territories subject to the Law of Pre-emption:*

##### *Choice of Law as Affected by Status of Parties.*

Application in India:

**523.** (1) The law of pre-emption is enforced in British India in accordance with s. 5, above.<sup>3</sup>

Shiah and Sunni law of pre-emption.

(2) The Sunni or Shiah law of pre-emption respectively governs persons belonging to the said sects.<sup>4</sup>

Custom or contract.

(3) Pre-emption may be based on custom<sup>5</sup> or may arise out of contract (whether or not contained in the 'wajib-ul-arz'); and then the terms of the custom or contract (as the case may be) will govern the rights of the parties,<sup>6</sup> and the conditions of the custom or contract will (subject to ss. 523 c and 523 d) be strictly enforced.<sup>7</sup>

Conflict of laws.

(4) Where the parties to a suit for pre-emption are not governed by the same law the decision will be in accordance with the provisions of s. 524, below.

#### 1. HISTORY OF THE LAW OF PRE-EMPTION.

History of pre-emption

The history of pre-emption in India was alluded to by Sir John Edge, delivering the advice of the Privy Council<sup>8</sup> in the following terms:—

<sup>1</sup> *Ajudhia Baksh Singh v. Arab Ali Khan* (1885) 7 All. 892.

<sup>2</sup> *Sitaram Baurau v. Sayed Sirajul Khan* (1917) 1 Bom. 636, 660; cf. the Transfer of Property Act, s. 54, last clause, and s. 40.

<sup>3</sup> See comment.

<sup>4</sup> *Ch. Qurban Hussain v. Chote* (1899) 22 All. 102.

<sup>5</sup> As to proof of custom see *Dakshabhai v. Chumal* (1913) 38 Bom. 183; *Janki v. Ranoo* (1913) 35 All. 472.

<sup>6</sup> Cases depending on the *wajib-ul-arz* are very common. Examples of other contracts are furnished by *Rajaram v. Krishnasami* (1892) 16 Mad. 301 and *Haris Patil v.*

*Jahuruddin Gazi* (1897) 2 Cal. W.N. 575. When it arises out of contract, it is frequently mentioned by reference to the option to purchase which, e.g., the lessee or mortgagee or partner may be given.

<sup>7</sup> *Ranchhugh v. Mellon* (1864) 2 Dr. & Sm. 278; 34 L.J., CH., 227; *Weston v. Collins* (1865) Jur., N.S. 190, 34 L.J. CH., 353; *Chatterman v. Mann* (1851) 9 Ha. 206; *Ward v. Wolverhampton Waterworks Co.* (1871) 13 Eq. 243; 41 L.J., CH., 308; cf. Act X. of 1877 s. 310 and Act XXI. of 1890 s. 14, for rights of pre-emption in Court sales.

<sup>8</sup> *Digambar Singh v. Ahmad Sayed Khan* (1914) 13 All. L. J. 236 (P.C.)

"Pre-emption in village communities in British India had its origin in the Muhammadan law as to pre-emption, and was apparently unknown in India before the time of the Mughal rulers. In the course of time customs of pre-emption grew up, or were adopted, among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan law of pre-emption, and is peculiar to the village in its provisions and its incidents; a custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as it is possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.<sup>1</sup>

Pre-emption originates from Muhammadan law.

Customs follow that law.

Acts of Legislature.

Contract.

## 2. PRE-EMPTION: ITS ORIGIN.

The following extracts from the historical portions of the judgment in 'Chowdhree Brij Lal v. Raja Goor Sahai'<sup>2</sup> are not affected by the fact that the Privy Council<sup>3</sup> have approved of the decision in 'Fakir Rawot's'<sup>4</sup> case, and thus, it would appear, by implication, disapproved of Chowdhree Brij Lal's case,<sup>5</sup> in so far as the two decisions conflict.

"There are three grounds on which claims to pre-emption may be put forward: they may be claimed as founded on law, or on general usage, or on special contract. Act XIV. of 1850, (Limitation) . . . I. distinctly recognises these three grounds of claim.

PRE-EMPTION may be put forward as founded on

(1) "As founded on law, 'pre-emption' may be claimed in this country under the provisions of the Muhammadan law or the special enactments with regard to . . . auction sales of 'putteedaree' estates."

1. LAW:—  
(a) Acts.  
(b) Muhammadan law.

<sup>1</sup> See p. 650, n. 8.

<sup>2</sup> [1867] N. W. P., F. B. Rulings, July—Dec., p. 95. The figures and letters in ( ) are mine. This Judgment is reproduced in Abbasi's "Law of Pre-emption," from which

work it is cited here.

<sup>3</sup> *Jadu Lal v. (Maharani) Janaki Koor*, (1912) 39 Cal. 915; 39 I. A. 101.

<sup>4</sup> [1863] W. R., Sp. No. 143; Beng. L. R., Supp. vol., 35.

**SECTION 523.** (2) "As regards general usage, it was declared by the late Sudder Court of these Provinces<sup>1</sup> that pre-emptive rights do not obtain as an universal custom among Hindus. To this statement we assent, with this addition that in some parts of India the custom has been found to prevail accompanied with all the conditions attaching to pre-emptive rights under the Mahomedan law.

**III. CONTRACT** (3) "As based on contract, we hold it beyond question that in this country persons who are in the position of proprietors, may by contract, attach to their property such conditions as may be mutually agreed upon between the contracting parties, provided that such conditions are not contrary to law; and we further hold that in the case of co-parcenary estates, in respect of which such contracts are most frequently made, stipulations for mutual rights of pre-emption are not forbidden either by positive enactments, or general usage having the force of law."

Claim in the alternative on contract, custom, or Muhammadan law.

It is the practice of the Courts to allow claims for pre-emption to be asserted on the grounds both of contract and custom in one and the same plaint<sup>2</sup> and a suit for pre-emption may be based, in the alternative, on contract, custom, or Muhammadan law;<sup>3</sup> but, where there is an established custom of pre-emption, and the pre-emptor fails to bring himself within it, he cannot fall back on the Muhammadan law.<sup>3</sup>

**I. MUHAMMADAN LAW** of pre-emption enforced as religious usage or equity, etc.

Sir R. Wilson (s. 350) after referring to the view of Mahmood, J., and Spankie, J., that the law of pre-emption is enforceable amongst Muslims as a religious usage or institution, says that this proves too much, for if it were so the whole of the Muhammadan 'Shari'at' should be enforced, including the law of property, and contract. [As a matter of fact the law on these points is enforced, unless it is ousted by any legislative enactment (cf. s. 4, above).] Sir Roland suggests that "some portions are more firmly rooted in the sentiments of the Moslem community than other portions, and that the judges may possibly have had good reasons for believing this to be the case with pre-emption." It is submitted that the proper view of the question is that the whole of Muhammadan law would be enforced, if not as a religious usage or institution, then on the ground of justice, equity, and good conscience except such portions (1) as are repealed by Acts of the Legislature, (2) as have fallen into desuetude,—which seems to be the case

Desuetude.

<sup>1</sup> 2 Sel. Rep. 477. *Sic*; Cf. *Mori. Dig. I.* 535, 536.

<sup>2</sup> *Nehal v. Than Singh* (1870) 2 N. W. 222

<sup>3</sup> *Muhammad Akbarullah v. Shams-un-*

*Nissa Bibi* (1914) 36 All. 456. See also *Abdul Hamid v. Maritullah* (1914) 36 All. 573, where the plaint was sought to be amended and the High Court held that the refusal of permission to amend was wrong.

with such rules of Muhammadan law (if any) relating to contract, SECTION 523. or the law of property as are not covered by the law of British India on the point. The latter seems to have been the ground on which the High Court at Bombay recently held that pre-emption would not be enforced in Bombay; though the judgments do not explicitly refer to desuetude, it is said that the adoption of pre-emption must be clearly proved.<sup>1</sup>

The origin and character of the ‘wajib-ul-‘arz’ is examined in detail in ‘Brij Lal’s’ case.<sup>2</sup> It is pointed out that it had its origin in Regulation VII. of 1822, and then the Judgment proceeds:—

“We have seen that the Settlement Officers were instructed to induce the co-parceners, whose property they were engaged in settling, to come to an agreement on all subjects on which disputes were likely to arise; and probably on no point were disputes more likely to arise than on questions relating to the transfer of tenure. As in the case of the undivided family, no member could alienate his share of the common inheritance without the consent of the other members, so in the village community, which often had its origin in an undivided family, nothing could be more opposed to the feelings of the community than the transfer of any interest in the estate to one who was not a member of the village community. Hence at settlement it was not unfrequently admitted as an established usage, or agreed, that no alienation should be made by any co-parcener to a stranger, without the consent of the whole body of co-parceners. The settlement ‘mist’ published under the authority of Government in 1847, as a supplement to the directions of Settlement Officers, contains a form of such a stipulation.

“But a stipulation of this nature practically operated to prevent a co-parcener from obtaining the full value of his share, because it limits the market, i.e., the number of persons to whom he could without such permission sell. Consequently a modified provision was more generally adopted whereby the co-parcener was not restricted from selling for the best price he could obtain in the open market; but it was made incumbent upon him to give the opportunity of purchasing at that price to the other co-parceners commencing with those, who, being co-parceners, were first nearest to him in family, and next co-sharers in the same ‘thoke’ or ‘puttee.’ Such a stipulation, a form of which is likewise given at page 195 of the settlement ‘mist,’ it can easily be

Originating from Settlement Officer's efforts to bring about agreement as to tenures. Pre-emption amongst Hindus traced to inalienability of joint family property unless consent of all co-parceners obtained.

Stipulation for pre-emption modifies this by allowing alienation without such consent but with prior option.

Pre-emption accords with spirit of Hindu law.

<sup>1</sup> *Mahomed Beg Amin Beg v. Narayen Meghaji Patil* (1915) 40 Bom 258; *Bhatt Dahyabhai Motiram v. Pandya Chondal Keshordas* (1913) 38 Bom. 183

<sup>2</sup> (*Choudhree*) *Brij Lal v. (Raja) Goor Sahai* (1867) N. W. P. Full Bench rulings, July-Dec. 1867, p. 95.

SECTION 523. soon, was entirely in accordance with the spirit of Hindoo law and custom ; it obtained still greater importance, when the default of a single shareholder in contributing his portion of the Revenue, rendered the whole of the village or 'puttee' liable to sale.

Theory that pre-emption not borrowed from Muhammadan law.

"It seems reasonable to conclude that it was with a view to compass these ends, that is to say, to prevent the intrusion of a stranger into the estate of the family or community and to exclude any person whose want of thought or skill might augment the burdens of the other members of the co-parcenary community, rather than from any desire to borrow an institution from their Mahomedan neighbours, that the Hindoo communities caused stipulations for pre-emption to be inserted in the 'wajih-ool-urz.' In corroboration of this view, we may point to the fact that few cases are to be found in the reported decisions in which pre-emption as a local custom has been claimed, and fewer still where it has been proved to obtain among Hindoo communities in these Provinces : again, it is worthy of observation that the Mahomedan pre-emption is by no means identical in its incidents with the right, as it is ordinarily recorded, in the 'wajih-ool-urz.'

Distinctive features of pre-emption under 'wajih-ool-urz.'

"Differing from pre-emption under the Mahomedan law, pre-emption, under a 'wajih-ool-urz,' is most frequently stipulated to arise on occasions of temporary alienations by way of mortgage, as well as on occasions of absolute alienation, or sale.

1. It agrees even on temporary alienations like mortgage.
2. Offer to co-parcener necessary before sale to outsider.

"Under the ordinary 'wajih-ool-urz' the parties admit that by agreement or otherwise they have no right to alien to a stranger, unless an offer has, before alienation, been made by the co-parceners desirous of aliening, to the other co-parceners, which they have refused to accept. Under the Mahomedan law, the right does not accrue, until the sale has been actually made ; according to some authorities, too, pre-emption under the Mahomedan law is confined to property in towns, such as houses and gardens or small walled enclosures, and to such property only ; while the 'wajih-ool-urz' deals principally with the holding of the agricultural community.

3. Exercise of right not dilated.

"The conditions necessary to give validity to a claim of pre-emption under the Mahomedan law seem purposely designed to make the exercise of the right difficult and unfrequent ; the object proposed by the parties to the 'wajih-ool-urz,' if the origin be such as is above suggested, would be, on the other hand, to make the exercise of the pre-emptive right easy and general.

Such a right or pre-emption no hardship on seller.

"Nor can it be said that such a right of pre-emption as is most frequently accorded is any great hardship to the vendor ; it does not



preclude him from procuring the best price he can for his property, SECTION 523. it only requires that, having ascertained the fair market value, he shall dispose of it at a price equal to that value, to his co-parceners; it may entail some delay and prevent him from making a speedy sale, but it does not deprive him of an adequate consideration for his property.

Act relating to  
'putteedaree'  
estates.

"It is moreover worthy of notice that this same right of pre-emption, the legislature of this country have by two separate enactments thought fit to secure to co-sharers in 'putteedaree' estates, on the occasion of the sale of the 'puttee' for default of revenue, or of any share in any 'puttee' in execution of a decree.<sup>1</sup> That these enactments are both passed on the same policy which led to the insertion of the pre-emptive condition in the 'wajib-ool-urz' it is almost impossible to doubt.

"In view of the foregoing considerations, we hold that the pre-emptive conditions which are found in the 'wajib-ool-urz' paper, are to be regarded generally on a distinct basis from that of the 'huq shoofa,' under the Mahomedan law,<sup>2</sup> and that two of the earliest decisions<sup>3</sup> of the late Sudder Court in which this dictum was pronounced, are worthy of acceptance;<sup>4</sup> in support of this ruling we may also refer to the 194th paragraph of directions for Collectors of Land Revenue where the origin of the right, as created generally by stipulation at the time of settlement, and as independent of the Mahomedan 'shoofa,' is affirmed.

Conclusion:  
Muhammadian  
law does not  
affect rights  
under 'wajib-ool-urz'—

"We do not mean to lay it down, that a pre-emptive condition in a 'wajib-ool-urz,' may not be so expressed, as to indicate that the Mahomedan custom of pre-emption prevails, and in such case, it will be undoubtedly the duty of the Court, if called on to decide on the validity of a claim preferred under such a condition, to decide upon its validity, with reference to the special provisions of the Mahomedan law, but if no clear expression is found that the parties intended that the Mahomedan right of pre-emption should be recorded as prevailing, and if on the contrary, the words indicate a course differing from the requirements of the Mahomedan law to be pursued by the vendor and the would-be purchaser, then the stipulations of the 'wajib-ool-urz,' and those stipulations alone, are to be regarded, and the Court must pass its decree with reference to the proof afforded, that those stipulations

unless  
expressly  
incorporated.

<sup>1</sup> Compare *Kadir Bux v. Ram Tahul Bhagut* (1871) 3 N.W. 125.

<sup>2</sup> As already pointed out, a different view of the history of the law was taken in *Fuker Rawot v. Sheikh Emambulah* [1863] W. R. (P.R. N., 8p, No.) 113; Beng. L. R. SUPP. VOL. 35,

the Privy Council have in *Jadu Lal v. Maharanee Janki Koor* (1912) 39 Cal. 915, approved of *Fuker Rawot's* case.

<sup>3</sup> No. 105 of 1840, LL. Dec. N. W. F., p. 166.

<sup>4</sup> No. 72 of 1850, Report of 1851, p. 214.

SECTION 523. have or have not been performed. In our view, if the 'wajib-ool-arz' is to be regarded as a contract, the same laws of interpretation are to be applied as to other contracts; if on the other hand it is to be regarded as a record of usage or custom, the custom (if the term of the instrument be clear) may be assumed to be recorded with all the incidents which are admitted to attach to it, and no new incidents not mentioned in the record ought to be imported into it, unless it be the manifest intention of the parties that they should be so imported."

Necessity of  
forms of  
Muhammadian  
law when  
claim under  
'wajib-ul-arz.'

With reference to the preliminary ceremonies of Muhammadian law they say: "We have been able to find two cases only among the earlier reported decisions, in which one incident of the Mahomedan law, immediate demand, has been held necessary to the validity of a claim of pre-emption under a 'wajib-ool-arz' . . . In reference to this precedent,<sup>1</sup> we observe that the suit was brought after a lapse of ten years from the date of the transaction, which it sought to impugn, and in holding, as we do, that a prompt assertion of the nature required by the Mahomedan law is not necessarily essential to the validity of a claim under a provision in the 'wajib-ool-arz,' we do not wish to be understood as ruling, that a person entitled to such a claim, may not by his conduct debar himself from obtaining relief, although he may sue within the limitation period prescribed by law.

Loss of right  
by standing  
by.

"If, being entitled to a prior offer, or, if, his consent being necessary to give validity to a sale, he stands by for a considerable period, with full knowledge that a sale is being made, and, without giving any intimation that he dissents, allows persons to enter into contracts and occupy under those contracts, he may have lost his legal right of relief, though a breach of contract may be shown."

'Wajib-ul-arz'  
a contract or  
official record  
of rights.

In concluding, the Court says: "In fine, we answer the question proposed to us as follows: The 'wajib-ool-arz' is to be regarded as a contract or rather as an official record of admitted usages or agreements. In construing it, the Court should apply the same rules which would guide them in the interpretation of any other record, the terms of which may be assumed to have been accepted by the persons who can be proved to have assented to them, or who may derive title from persons who have so assented.

When  
Muhammadian  
law to be  
regarded and  
when not.

"If it appears from the terms of the record, that the Mahomedan custom was recorded as prevailing, then the precepts of the Mahomedan law, although not expressly mentioned, must be regarded in determining the rights of the parties. If it appears from the terms of the

<sup>1</sup> No. 191 of 1862 [1863] I. Dec. N. W. P., p. 437.

instrument that some particular local custom of pre-emption was recorded as prevailing, then the Courts must determine the rights of parties with reference to the peculiar incidents which may be proved to have formed part of the custom in the particular district at the time the record was made, and which may or may not be identical with the precepts of the Mahomedan law. If on the other hand it appears from the terms of the records (and this we believe will be generally the case) that the condition of pre-emption was introduced, not as a recorded custom, but as an agreement either entirely new in its origin, or based upon, but superseding, a former custom, or prescribing and defining the conditions of the custom, then we hold that it is practically a supersession of the agreement made by the parties to import into it conditions which were not only not contemplated by the parties, but are repugnant to the end they had in view."

The judgment above referred to was that of Morgan, C.J., Pearson, Turner and Spinkie, JJ.,—Robertson, J., dissenting, held that the preliminary forms of Muhammadan law must always be adhered to, agreeing with the view of the Calcutta Judges in *Fakir Rowot v. Sheikh Imambakh*.<sup>1</sup>

**523A.** The right of pre-emption is recognised as prevailing by custom in Behar,<sup>2</sup> [Gujarat],<sup>3</sup> and

<sup>1</sup> (1863) W.R. p. n. 143; Beng. L. R. SUPP. VOL. 35, which case was generally approved by the Privy Council, there being no reference to this specific question; *Jadu Lal v. Maharani Janaki Koer* (1912) 39 Cal. 915 (P.C.).

<sup>2</sup> *Jadu Lal Sahu v. Maharani Janaki Koer* (1912) 39 Cal. 915; 39 I.A. 101; 14 Bom. L.R. 436 (P.C.); *Joy Koer v. Suroop Narain Thakoor* [1864] W.R. 250, *Kasi Chunder Surma*, ib. 189; *Fakir Rowot v. Sheikh Emambakh*, Beng. L.R. (SUPP. VOL.) 35; W.R. (SP. NO.) 143 (P.B.); *Ramdulal Misser v. Jhumrat Lal Misser* (1872) 8 Beng. L.R. 455, 17 W.R. 265; *Rampattu Surma v. Sheojittun Roy v. Anwar Ali* (1870) 13 W.R. 180, *Jadu Lal v. Janaki Koer* (1908) 35 Cal. 575; whether he is a NATIVE OF BEHAR OR DOMICILED there; cf. *Parasath Nath v. Dhanai* (1905) 32 Cal. 988; but a NATIVE OF LOWER BENGAL seeking his fortune in Behar is not necessarily bound by it. *Bijnath Perashad v. Kopolimou Singh* (1875) 24 W.R. 59; nor a person who is a co-sharer in property in Behar but is not domiciled there, *Parasath Nath v. Dhanai* (1905) 32 Cal. 988 9 Cal. W.N. 871, nor a CHRISTIAN IN BHAGALPORE, *Mohender Lal v. Christian* (1866) 6 W.R. 250. As to HINDUS IN CHITTAGONG see *Inder Narain Choudhry v. (Mahomed) Nazirooden* (1864) 1 W.R. 234, S.C. on review, *vice versa*, (1866) 5 W.R.

237; three decisions of subordinate courts holding that it existed, and one to the contrary the High Court held the custom not proved. HINDUS IN PARSIAH not proved to be governed by it, *Kanteer Ram v. Walce Sahu* (1869) 11 W.R. 251. HINDUS IN JESSORE not governed by law of pre-emption; *Madhub Chunder Nath Banerjee v. Tamer Bewah* (1866) 5 W.R. 279. TIPPERAH, *Deena Munar Ali v. Azharooddeen Mahomed* (1866) 5 W.R. 270. *Held*, not to prevail in MADRAS *Ibrahim Sah v. Munsir Murtuza Sah* (1870) 6 Mad. H.C.R. 26 (see s. above), SYLHET *Jumela Khatoon v. Pagul Ram* (1861) 1 W.R. 251, see also *Abdul Jalil v. Khalat Chunder Glove* (1868) 1 Beng. L.R. (S.C.) 105, 10 W.R. 165; *Sued Ablood Jalil v. Kalee Coomar Dui* (1866) 6 W.R. 115 3. It prevails in MIZAPURSAHAR (in *Muhalla Abupura*) *Zamir Hussain v. Daslat Ram* (1862) 5 All. 110.

<sup>3</sup> *Gordhandas Gudharbai v. Frankor* (1869) 6 Bom. H.C.R. (S.C.) 263. In *Reva v. Dhalabdas* (1902) 1 Bom. L.R. 811, it was assumed that the right of pre-emption was established amongst the HINDUS of GUJARAT, but that decision as well as the decision in *Gordhandas Case*, 6 Bom. H.C.R. 263, has been explained in *Dahyabhai Motram v. Chumal Keshordas* (1913) 38 Bom. 183, as being insufficient to show that the custom of pre-emption prevailed in the

SECTION 523A. Malabar,<sup>1</sup> and is enforceable in the said provinces irrespective of the religious persuasion of the parties concerned.<sup>2</sup>

Based on  
Muhammadan  
law.

The law of pre-emption, as recognised in India, is that based on Muhammadan law; and even where it is enforced as deriving its authority by the customs and usages of the people, "it is presumed to be founded on, and co-extensive with, the Muhammadan law on that subject, unless the contrary is shown."<sup>3</sup>

Codification  
of the law of  
pre-emption.

The law of pre-emption has, however, been practically codified in the Punjab Laws Act, IV. of 1872, ss. 9—20, and the Oudh Laws Act, XVIII. of 1876, ss. 6—15: see s. 557, below. In those two Provinces, therefore, this branch of the law has to be applied as contained in the Acts referred to. With them may be compared the provisions of Act XXIII. of 1861, s. 14, which allowed a right of pre-emption to a co-sharer of 'putteedari' estate sold in execution of a decree,<sup>4</sup> Act X. of 1877, s. 310, and Act XXI. of 1860, s. 14, gave rights of pre-emption on contract sales.

Grounds for  
enforcing it:  
1. As "religious  
usage  
or institution."

The Acts other than these two enactments, which lay down the law in accordance with which decisions are to be given by the Courts, do not expressly refer to the law of pre-emption. See the table of enactments preceding Chapter II., above.

Mahmood, J., was, however, of opinion<sup>5</sup> that, as the law of pre-emption is based on the 'sunna' or traditions of the Prophet's sayings and actions, it must be considered to be a part of "religious usages or institutions"<sup>6</sup> and as such must necessarily be enforced by the Courts in British India. But Petheram, C.J., and Oldfield, J., who sat with

whole of Gujarat, beyond the territorial jurisdiction of the Sadr Courts of SEVET AND BROACH. The ultimate decision in Dahyabhai's case proceeded the omission of the parties to go through the preliminary ceremonies.

<sup>1</sup> *Krishna Menon v. Keeran* (1897) 20 Mad. 305. The law of pre-emption is generally not enforced in MADRAS; see comment to s. 523A, below, and see s. 5, above; *Kudakamali v. Molakath* (1897), 30 Mad. 388.

<sup>2</sup> In other cases, of course, the custom, where it is alleged, must be proved, (see comment to s. 10, above); and one or two solitary instances will not suffice: *Benares Doss v. Phool Chand* (1860) 1 Agra 243; *Sheraz Ali Chowdhry v. Ramjan Bibee* (1867) 8 W.R. 204; 2 Ind. Jur. (N. S.) 249; *Haberal Hosain v. Lalai Dooki Nundun*, [1864] W.R. 75; *Muhammed Mahbub's Khan v. Raghubar Daga* (1915) 13 All. L.J. p. 951. Whether the custom exists is a question of fact: *Barumal v. Tansakh Rai* (b. 717; and the evidence of the *sanit-ul-arz* may be re-

butted, *Digambar Singh v. Ahmad Sayeed Khan* (1911) 13 All. L.J. 236, 246 (P.C.).

<sup>3</sup> *Frederic Rawat v. Shalish Kumbukh* (1863) W. R. 143; *Gor-dhan Das Gurthurdhas v. Prinkar* (1869) 6 Bom. H. C. R. 263; *Irwa v. Dainbhias* (1905) 1 Bom. L. R. 811; cf. *Gobind Dugal v. Inayatullah* (1885) 7 All. 775.

<sup>4</sup> Cf. *Shib Sahai v. Thika Ram* (1875) 7 N. W. 97.

<sup>5</sup> *Gobind Dugal v. Inayatullah* (1885) 7 All. 775; cf. *Fahazullah v. Boyapati* (1906) 30 Mad. 510, 521; *Abdul Ghani v. Aziz-ul-Husn* (1911) 39 Cal. 259; *Amir Beg v. Saman* (1910) 7 All. L. J. 956; *Imam Dui v. Hasan Bibi* (1905) 41 Punj Rec. 109 (No. 85).

<sup>6</sup> It will be observed, on a reference to the table of Acts preceding Chapter II., above, that most of them mention "religious usages or institutions" amongst the matters that have to be decided in accordance with Muhammadan law—see s. 6, below.

Mahmood, J., did not agree with him on this point, and said that the Courts are not bound to administer the Muhammadan law in claims of pre-emption, but do so on grounds of equity.<sup>1</sup>

The Madras High Court has taken a directly contradictory view; 2. Justice, equity and good conscience, and Holloway, J., said that the law of pre-emption was "manifestly opposed" to equity and good conscience,—coming to that conclusion after a comparison of the Muhammadan law with the Roman and German law on the same point. Roman law differs from the two others, inasmuch as, in accordance with it, the right arose out of contract, and gave only a personal action against the vendor. The learned judge also refers to the facts that in Germany almost all trace of the law of pre-emption has disappeared, and that the Muhammadan lawyers felt the necessity of "an antidote to its baneful influences" and "found it in subtle devices for its defeat," and "short periods of prescription for its exercise."<sup>3</sup>

Pre-emption may, of course, be adopted by the customs<sup>3</sup> of the people and enforced on that ground or arise out of contract.<sup>4</sup>

In Bombay,<sup>5</sup> Batchelor, J., concurred with the view that pre-emption is opposed to justice, equity and good conscience; his Lordship also considered that the rules of pre-emption place a clog or fetter upon that freedom of sale for which the Transfer of Property Act and the Indian Contract Act provide.

The other member of the Court, Mr. Justice Shah, while he agreed with (a) the first-mentioned part of Mr. Justice Batchelor's decision (that pre-emption was opposed to justice, equity and good conscience) hesitated to accept his view (b) that pre-emption was opposed to the statutory law of transfer and contract in British India, and the reasons for his so hesitating were two-fold: (i) pre-emption according to Muhammadan law has been enforced in other parts of India and even in parts of the Bombay Presidency; and (ii) Chapter III. of the Transfer of Property Act which relates to sales of immovable property, does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and

<sup>1</sup> *Gobind Dayal v. Inayatullah* (1885) 7 All. 775, 815.

<sup>2</sup> *Ibrahim Saib v. Muni Mir Udin Saib* (1870) 6 Mad. H. C. R. 26. (Innes, J., concurred).

<sup>3</sup> *Gordhandas v. Prankor* (1869) 6 Bom. H. C. R. 263.

<sup>4</sup> *H. g., in Rajaram v. Krishnasami* (1892) 16 Mad. 301; and *Sitarum Bawaan v. Sayad Sirajul* (1917) 41 Bom. 636; cf. Act X. of 1877,

s. 310, and Act XXI. of 1860, s. 14, for rights of pre-emption on Court sales. For Shah's law see *Munkaj*, 205 (Bk. 18, s. 1). In *Wajid Ali v. Shaban* (1909) 31 All. 623, the distinction between pre-emption under Muhammadan law and under contract and custom are pointed out.

<sup>5</sup> *Mahomed Beg Amin v. Narayan Mopahji* (1915) 40 Bom. 358; cf. *Sitarum Bawaan v. Sayad Sirajul Khan* (1917) 41 Bom. 636, 649, 660.

**SECTION 523A.** contains provisions as to the rights and obligations of the seller and buyer in the absence of a contract to the contrary.<sup>1</sup>

Both judges, however, agreed on (c) the third ground for decision, viz., that it had not been proved that the custom of pre-emption was recognised in the District of Khandesh.<sup>1</sup>

Presumptions.

1. Muslims alone governed by it.

**523B.** In the absence of proof to the contrary it will be presumed that Muslims are governed by the law of pre-emption, and that non-Muslims are not governed by it.<sup>2</sup>

2. Pre-emption and Hanafi law.

**523C.** In the absence of proof to the contrary it will be presumed that where the law of pre-emption is adopted by custom [or contract<sup>3</sup>] it is the Muhammadan law in accordance with the Hanafi exposition thereof.<sup>1</sup>

Muhammadan law adopted.

**523D.** Where pre-emption is claimed under a clause contained in the 'wajib-ul-arz,' and it is not apparent, either from the language itself or from other evidence, that the clause is merely the record of a new contract, it will be presumed that it is the record of a pre-existing custom.<sup>5</sup>

Existence of custom.

Law of pre-emption personal not territorial.

**523E.** Subject to s. 523A, above, and s. 557, below,<sup>6</sup> the law of pre-emption is not territorial but personal; and where the inhabitants of any locality have adopted it by

<sup>1</sup> 40 Bom. 364, 365, 368.

<sup>2</sup> *Fakir Rawot v. Imam Bakh* (1863) Beng. L.R. (SUPP. VOL.) 35; 35 W.R., Sp. No. 143 (18 B.); cf. *Judoo Lal Sahoo v. Maharami Janki, Koer* (1912), 39 Cal. 915; 39 L.A. 101, 14 Bom. L.R. 436, (P.C.).

<sup>3</sup> See *Muhammed Usman v. Muhammed Abdul thejfer* (1912) 31 All. 1; when it arises under a CONTRACT, the contract can affect the general law only during its subsistence, therefore the general law revives. It would seem that on points not covered by the contract also the general law would prevail. In *Suaram Bhanoo v. Sayed Saraj-ul-Khan* (1917) 41 Bom. 636, 652, there was a contract for pre-emption, and the parties had agreed that the Muhammadan law should apply.

<sup>4</sup> *Chokkars Dues v. Sundari Dosi*, (1905) 28 All. 590; in the absence of allegation or proof as to any custom different from or not co-extensive with the Muhammadan law of pre-emption, that law must be applied between Hindus; *Gowshi Lall v. Luchman*

*Ease* (1873) 5 N.W. 31; cf. *Arjun Singh v. Sarfaraz Singh* (1888) 10 All. 182; *Ram Prashad v. Abdul Karim* (1887) 9 All. 513; *Jog Deb Singh v. Mohammed Afzal* (1905) 32 Cal. 982, *Jadu Lal v. Janki Koer* (1912) 14 All. 436, 442, (P.C.). See also *Jai Ram v. Mahabir Das* (1885) 7 All. 720, 728 (more fully noted under s. 547, below); *Jasoda Nand v. Kandhanga Lala* (1891) 13 All. 373; *Rustum Ali Khans v. Abbas Begum* (1891) 13 All. 407; *Jag Deo Singh v. Kazi Sayed Mohammed Afzal* (1905) 9 Cal. W.N. 826; *Zamir Ahmad v. Abdul Hazzak* (1915) 13 All. 1, 704.

<sup>5</sup> *Bhim Sen v. Motiram* (1910) 33 All. 85 (P.B.), following *Majidan Bibi v. Sheikh Hayatan* (1897) All. W.N. 3 (P.B.). ON CUSTOM: *Hazari Lal v. Durga Prasad* (1909) 32 All. 18. ON CONTRACT: *Kanchan Singh v. Mani Ram* (1910) ib. 301; *Tasaddug Hussain Khan v. Ah Khani* [1918] W. N. 121; *Pran Sukh v. Salig Ram* (1910) 32 All. 261. Cf. *Ganga Singh v. Chedi La* (1911) 33 All. 605.

<sup>6</sup> I.e., Oudh and Punjab Laws Acts.

custom,<sup>1</sup> it will not necessarily be presumed that a person not being a native of or domiciled in the said locality is governed by it, notwithstanding that he may be the owner of land within the said locality.<sup>2</sup>

The question whether the claim to pre-emption should, in any particular case, be considered to arise out of custom or contract, and in either case whether it should be presumed to be in accordance with the Muhammadan law of pre-emption unless the contrary is proved, does not seem to be entirely free from doubt.

(1) Sir B. Peacock, C.J., (Calcutta) said "a right or custom of pre-emption is recognised as prevailing among Hindoos in Behar. . . ; in districts where its existence has not been judicially noticed, the custom will be matter to be proved, that such custom where it exists must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject unless the contrary be shown: that the Court may, as between Hindoos, administer a modification of that law as to the circumstances under which the right may be claimed when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption; but that the assertion of the right must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record.<sup>3</sup> In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable, therefore, to encompass it with certain rules and limits, lest the right should be exercised vexatiously."<sup>4</sup> Similarly Mahmood, J., expressed a strong view that pre-emption, as it prevails in India, owes its origin entirely to Muhammadan law, and that there was no foundation

Calcutta view—that custom is co-extensive with Muhammadan law. Preliminary forms.

Mahmood, J., pre-emption originates from Muhammadan law.

<sup>1</sup> I.e., being either non-Muslims, or inhabitants of Madras; for the law of pre-emption has been applied to Muslims to the extent referred to in this Chapter, mainly on the ground of equity.

<sup>2</sup> *Bynath Pershad v. Kapiemson Singh* (1875) 24 W.R. 95 (Hindu resident of Calcutta registered as pleader at Arrah in Behar, owns and sells land there; no pre-emption); *Parasath Nath Tewari v. Dhawan Ujha* (1905) 32 Cal. 988.

<sup>3</sup> This passage, thus far, is quoted with approval by the Privy Council in *Jadu Lal v. (Maharani) Janki Koor* (1912) 39 Cal. 917, 39 I. A. 101; 14 Bom. L.R. 436, 443.

<sup>4</sup> *Fakir Rasool v. Sheikh Enam Bukkah*

(1863) W.R., S.F. No. 143; Beng. L.R., SUPP Vol. 35. They add: "It may be noted as a significant fact that every term employed in connection with this right, including the name of the right itself, *shoofa*, is borrowed from the Arabic, and that the special appellants' pleader, himself a Hindoo, could not, when questioned by the Court, refer to any term of Hindoo origin connected with the subject; and, in reference to this particular case, no separate Hindoo custom was ever pleaded nor was the applicability of Mahomedan law ever disputed by the defendant until the point was orally taken up at the hearing of the special appeal."

**SECTION 523E.** for it in Hindu law. "My idea is," he said,<sup>1</sup> "that the administration of law by Kazis during the Muhammadan period gave wide currency to 'haq-i-shufa' and its advantage became so apparent to the Hindus, that they attempted to naturalize it . . . by an interpolation in the Tantra in question," i.e., in the 'Maha Nirvana.'

2. Earlier Allahabad view—that pre-emption based on custom or contract is independent of Muhammadan law.

(2) On the other hand, in 'Chowdhree Brij Lal's'<sup>2</sup> case, after the passage cited in the comment to s. 523, above, the Judges say: "We further hold,<sup>3</sup>—

(a) That except in those cases in which a claim to pre-emption is put forward under the Mahomedan law,—

(i) "It is not to be assumed that a claimant to pre-emption must necessarily prove that he has complied with the peculiar conditions which under the Mahomedan law are essential to give validity to such a claim.

(ii) "By the special enactments relating to . . . puttadaree estates . . . the claimant is bound to comply with the provisions expressed in those enactments and with those provisions only.

(b) "In cases in which pre-emption is claimed . . . on general usage or custom,—

(i) "It may be (as found to be in the instances which came before the High Court at Calcutta) that the incidents of Mahomedan pre-emption attach to the exercise of the right, and attach to it as part of the custom; but, also

(ii) "It is conceivable that there may be districts in which the right of pre-emption obtains by general usage, unfettered by any, or accompanied by only some, of the restrictions of the Mahomedan law. If the existence of such a custom, so unfettered, were proved, it would be the duty of the Court to give effect to it, without adding to it incidents which are not proved to form part of the custom.

(c) "Again, when parties competent to contract enter into pre-emptive agreements they are at liberty, if they so please, to make the exercise of the right depend on the performance of certain conditions which may or may not be identical with the

<sup>1</sup> *Golind Dayal v. Inayatullah* (1895) 7 All. 775 (F.B.) *Deekinandan v. Sri Ram* (1889) 12 All. 234, 289 (F.B.); *Deonadan Prashad Singh v. Ramdhari Chowdhri* (1916) 44 Cal. 675, 686 (P.C.). Cf. *Ram Pershad v. Abdul Karim* (1887) 9 All. 513, (where the *usajib-ul-az* gave a right of shufa according to the

usage of the country); *Jadu Lal v. Janki Koor* (1912) 39 Cal. 915; 39 I.A. 101; 14 Bom. L.R. 436, (where this view seems to be adopted by P.C., per Syed Ameer Ali).

<sup>2</sup> (1887) N.W.P. (F.B.N.), 65.

<sup>3</sup> The division into paragraphs, &c., is mine.



requirements of the Mahomedan law.<sup>1</sup> In construing such SECTION 523E. contracts it will be the duty of the Court to consider the intention of the parties as expressed in the terms of the contract, and if those terms are clear, to give effect to them without alteration or addition.<sup>2</sup>

In a later case the same opinion seems to be expressed: "Inasmuch Pre-emption how beneficial. as it was deemed conducive to the welfare and tranquillity of village communities that some such provision [i.e. for pre-emption] should be made to prevent the incursion into the community of strangers in race or religion, the officers engaged in the preparation of the record of rights induced the proprietors to consent to the introduction of a stipulation binding each co-sharer, when transferring his share, to give the first refusal of it to one of his own family or to the other co-sharers in the 'patti' or 'mahal.' The stipulations vary in their terms, and while they are not clogged with the formalities which attach to the Muhammadan 'haqq-i-shufa' they also differ from that right in that while the latter is regarded by Muhammadan law as a feeble right, the former, arising out of contracts, are enforced with the same rigour as contracts."<sup>3</sup>

## (2) Conflict of Laws: Parties of Different Religions.

524. (1) *Quære*, whether the claim to pre-emption The personal law of—  
cannot be claimed unless it is enforceable in accordance 1. the pre-emptor with the personal law by which the pre-emptor is governed.<sup>4</sup>

(2) The claim to pre-emption cannot be enforced where 2. the seller, the seller is not governed by the law of pre-emption.<sup>5</sup>

(3) The personal law of the purchaser does not, according 3. the purchaser, to the Allahabad High Court,<sup>6</sup> affect the enforceability of a claim to pre-emption; the Calcutta High Court

<sup>1</sup> See *Sitaram Bhauran v. Sayad Serajul Khan* (1917) 41 Bom. 636, where pre-emption based on a contract was in question.

<sup>2</sup> Then the Court proceeded to apply these principles to a *waqf-ul-'arz*. Extracts are given from this part of the judgment in the next following paragraph of the comment.

<sup>3</sup> *Raja Ram v. Bansi* (1876) 1. All. 207.

<sup>4</sup> See s. 524, *ill.* (1). The three subsections of s. 524 deal with the question how far the enforceability of pre-emption is governed by the personal law respectively (1) of the pre-emptor, (2) the seller and (3) the purchaser.

<sup>5</sup> "The right of pre-emption arises from a

rule of law by which the owner of land is bound, and it exists no longer if there ceases to be an owner who is bound by the law either as Mahomedan or by custom": *Poornoo Singh v. Hura Charr Sunah* (1872) 10 Beng. L.R. 117; 18 W. R. 410, followed in *Bijnath Parshad v. Kiplimon Singh* (1875) 24 W.R. 95; *Duaria Das v. Hussain Bakish* (1878) 1. All. 564; see also *Pir Khan v. Fayaz Hussain* (1914), 36 All. 488; CONTRA: *Chundo v. Alimooddeen* (1873) 6 N.W. 28 etc.; see comment. Cf. s. 524, *ill.* (1).

<sup>6</sup> *Gobind Dayal v. Inayatullah* (1885) 7 All. 775 (P.B.). But see comment.

SECTION 524. has held that rights of pre-emption do not arise unless the purchaser (as well as the pre-emptor, and the seller) is also governed by the law of pre-emption.<sup>1</sup>

Seller and pre-emptor must both be governed by law of pre-emption.

*Explanation.*—(1) There can be no pre-emption unless the pre-emptor and the seller are Mussalmans, or have by custom or contract adopted the law of pre-emption, or are governed by it by operation of a legislative enactment. (2) *Quære*, whether where the laws of pre-emption, by which the pre-emptor and the seller are respectively governed, are not the same, the claim to pre-emption will be enforced only in cases where it is reciprocally enforceable, i.e., where it would have been enforceable also by the personal law of the pre-emptor, had he been the seller.<sup>2</sup>

*Illustrations.*

(1) *As to the personal law of the pre-emptor* : A Shiah cannot enforce pre-emption on the ground of vicinage even though both the vendor and vendee are Sunnis.<sup>3</sup>

(2) *As to the personal law of the seller* : S, a Hindu, sells land; pre-emption under Muhammadan law is not enforceable.<sup>4</sup>

(3) *As to the personal law of the buyer* : S and P are Mussulman neighbours, and S sells his share to B, who is not a Mussulman : *held*, (a) in Calcutta (by Peacock, C.J., Kemp and Mitter, JJ.) that no right of pre-emption arises; (Norman and Macpherson, JJ., dissenting),<sup>5</sup> (b) according to the Allahabad High Court, P may enforce pre-emption against B.<sup>6</sup>

(4) The plaintiff, a Sunni, claimed pre-emption alleging that he was a 'khalit'; the purchaser, a Shiah woman, defended the suit on the ground that she was also a 'khalit.' The plaintiff contended

<sup>1</sup> *Kudratullah v. Mahini Mohan* (1870) 13 W.R. (P.B.) 21; 4 Beng. L.R. (P.B.) 111. However, in *Jog Debí Singh v. Mahomed Afzal* (1905) 32 Cal. 982, the seller was a Sunni, the buyer Hindu, and the pre-emptor a Shiah, but the point does not seem to have been taken, that the right is not enforceable, unless the buyer is a Hindu. All that was argued was that (a) the pre-emptor's law (i.e., the Shiah, and not the Sunni law) prevailed; (b) that the preliminary ceremonies were not duly performed. *Jog Debí Singh's* case was not followed in *Pir Khan v. Fayaz Hussain* (1914) 36 All. 488.

<sup>2</sup> This seems to follow from *W. (1)* as far as the Allahabad High Court is concerned, Cf. *per Mahmood, J.*, in *Gobind Dayal v. Inayatullah* (1885) 7 All. 775. "The rights and obligations

created by that (i.e., Muhammadan) law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal." On the other hand, in *Jog Debí v. Mahomed* (1905) 32 Cal. 982, where the seller was a Shiah, and the pre-emptor a Sunni, the Sunni law was applied. See comment.

<sup>3</sup> *Qurban Hussain v. Chote* (1890) 22 All. 102.

<sup>4</sup> *Dwarkan Doss v. Hussain Bakhsh* (1878) 1 All. 564 (F.B.), Stuart, C.J., and Pearson, J., dissenting.

<sup>5</sup> *Kudratulla v. Mahini Mohan Shaha* (1860) 4 Beng. L.R. (P.B.) 134; 13 W.R., (P.B.) 21. Cf. also *Hira v. Kattu* (1885) 7 All. 916.

<sup>6</sup> *Gobind Dayal v. Inayatullah* (1885) 7 All. 775 (P.B.).

that, inasmuch as under the Shiah law 'khalits' had no right of pre-emption, while, under the Sunni law, they had, and the plaintiff was governed by the Sunni law whereas the defendant was governed by the Shiah law, the plaintiff had the right to pre-empt against the defendant. Held, that if a Sunni claims pre-emption on the ground that he is a sharer in the appendages, he cannot oust a vendee who is in the same position, whether that vendee is a Shiah, a Sunni or a Hindu. Consequently the suit was dismissed.<sup>1</sup>

*Illustrations.*

According to Shiah law the right of pre-emption cannot arise in favour of a non-Muslim when the purchaser is a Muslim.<sup>2</sup> "The

'shuffi' is every partner of a share in joint and undivided property, who is able to pay the price at which it has been sold. It is, however, a condition that he be a 'Mooslim,' when the purchaser is of that religion."<sup>3</sup> According to Sunni law the religion of the pre-emptor does not affect his rights.<sup>4</sup> But of course these rules of law have no force in British India. The question, as pointed out by Mahmood, J., in 'Gobind Dayal's' case,<sup>5</sup> turns on whether the right of pre-emption depends upon

of the law of pre-emption.

a defect of title or the part of the Muhammadan co-parcener to sell, except subject to the right of pre-emption,<sup>6</sup> or whether "it is a mere right of repurchase, not from the vendor, but from the vendee," the former view being put forward by Mahmood, J., and adopted by his colleagues Petheram, C. J., Oldfield, Broadhurst, and Duthoit, J.J., and the latter by Peacock, C.J., Kemp, and Mitter, J.J. (Norman and Macpherson, J.J., dissenting). One main ground on which Mitter, J., (with whose elaborate judgment the majority of the Calcutta Judges agreed) proceeded, was that "there is nothing whatever in the Muhammadan law which imposes upon anyone the obligation of making the first offer to his neighbour." Whereas, in the latter case, Mahmood, J., cited authorities<sup>7</sup> stating that "it is not lawful for anyone to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share." As to the point that it was merely a right of repurchase from the vendee, Mahmood, J., argues that it can only be a "right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject . . . the right being

Nature of right of pre-emption:  
(a) Defect of title or  
(b) Right of repurchase.

<sup>1</sup> *Roknais Begum v. Ahmadi Khanam* (1912) 9 All. L. J. 790.

<sup>2</sup> *Id.* II. 179 (par. 1), 180 (par. 3).

<sup>3</sup> *Id.* II. 179 (par. 1).

<sup>4</sup> *Id.* L. 473 (par. 2). *Hed.* 556 (col. 1, par. 2), 557 (col. II. par. 4).

<sup>5</sup> *Gobind Dayal v. Inayatullah* (1885) 7 All. 775 (P.B.)

<sup>6</sup> "A legal disability on his part to sell his property to a stranger without giving an opportunity to his co-parceners and neighbours to purchase in the first instance," as expressed by Mitter, J., in *Kudratullah's case*, 4 Beng. L. R. (P.B.) 139, 140.

<sup>7</sup> *Ali Shakh-Kanz*, II. 237; *Muslim*, VI. 32; *Nawais Shakh Muslim*, II. 32.

SECTION 524. necessarily antecedent to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident." He also intimated that, in his opinion, the right of pre-emption could not in British India be defeated by the devices (characterised by Mitter, J., as "tricks and artifices") to which the Muslim texts refer.

It was held<sup>1</sup> in Allahabad, previous to the judgment in 'Gobind Dayal,' that the right of pre-emption could not be enforced when the buyer was a Hindu (and, therefore, not governed by the law of pre-emption) and that it could be enforced though the seller was a Hindu. This view must follow from the reasoning that only the buyer and the pre-emptor are concerned in the transaction, the seller "being not in the least degree interested in the matter . . . and need not be considered."<sup>2</sup> But this is no more law.<sup>3</sup>

It has been held that where a Sunni claimant brings a suit against a Shiah vendor and a Hindu purchaser, the governing system of law will be the Hanafi, inasmuch as the Hanafi law is in force in India territorially or by custom, and that the Shiah law will be applied only where the claimant and vendor are both Shiahs,<sup>4</sup>— *sed quaere*, whether any such broad rule can be laid down

### (3) Pre-emption under 'wajib-ul-'arz' : Interpretation.

(Construction of contract.

524A. In construing the contract on the terms of which pre-emption is claimed, the Court will consider the intention of the parties as expressed in the contract, and give effect to it without alteration or addition.<sup>5</sup>

As mentioned in s. 423 (2), above, the terms of a contract for pre-emption are strictly construed by the Courts both in England and in India as pre-emption is not favoured by the law : see s. 556, below.

Words interpreted by Courts.

524B. The following words and expressions have been interpreted as mentioned below with reference to the particular context before the Court:<sup>6</sup>—

<sup>1</sup> *Moti Chand v. Mahomed Hossain Khan* (1875) 7 N. W. 147; *Chundo v. (Hakeem) Alimooden* (1874) Agra F.B. 305, 6 N. W. 28.

<sup>2</sup> *Ibid*, per Pearson, J.

<sup>3</sup> *Dwarkan Doss v. Hussain Bakhsh* (1878) 1 All. 564 (Stuart, C. J., and Pearson, J., dissenting) overruling *Chundo v. Alimooden* (1874) 6 N. W. 28; *Gobind Dayal v. Inayatullah* (1885) 7 All. 775 (F.B.).

<sup>4</sup> *Jug Deo Singh v. Kazi Sayed Mahomed Afzal* (1905) 9 Cal. W. N. 826.

<sup>5</sup> *Choodery Brj Lal v. Goor Suhai* (1867) Agra F.B. 128. For illustrations see *Ruttun Singh v. Umrao Singh* (1872) 4 N. W. 13; *Dowlat v. Nirmam* (1871) 3 N. W. 42.

<sup>6</sup> The expressions mentioned below would not necessarily be interpreted always in the same sense irrespective of the context.

(1) That 'bhai band' referred to the brotherhood of SECTION 524B.  
the village, and not merely to those who were related 'Bhai band.'  
by blood;<sup>1</sup>

(2) that 'ek-jaddi' referred to persons descended from a 'Ek-jaddi.'  
common ancestor, through the male line;<sup>2</sup>

(3) that 'haqqiyat' referred to rights and interests in 'Haqqiyat.'  
the legal sense of the phrase;<sup>3</sup>

(4) that 'hissadar' (where a perfect partition, into three 'Hissadar.'  
'mahals,' had been made, of the village without a new  
'wajib-ul-'arz'), referred only to one who owned a share in  
the same 'mahal' as the seller;<sup>4</sup>

(5) that 'hissadaran-shikmi' in clauses dealing with 'Hissadaran-shikmi.'  
various classes of persons who were entitled to pre-emption  
in preference to strangers, did not necessarily imply any  
idea of subordination but was applicable to persons who  
were co-sharers in the particular 'khattu' of the 'patti'  
in which the land sold was situated;<sup>5</sup>

(6) that 'intiqal' signified not only an absolute 'Intiqal.'  
transfer, but had the broadest meaning in connection with  
alienation, conveyance, assignment, or transfer of rights  
in immovable property<sup>6</sup> and applied also to conditional  
sales and usufructuary mortgages;<sup>7</sup>

(7) that 'karibi' as indicating shareholders "near" 'Karibi.'  
to the seller and was ambiguous, and inadequate to express  
the intentions of the shareholders; and that (a) when  
'karibi' was read in connection with the word 'bhai'  
(which preceded it in the 'wajib-ul-'arz' under construction)  
it could not reasonably be confined to cousins, but had to  
be construed as meaning 'bhai band' or 'bhailog' so as 'Bhai band.'  
to include all near relatives both male and female;<sup>8</sup> (b) that

<sup>1</sup> *Hira Lal v. Rampas* (1885) 75 6 All. 57.

<sup>2</sup> *Chatai Singh v. Kalyan Singh* (1900),  
23 All. 32.

<sup>3</sup> *Sheoratan Kuar v. Mahipal Kuar* (1884)  
7 All. 258.

<sup>4</sup> *Dalpanjan Singh v. Kalka Singh* (1809)

<sup>5</sup> 22 All. 1; cf. *Sheobhain Singh v. Lachmidar*  
(1901) 23 All. 427.

<sup>6</sup> *Abdul Shakur v. Mendai* (1901) 23 All. 260.

<sup>7</sup> *Sheoratan Kuar v. Mahipal Kuar* (1884)

7 All. 258; *Jagdam Sahai v. Mahabub Perad*  
(1905) 28 All. 60.

<sup>8</sup> *Chuttur Mull v. Chuttur Kishore Lal*  
(1868) 3 Agra 306.

<sup>9</sup> *Khumman Singh v. Harday* (1888) 11  
All. 11.

SECTION 524B. 'karibi wa-khandani' did not include a person related to the vendor through the female line only, and twelve degrees removed from him ;<sup>1</sup>

'Pattidar.'  
'Chakdar.'  
(8) that 'pattidar' did not apply to a 'chakdar' holding a share in the same 'chak' as the seller ;<sup>2</sup>

'Qimat.'  
(9) that 'qimat' had to be interpreted in the sense given it by Muhammadan law, including not only money but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of sale as well as exchange as defined in ss. 54 and 118, respectively, of the Transfer of Property Act ;<sup>3</sup> that it was also wide enough to include the consideration given for a usufructuary mortgage with possession ;<sup>4</sup>

'Rahn.'  
(10) that 'rahn' was a generic word indicating all that is included in the English word mortgage and was not limited to usufructuary mortgages, but included simple mortgages also ;<sup>5</sup>

"Sale, etc."  
(11) that "sale, etc." included a usufructuary lease for a term of eight years ;<sup>6</sup>

'Shikmi showkayan'  
(12) that 'shikmi showkayan' in the particular context implied priority in favour of sharers in the 'thoko' over those who were merely sharers in the village.<sup>7</sup>

524C. The question frequently arises whether the right of pre-emption has been confined under the particular 'wajib-ul-arz' to cases where the sale is to a stranger or is extended to cases where the purchaser would himself have been entitled to pre-empt had the sale been to a stranger.<sup>8</sup>

Sale to one who might himself have pre-empted.

<sup>1</sup> *Durga Prasad Pande v. Fateh Bahadur Singh* (1914) 36 All. 451.

<sup>2</sup> *Bahwan Singh v. Subhan Ali* (1887) 10 All. 107.

<sup>3</sup> *Niamat Ali v. Asmat Bibi* (1885) 7 All. 626.

<sup>4</sup> *Hules Rai v. Ram Prasad* (1906) 28 All. 434.

<sup>5</sup> *Shoravati Kuar v. Mohipal Kuar* (1884) 7 All. 258. Cf. the extract from the *Shariyat-ul-Islam* given in the comment to s. 370, above.

<sup>6</sup> *Ahmed Ali Khan v. Ahmed Ali* (1866)

1 Agra 101.

<sup>7</sup> *Jay Mull v. Kesrar*, Agra F. B. 171., col. 1874, 128.

<sup>8</sup> *Janaki v. Ram Partab Singh* (1905) 28 All. 286; *Sardar Singh v. Ijaz Hussain Khan* (1906) 28 All. 614; *Jai Datt v. Ram Badal* (1905) 28 All. 168; *Sukhdeo Singh v. Bahadur Singh* (1904) 26 All. 544; *Khatun Bibi v. Sayyida Bibi* (1905) 27 All. 457; *Amjad Ali v. Mush-taq Ahmad* (1895) 17 All. 454, upheld in appeal (1897) 19 All. 311. For the general law see s. 527, below.

### § 3.—Pre-emption, how Established and Enforced. SECTION 625.

#### (1) Sale of Ground of Pre-emption.

525. The<sup>1</sup> right of pre-emption arises under Muham-  
madan law only where there is an exchange of property  
for property;<sup>2</sup> it does not arise where the land is transferred  
without consideration<sup>3</sup> or by operation of law;<sup>4</sup> but it  
is not necessary that the land sold should be actually  
separated or defined.<sup>5</sup>

Arises only on  
transfer for  
consideration.

(1) For the purposes of pre-emption—

Illustrations.

- (a) A 'hiba ba shart ul 'iwaz' is a transfer for consideration,<sup>7</sup> provided that it is completed by possession being transferred of the subjects of the gift, and of the return, to the donee and the donor, respectively,<sup>8</sup> but
- (b) a 'hiba bil 'iwaz' is not a transfer for consideration,<sup>6</sup> nor
- (c) is a partition of property amongst partners,<sup>7</sup> nor
- (d) a transfer of property in lieu of 'mahr',<sup>9</sup> provided that (i) according to Shafi'i law, where a share in land is transferred to the wife by way of dower, or in consideration for a 'khub' it is subject to pre-emption by the other co-owners,<sup>9</sup> (ii) according to Hanafi law where a marriage has been contracted without any 'mahr' having been agreed upon, and land is then sold to a third person or to the wife

<sup>1</sup> See s. 526, below, which is complementary to s. 525.

<sup>2</sup> I.e., either a sale or barter. Cf. *Sau Ram v. Ramlal Chowdhry* (1866) 1 Agr. 141; and *Hamat Ali v. Asmat Bibi* (1885) 7 All. 626, where plots were exchanged. In *Lachmi Narain v. Manog Dut* [1889] 5 All. W.N. 17 a suit was compromised. For cases where the property has been CONFISCATED BY THE GOVERNMENT and then sold, see (1869) *Shroout Ram Tewary v. Ramadprey*, 1 N.W., Part II, p. 35 (cd. 1873) p. 93; *Mohamed Vallaydollah Khan v. Ahmed Hussain Khan* (1868) 3 Agr. 70, *Collector of Futehpore v. Yod Ali* (1866) 1 Agr. 88. In *Mahomed Raza Khan v. Jauhar Singh* (1897) 2 Agr. 1, and *Liakat Hussain v. Rashiduddin* (1906) 29 All. 125, there were sales and re-sales.

<sup>3</sup> But where it was really a sale disguised as a gift, pre-emption was allowed: *Angan Lal v. Muhammad Hussain* (1891) 13 All. 409, *Chiragh Din v. Allah Din* (1916) 51 Punj.

*Roe* 208, (No. 70); cf. *Fida Ali v. Muzaffer Ali* (1882) 5 All. 65.

<sup>4</sup> Bail. I. 172; e.g., If one should emancipate a slave in exchange for a mansion there is no right of pre-emption. Bail. I. 471; gift, charity, inheritance and bequest are given as illustrations of transfer without consideration: Bail. II. 177 (par. 1). See also s. 525 *ill.* (1); *Ameeb Ali v. Perani* [1864] W.R. 239; *Hur Narain Pandit v. Ram Prasad Mair* (1891) 14 All. 333; *Am-mooden v. Kanye Jha* (1868) March. 555; 2 May. 631.

<sup>5</sup> *Gobind Chunder Gopta v. Raj Kishore Sen* (1870) 14 W.R. 365.

<sup>6</sup> Bail. I. 472.

<sup>7</sup> Hed. 560 (col. ii. par. 5): Bail. I. 475 (par. 2).

<sup>8</sup> Hed. 559 (col. i. par. 1 & 3, *ll.* 19 *et seq.*), 475 (par. 1); cf. Bail. I. 483 (*ll.* 7-11), II. 177 (par. 3).

<sup>9</sup> *Mishay*, 207 (Bk. 18, s. 2) cited in comment; Hed. 559 (col. i. par. 1).

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## Illustrations.

herself<sup>1</sup> in exchange for her 'mahr-ul-mithl' or "proper dower," it becomes subject to pre-emption;<sup>2</sup> (iii) where 'mahr' has already become due to the wife, and the land does not form the subject of the 'mahr,' but is transferred to the wife in consideration of her releasing her right to the 'mahr' agreed upon, such transfer becomes subject to pre-emption;<sup>3</sup>

(e) the courts have taken different views as to whether a sale in execution of a decree is such a transfer as can give rise to rights of pre-emption.<sup>3</sup>

(2) B claims to have certain rights against S, who compounds B's claim by transferring to him a mansion; such a transfer is a transfer for consideration notwithstanding that S denied B's claims.<sup>4</sup>

(3) S claims to be the owner of a house; B compounds the claim by paying to S Rs. 1,000; the house may be the subject of pre-emption if B admitted, but not if B denied S's claim.<sup>5</sup>

(4) S on his death-bed purports to sell his share (valued at Rs. 1,000) in the land to one of his heirs, by 'muhabat,' viz., for Rs. 500. This sale will, in so far as it is valid, be a ground for pre-emption.<sup>6</sup>

(5) Where pre-emption was claimed in accordance with custom, and the custom proved had reference to voluntary transfer ('*intiqal*') by co-sharers, it was held that the cause of action arose as soon as a mortgage by way of conditional sale was effected; rejecting the plaintiff's contention that the cause of action arose and limitation began to run from the date when possession was taken in pursuance of a decree absolute.<sup>7</sup>

<sup>1</sup> *Fida Ali v. Musaffar Ali* (1882) 5 All. 65; but see comment.

<sup>2</sup> See p. 669, n. 8.

<sup>3</sup> In the negative: *Nuzmoodeen v. Kamey Jhu* (1863); *Marsh* 555; 2 *Hay* 651; *Abdul Jleel v. Khellat Chunder Ghose* (1868) 5 W.R. 165. In the affirmative: *Imamodeen Sowdagar v. Abdul Subhan* (1866) W.R. 169; *Ajmalia v. Jeebooda* (1878) 6 N.W. 46.

<sup>4</sup> *Hed.* 559 (col. II, par. 2, col. 1, par. 1); *Ball*, I. 472 (II, 5-12). The distinction between illustrations (2) and (3) to s. 525 is that in the second illustration the person who becomes the owner of the property accepts it in consideration of his claim; in the third illustration, if the claim is denied by B, he remains the owner of the house which he claimed before,

and there is no transfer to him for consideration: *Hed.* 559.

<sup>5</sup> See last footnote. For other cases of compromises which have been held not to amount to such a transfer as to give rise to pre-emption: see *Lachmi Narain v. Manoj Das* (1885) 7 All. 291; *Hanuman Rao v. Udit Narain Rai* (1885) 7 All. 917.

<sup>6</sup> *Ball*, II. 192; to validate it the consent of the other heirs is necessary,—(a) according to Sunni law as to the whole; (b) according to the prevailing view of Shia law in so far as it exceeds the bequeathable third; (c) whereas another Shia law is that it is valid without such consent, as <sup>(d)</sup> the whole, not ranking as a bequest at all.

<sup>7</sup> *Suba Singh v. Mahabir Singh* (1917) 39 All. 5.



Where property is assigned as 'mahr' to the wife, the question whether or not rights of pre-emption arise, in accordance with Hanafi law, is in the 'Fatawa 'Alamgiri' and 'Hidaya' made to depend upon the question whether the subject of transfer is itself the 'mahr' or the transfer is made in exchange or in consideration for 'mahr'.

Transfer by way of 'mahr' and in lieu of mahr.

'Mahr' arises in law without consideration (being an incident of marriage);<sup>1</sup> but having arisen, it gives the wife a right, the extinction of which may form the consideration for a transfer of property. This explains the statement that if the husband "gives the house as dower, there is no pre-emption; but if he gives it in exchange for dower, there is pre-emption."<sup>2</sup> The anomalous character of the right to 'mahr' has been referred to before.<sup>3</sup> The Prophet was extremely anxious that the 'mahr' should not under any circumstances be permitted to lend weight to the argument that the wife was purchased by the husband, or sold by her guardian or parent, or that when the bride is competent to consent, her marriage could arise except by her consent; he strove hard on the one hand to prevent any pecuniary element being brought as an inducement for the consent, and he wished, on the other hand, to convert the wonted "price" for the sale of the woman, into a "token of respect."<sup>4</sup> So explained the rule, it is submitted, though technical in operation, is grounded on principle.

Syed Ameer Ali says<sup>5</sup> that "the decision in 'Fida Ali v. Muzaffar Ali' does not seem to be correct," because "if a property is conveyed to a wife in discharge of the dower debt, in this case also there is no right of pre-emption . . . The reason of these rules is self-evident. The wife conveying to the husband and 'vice versa' do not thereby introduce a stranger among co-sharers or neighbours."<sup>6</sup> The reason given applies, no doubt, where the husband and wife are living together on the subject of pre-emption, but this view does not seem to be taken in any of the texts, and no authority is cited by the learned author. 'Fida Ali's' case was followed in 'Nathu v. Shadi.'<sup>7</sup>

Fida Ali v. Muzaffar Ali.

With reference to Shafi'i law, the author of the 'Minhaj' says:— "A portion of an immovable property transferred as dower is subject to right of pre-emption on the part of a co-proprietor, for a price valued

Shafi'i law,

<sup>1</sup> See comment to s. 92, above.

<sup>2</sup> Bail. I. 475 (ll. 2-4).

<sup>3</sup> See ss. 92, 108, 107 (lien for dower) and ss. 372, 442 (gifts), above.

<sup>4</sup> Bail. I. 91.

<sup>5</sup> "Mahomedan Law," I. 107.

<sup>6</sup> (1882) 5 All. 65.

<sup>7</sup> (1915) 13 All. L. J. 714. See also

(Syed) Mahomed Tukre v. (Sheikh) Hajes alias Khujai, (1873) 5 N. W. 142, which however proceeded on the construction of the 'rajhi-ul-arz.'

SECTION 525, according to the proportional dower the woman in question could claim; and the same rule is observed with regard to a transfer as compensatory price in case of divorce."<sup>1</sup>

Right arises only when land completely transferred.

Querre, sale must be complete according to which law?

526. The right of pre-emption does not arise unless the land is completely transferred<sup>2</sup> by the seller to the buyer, so that the seller's interest in it ceases.<sup>3</sup> The Allahabad High Court has held that the sale must be complete in accordance with Muhammadan law,<sup>4</sup> and not with the law of British India;<sup>5</sup> hence that non-execution of the sale deed, and want of registration, do not prevent the right of pre-emption from arising, but the facts that the price is not ascertained, and possession not transferred under the sale, do prevent it.<sup>6</sup> The Calcutta High Court has, however, dissented from this view;<sup>7</sup> and held that the right does not arise until there is a sale complete in accordance with the general law of British India.<sup>8</sup> The Bombay High Court<sup>9</sup> has also dissented from the view of the Allahabad High Court and adopted the view that in each case the intention of the parties must be ascertained as to the date when the bargain is to be considered as concluded.<sup>10</sup>

Illustrations.

(1) S<sup>11</sup> sells his joint interest in a village for Rs. 300, paid to him by B, who obtains possession, but no transfer under the

<sup>1</sup> *Mishaf*, 207 (Bk. 18, s. 2).

<sup>2</sup> *Heil*, 579 (col. II, par 1), 560 (col. I, par 1); *Bail*, I, 172, 482 (II 5-11); II 182. See ss. 526A and 526B, below.

Nor does it arise where shares in a *mauza* are, by arrangement between the parties, made over to a manager upon trust in part for the debtor of the transferors and the residue for the transferees: *Sheo Lal Sahoo v. Ramnath* (1867) 2 Agra 35. Nor where there is a mere proclamation inviting offers: *Nabhiqi v. Muhammad Isahak* (1884) 6 All 461. See also *Budhai Sardar v. Sonnullah* (1911) 11 Cal. 943.

<sup>3</sup> *Ludun v. Bhryo Ram* (1867) 8 W. R. 235; *Soonder Koer v. Lalla Rughoober Dyal* (1868) 10 W. R. 246; *Buksha Ali v. Tafee Ali* (1872) 20 W. R. 216; *Mohno Bibee v. Juggurnathi Chondhry* (1865) 2 W. R. 78. See also ss. 526A and 526B, below.

<sup>4</sup> As to which see *Fula Ali v. Musaffer Ali* (1882) 5 All 65, cf. *Amyad Ali Mushtar Ahumt* (1895) 17 All 44. See also 17 All. W. N. 121.

<sup>5</sup> See s. 526 All. (1) *Benamv. Muhammad Yakub* (1894) 16 All 341 (P.B.) (Banerji, J. dissenting on this point, but concurring in decree on other grounds). *Jadu Lal Sahu v. Janki Koer* (1908) 35 Cal. 575, 599, affirmed by the P. C., 39 Cal. 915; 39 I. A. 101; see also *Sitarum Bauran v. Sayed Sirajul Khan* (1917) 41 Bom. 636, 651. Accordingly, in *Najmanussav v. Ajaz Ali Khan* (1900) 22 All. 343, the Muhammadan law of sale was carefully examined. It need hardly be said that ordinarily a Muslim cannot transfer except in accordance with the Transfer of Property Act.

<sup>6</sup> *Najmanussav v. Ajaz Ali Khan* (1900) 22 All 343.

<sup>7</sup> *Budhai Sardar v. Sonnullah Meridha* (1914) 11 Cal. 943, 18 Cal. W. N. 890.

<sup>8</sup> *I. e.*, after registration.

<sup>9</sup> *Sitarum Bauran v. Sayed Sirajul Khan* (1917) 41 Bom. 636, 641.

<sup>10</sup> This view seems to have been first enunciated by Brett, J., in *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575, 599, the case was affirmed by P. C. in 39 Cal. 915 (1912).

<sup>11</sup> *Janki v. Urjudat* (1885) 7 All. 382 (P.B.).

Transfer of Property Act is executed or registered. *Held* (Mahmood **SECTION 526**, J. dissenting), that

*Illustrations.*

(a) the right of pre-emption arises :

- (i) by Petheram, C J., on the ground that the claim being based on a 'wajib-ul-'airz,' which refers to a transfer of a share 'wholly or in part, by sale or mortgage, and . . . obviously means . . . that if any co-sharer transfers his rights wholly or partly, the right of pre-emption is to arise ;' <sup>1</sup>
- (ii) by Straight, J, on the ground that the parties intend a sale but deliberately omit to observe the necessary legal formality of a registered instrument to defeat the pre-emptive right, and a court of equity would hesitate before permitting a defence based on the defendant's own intentional evasion of the law ;<sup>2</sup>
- (iii) by Oldfield, J., on the ground that the transaction amounts to a sale in fact, and failure of the parties to comply with the requirements of the Act do not alter its nature;
- (iv) by Broadhurst, J., on the ground that the share is transferred, though, with the object of defeating pre-emption (under the said 'wajib-ul-'airz'), a deed of sale is not executed

(b) *Held* by Mahmood, J, that the pre-emptive right does not arise on the following grounds :

- (i) it cannot under Muhammadan law be enforced upon a sale which is invalid, and can take no effect, and when the owner has not been divested of the proprietary title, and the purchaser invested with it,
- (ii) that the answer to that question is the turning point in the decision of such cases,
- (iii) that the words of the 'wajib-ul-'airz' in question did not refer to transfers of all kinds, but only to sales and mortgages : they did not include a transfer (not of the whole of the incidents constituting ownership, but) of some of the incidents only,
- (iv) that nothing that could under it be called a sale had taken place,
- (v) that if the transaction was taken to be a mere agreement to sell, assuming that it could be specifically enforced, the suit was premature.<sup>3</sup>

<sup>1</sup> See comment.

<sup>2</sup> Straight, J., added that the seller could not succeed in a suit for possession of the share against the buyer on the ground that there

was no registered document, because consideration having been paid and possession obtained the buyer would have a good defence  
<sup>3</sup> *Tanku v. Gopadal* (1885) 7 All. 482 (F B)

**SECTION 52B.***Illustrations.*

(2) S sells a dwelling house as a house to be inhabited as it stands, with the same right of occupation as S, but without the ownership of the site. *Held*, that the right of pre-emption attached to the sale.<sup>1</sup>

(3) S enters into a contract for sale of the land; *held*, that P is not bound to defer the enforcement of his right of pre-emption till the bill of sale has been delivered or registered and payment made.<sup>2</sup>—*See quare*.<sup>3</sup>

(4) As soon as a contract for sale is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.<sup>4</sup>

As to a sale on credit, see s. 554, below. On the main point in s. 526 the arguments are analysed in *ill.* (1) and need not be repeated: it may be pointed out, however, that Petheram, C.J., seems to have proceeded on the construction of the 'wajib-ul-arz.'

Several cases dealing with benami transactions have come before the Courts, but they do not seem to enumerate any new principle beyond that the Court endeavours to get to the real transaction whichever name the parties may have proceeded.<sup>5</sup>

Benami transactions.

seller's option postpones it—  
not buyer's.

**526A.** (1) Where there is an option to the seller to dissolve the sale, the right of pre-emption does not arise until after the expiration of the option.<sup>6</sup>

(2) The right of pre-emption arises notwithstanding that there is an option to the buyer to annul the sale.<sup>7</sup>

Mortgage gives rise to pre-emption when foreclosed.

**526B.** (1) A mortgage, unless and until it is finally foreclosed, is not such a transfer of the land as can give rise to a claim to pre-emption under the general law

<sup>1</sup> *Zahur v. Nur Ali* (1865) 2 All. 90.

<sup>2</sup> *Luchmee Narain v. Bheemul Dass* (1867) 8 W. R. 600; cf. *Girdhara Lal v. Deansutali* (1874) 1 W. R. 311.

<sup>3</sup> See *Najmunnissa v. Ajaib* (1900) 22 All. 343.

<sup>4</sup> *Nabee Bukhsh alias Goleam Nabee v. Kuloo Lushker* (1874) 22 W. R. 4.

<sup>5</sup> *Gunga Ram v. Moola* (1870) 2 N. W. 200; *Beni Shankar Shethai v. Mahpal Bahadur Singh* (1888) 9 All. 480 cf. s. 541 (1) explanation II below.

<sup>6</sup> *Gurdial Mander v. Teknarayan Singh* (1865) Beng. L. R. (SUPP. VOL.) 166; 2 W. R. 215 (a mortgage in the form of a conditional sale); *Itanagar Das v. Mohan Lal* (1903) 25 All. 431 (on a transfer of a mortgage by a co-sharer mortgagor, to a stranger, the right does not arise, nor does it arise when the sale is repu-

lated by either the seller or buyer); (*Mussannat Ojheemana Begum v. (Sheikh) Rustom Ali* [1864] W. R. 219 Some Shiah authorities hold that the option to the seller does not prevent the right from arising immediately).

<sup>7</sup> *Gurdial Mander v. Teknarayan Singh* (1866) Beng. L. R. (SUPP. VOL.) 166; 2 W. R. 215 (F.B.—Bayley, J., dissenting); *Bheemnar Pershad v. Purshunna Singh* (1860) 11 W. R. 282. But if there has been foreclosure, pre-emption may be enforced (cf. *Balul Begum v. Mansur Ali* (1901) 24 A. 17) after the year of grace has expired notwithstanding that a decree for possession has not been obtained; *Tara Kumari v. Mangri Merah*, 6 Beng. L. R. (APPX.) 114. A right to claim preferentially in regard to leases and mortgages may be given by contract or custom, and will be enforced accordingly.

(apart from a contract or custom contained in a 'wajib-ul-<sup>SECTION 520a:</sup> 'arz' or otherwise). (2) A lease<sup>1</sup> is not such a transfer Lease does not. of the land as can under the general law give rise to a right of pre-emption, notwithstanding that the lease is 'moursi'<sup>2</sup> or is in perpetuity (like a 'mukarrari'), and however small the rent reserved might be.<sup>3</sup>

**527.** The Calcutta High Court has held that the right of pre-emption does not arise where the buyer is a co-sharer with the seller in the land, nor unless the claimant to pre-emption has priority over the buyer in accordance with s. 515, below.<sup>4</sup> The Allahabad High Court has dissented from the said rulings, and held that where the buyer of the land is one who (if the land were sold to a stranger) could himself claim to pre-empt, other persons whose claims to pre-emption are equal in degree to the rights of the said buyer<sup>5</sup> have the same rights of pre-emption that they would have had if the sale had been to a stranger.<sup>6</sup>

*S*, *B*, and *P* are co-sharers in the land; *S* sells his share to *B*. According to the Calcutta High Court<sup>7</sup> *P* has no right to pre-empt.

<sup>1</sup> *Manick Chand v. Bishanahar Bakhsh Singh* (1867) 2 Agra 99.

<sup>2</sup> *Devanatulla v. Kasem Molla* (1887) 15 Cal. 184; *Moorooly Ram v. Huree Ram* (1867) 8 W. R. 108.

<sup>3</sup> *Devanatulla v. Kasem Molla* (1867) 15 Cal. 184; *Ram Golam Singh v. Nursing Sahay* (1875) 25 W. R. 43; *Moorooly Ram v. Huree Ram* (1867) 8 W. R. 106 (rent of one rupee per year). The pre-emptive clause of a 'wajib-ul-arz' may, of course, be wide enough to include a perpetual lease: *Lalji Musr v. Jaggu Tewari* (1910) 33 All. 104 or a shorter lease: *Ahmed Ali Khan v. Ahmed* [1866] 1 Agra H. O. R. 101 (a lease for 8 years—pre-emption would hardly be a proper term for it; Spankie and Turnbull, J.J., refer to it as a preferential claim).

<sup>4</sup> *Baboo Moheshee Lal v. Christian* (1866) 6 W. R. 250; *Teska Dharee Singh v. Mohur Singh*, (1866) 7 W. R. 269; *Lalla Noubut Lal v. Lalla Jeevan Lal* (1878) 4 Cal. 831, (F.B.) 20 C. 1. R. 319 per Garth, C. J., Jackson, Markby, Ansell and Mitler, J.J., on the ground that the reason for allowing pre-emption is to prevent the introduction of disagreeable strangers as co-sharers or neighbours, and the reason ceases to arise when the buyer is already a co-partner.

<sup>5</sup> *I.e.*, if the buyer is a co-sharer then

other co-sharers may pre-empt; if the buyer is a *khatul*, other *khatuls* (as well as co-sharers) may pre-empt, and if the buyer is a neighbour, other neighbours (as well as co-sharers and *khatuls*) may pre-empt. See also below, s. 540 second proviso; which shows that in such a case the claim for pre-emption need not have reference to the whole of the property.

<sup>6</sup> *Amir Hasan v. Rahim Bakhsh* (1897) 19 All. 466: here the pre-emptor was a *khatul* (per Banerji and Atkinson, J.J.). Mr. Karamat Husain (later a judge of the Allahabad High Court) was the counsel for the appellant and the Court decided the case on the authorities cited by him, *v.z.*, *Bahr-ur-Raik*, Bk. on Pre-emption, Part II, Egyptian Ed 143, 161; *Radd-ul-Mukhtar*, v. 163, 152; *Fatawa 'Ilamiyyah*, IV, 15, 16 (ch. 6), *Iwazah* and *Durr-ul-Mukhtar*; *Abdulla v. Amanatullah* (1899) 21 All. 202. Here the decision in *Amir Hasan's* case 19 All. 466 was followed, and it was decided that, in such a case, the plaintiff need not sue for the whole land sold, but for the proportionate part which he would be entitled to pre-empt. For cases under the *Wajib-ul-arz* see s. 5240, above.

<sup>7</sup> *Lalla Noubut Lal v. Lalla Jeevan Lal* (1878) 4 Cal. 831.

Whether right of pre-emption arises when the buyer is himself a pre-emptor equal in degree.

Illustration

**SECTION 527.** According to the Allahabad High Court,<sup>1</sup> P can pre-empt half of S's share. The same results follow where B and P are 'khalits' of S, participating in a right of way.<sup>1</sup>

*Illustration:*

Three classes of cases would fall within s. 527: where the pre-emptor and the purchaser are both co-sharers of the seller, or they are both 'khalits,' or both neighbours.

*Conflict of decisions.*

*View of Allahabad High Court.*

*Texts examined.*

The decisions of the Calcutta High Court, above referred to, proceed on general principles: the object of pre-emption being to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour, it is held to follow that, since no such annoyance can result from a sale by one co-parcener to another, therefore, on such a sale no right to pre-empt can arise. Bannerji, and Aikman, JJ., of the Allahabad High Court, admit that were there no authority on the point, the correct law would seem to be as laid down by the Calcutta High Court. They consider, however, that the texts cited to them clearly lay down to the contrary effect. With reference to these texts it may be observed that some of them seem to refer to the purchase by the pre-emptor after the decree, and do not imply that the first sale is to a person who, in regard to the right of pre-emption, is on the same footing as the plaintiff in the suit for pre-emption. To give an example: If the buyer, B, is a stranger, and S, the seller, has two co-parceners, P and PA, it may be that PA is absent, and P alone obtains a decree for pre-emption, and purchases the land under the decree for pre-emption: then suppose that PA institutes a suit for pre-emption (within the period of limitation),—as between P and PA the former is the purchaser as well as a pre-emptor, and the texts deal with the relative rights of P and PA. It is quite correct to say, in such a case, that when the purchaser is himself a pre-emptor, the decree must be in favour of the second pre-emptor for half of the property. The question whether any of the texts cited by Banerji and Aikman, JJ., proceed beyond this depends upon whether they are right in assuming<sup>2</sup> that the expression "purchaser" means in the extracts "a person who would have the pre-emptive right as against a stranger," in other words whether the purchaser is referred to in connection with that sale which gives rise to the claim to pre-empt, or with regard to a sale in enforcement of a claim to pre-empt. The answer to this question must depend upon the context of the extracts.

<sup>1</sup> *Amir Hasan v. Rahim Bakhsh* (1897) 19 All. 468; *Abdullah v. Amanatullah* (1899) 21

All. 292.

<sup>2</sup> As they do: 19 All. 471.

The passage from the 'Durrul Mukhtar' which is cited in the judgment **SECTION 527.** refers to "a division under a decree or otherwise," implying that the "purchaser" may be the pre-emptor who has obtained a decree for pre-emption as against a stranger who originally purchased the property.

The decisions of the Allahabad High Court seem to recognise not only the right of co-parceners, etc., to prevent the intrusion of an outsider, but a right to purchase the share of another co-parcener in equal proportions, whenever any co-parcener wishes to alienate his share.

In any view, where the buyer is a co-sharer who has associated a stranger<sup>1</sup> with himself in the purchase of a share, then another co-sharer is entitled to pre-empt;<sup>2</sup> and it has been held that he may pre-empt at his option either the whole of the share sold, or the portion sold to the stranger,<sup>3</sup> the joint owner being considered to have forfeited his right as sharer by joining an outsider as a purchaser,<sup>4</sup> even though the portions or interests respectively purchased by the co-sharer and the stranger are specified severally in the sale deed.<sup>5</sup> On this last point, however, the said decision were dissented from<sup>6</sup> and overruled<sup>7</sup> in Allahabad. The right is similarly held to be forfeited if the pre-emptor having priority (P), is made a party to a suit for pre-emption brought by another pre-emptor (PA), whose rights are postponed to those of P,<sup>8</sup> though the right of P is not affected by a decree obtained by PA in a suit to which P was not a party.<sup>9</sup> Conversely, where the vendee has associated with himself in the purchase another co-sharer whose rights are inferior to those of the plaintiff in a pre-emption suit, the plaintiff will obtain a decree for pre-emption as against the whole property; in other words, "a vendee although having an equal right with the plaintiff loses his right when he brings in as a co-vendee a co-sharer having an inferior right."<sup>10</sup>

## (2) Formalities for establishing claim to Pre-emption.

'Talab-i-Muathibat': 'Talab-i-Ish had'. 'Talab-i-Tugrir.'

**528.** Except as hereinafter provided, the right of pre-emption is not established unless the pre-emptor takes

<sup>1</sup> In this connection, "stranger" means a person inferior in rights of pre-emption to the person claiming pre-emption: *Guptashekar Ram v. Rati Krishna Ram* (1912) 34 All. 342.

<sup>2</sup> *Haryas v. Kanahya* (1884) 7 All. 118. See explanation and all (5) to s. 541, below.

<sup>3</sup> *Satagram Singh v. Raghubardyal* (1887) 15 Cal. 221.

<sup>4</sup> *Ganesh Lal v. Zariat Ali* (1878) 2 N. W. 343; *Munna Singh v. Ramadhus Singh* (1881) 4 All. 252.

<sup>5</sup> *Sheebharas Rai v. Juet Rai* (1886) 8 All.

162, 464, per Mahmood, J., explaining *Sheodyal Ram v. Bhuru Ram* (1860) 8 D.A. (N.W.) 53.

<sup>6</sup> *Ram Nath v. Badri Narain* (1896) 19 All. 118 (three Judges). See also *Mushtaq Ahmad v. Amjad Ali* (1896) 19 All. 311; *Bhupal Singh v. Mahan Singh* (1896) 19 All. 324.

<sup>7</sup> *Abdur Razzaq v. Mumtaz Hussain* (1903) 25 All. 334.

<sup>8</sup> *Raf Narain Rai v. Dunia Pande* (1910) 32 All. 810.

<sup>9</sup> *Guptashekar Ram v. Rati Krishna Ram*, (1912) 34 All. 342.

SECTION 528. each of the three steps mentioned in ss. 528A, 528B, 528C, below,<sup>1</sup> the first two of which are referred to as the "preliminary ceremonies."

Sections 528 to 530 should be read together: several of them formed one section in the first edition: they explain the requirements for the enforcement of pre-emption together with some points closely allied thereto. The whole subject is compendiously treated in the illustrations and comment to s. 528i, below.

(a) Immediate assertion *talab-i-muathibat*.<sup>2</sup>

528A. The pre-emptor must (subject to s. 528D, below) assert his claim<sup>3</sup> immediately on getting information of the sale:<sup>4</sup> such assertion is technically called the '*talab-i-muathibat*.'<sup>5</sup>

(b) Confirmatory demand '*talab-i-sh-had*' before—

528B. The pre-emptor must confirm as soon as practicable<sup>6</sup> the assertion referred to in s. 528A, above, by making a (second) demand<sup>6</sup> for pre-emption including a declaration of his having already asserted his claim;<sup>7</sup> the said demand (including the said declaration) must be made in the presence,—

(c) witnesses.

(a) of witnesses<sup>8</sup> expressly called upon to bear witness to it, and in the presence,—

<sup>1</sup> See also s. 529, below.

<sup>2</sup> As to the form see s. 528i, *ill* (1). He must make a statement not merely that the right exists but that he claims pre-emption, hence, saying that he is the *hafi* [without other circumstances] is not enough. *Idid*, I 482, (*ill* 3, 4). See *per* Karamat Husain, J. (reversed in appeal) *Muhammad Nazir Khan v. Mahdum Jalkish* (1911) 31 All 53, and *Chakraborty v. Sandhya Devi* (1905) 28 All 30.

<sup>3</sup> *Hed.* 550, 1, 481-484; 11, 183 (*par.* 4) 195 (*par.* 2); see s. 529, below. It is of course invalid if purported to be made before the sale is completed; s. 733, below.

<sup>4</sup> *Talab* means requisition; and *muathibat* means *hd.* "prompting up." See s. 529 below, and comment thereto.

<sup>5</sup> *Jada Lal v. Janki Koor* (1908) 33 Cal. 575; 39 Cal. 2151, 39 L. A. 401; *Yusufdini Mahomed v. Asrar Ali* (312) 12 C.L.R. 342; *Jawidan v. Lotfi Yousfi* (1871) 8 Beng. L. R. 160, 16 W. R. (18) 13; *Mahomed Baria v. Husein Ramnawalla* (1906) 6 W. R. 173, (*Sheikh*) *Imamuddin v. (Mussammat) Noh Jan Bibi* (1870) 6 Beng. L. R. 167.

<sup>6</sup> The right is lost if *talab-i-sh-had* demand not made in due form as to which see s. 528i, *ill*.

(4), or (5). It is a separate overt act essentially over and over. *Jhola Singh v. Karam Roy* (1868) 10 W. R. 119, *Ra. Goudhar v. Zeeat Bibee* (1867) 8 W. R. 163 *Muhammad Ahmad Said Khan v. Mutha Prasad* (1916) 39 All. 133. Cf. *Ganga Prasad v. Anthon Prasad* (1905) 28 All. 24.

<sup>7</sup> See s. 528i, *ill* 3 and footnote thereto.

<sup>8</sup> "The invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof," *Idid* 1, 183 (*par.* 2), *Hed.* 561, 1, 4, *par.* 1, but see *Hed.* 561, (col. 1, *par.* 3); hence in British India no witnesses ought, in strictness, to have been required, cf. *Indian Evidence Act*, s. 134. But it has been held otherwise: *Probia Singh v. Jogeswar Singh* (1868) 2 Beng. L. R. (A.C.) 12; *Jada Singh v. Raj Kumar* (1870) 13 W. R. 177; 4 Beng. L. R. (A.C.) 171. *Dagamoollah v. Kirtie Chauder Sirmah* (1872) 18 W. R. 530; *Golokram Deb v. Brindaban Deb* (1870) 6 Ben. L. R. 165; 14 W. R. 265 and see s. 528i, *ill* 5. Servants of the pre-emptor are competent witnesses, and all persons who are not menials and have not been convicted of slander: *Muhammad Yunus Khan v. Muhammad Yunus* (1807) 10 All. 334.



(b) either of the seller<sup>1</sup> (if he is in possession of SECTION 528B. the land)<sup>2</sup> or of the purchaser,<sup>3</sup> or on the <sup>(1) Seller, or</sup> land;<sup>4</sup> <sup>pure buyer, or</sup> <sup>land.</sup>

such a demand is technically called the 'talab-i-ish-had' or 'talab-i-taqirir'.<sup>5</sup>

528c. The pre-emptor must enforce<sup>(c)</sup> the demand referred to in s. 528B, above, by instituting a suit -

(a) within a year of the purchaser taking possession of the land;<sup>7</sup> or

(b) where the subject of pre-emption does not admit of physical possession, within a year of the instrument of sale being registered;<sup>8</sup>

such enforcement is technically called the 'talab-i-tamlik,'<sup>9</sup> or 'talab-i-khusumat.'

1 *Golakram Deb v. Brindaban Deb* (180)  
 6 Beng. L. R. 165. 1 W. R. 267 and see  
 s. 5281 (1) 5 where seller refuses to show full  
*Sahoo v. Asfurmussa* (1874) 23 W. R. 124.

3 *Intaqat Khan v. Muhammad Yusuf* (1912) 10 All L.J. 92, the *talab-i-isk-hat* made in the presence of the seller and two witnesses held invalid, because the seller was not then in possession of the land.

¶ IIed. 551, 561, (col. 1 par. 3. Bail T. 151-182.) There is difference of opinion whether after the buyer has taken possession of the land (a) demand of the claim *may* be made in the presence of the seller, or (b) it *must* be made either in the presence of the purchaser or on the premises. Opinion (a) is stated to be expressed by Imam Muhammad in the *Jami Kabir*, "on a liberal construction, though not on analogy." Opinion (b) alone is mentioned in IIed. 551, (col. 1, par. 1), *cf.* *Imam Mahmood v. Mahmood Arad* (1879) 5 Cal 509; 5 Cal R. 3-20 (in the presence of the buyer though he had not taken possession), in *Chinnoo Pishan v. Puthoon Roy* (1871) 16 W R 3, it was held that it must be in the presence of the person who is in possession. But this seems incorrect if it means that it cannot be made in the presence of the buyer unless he is in possession, and the decision was explained away in *Ali Muhammad Khan v. Muhammad Said Hussein* (1896) 18 ML 309; *Mahomed Waris v. Huzee Esmamooddeen* (1866) 6 W R. 173

\* *Kulsum Bibi v Faqir Muhammad Khan* (1896) 18 All. 298; where an undivided two-anna share in a Zamindari is sold, the demand may be made on any part of the whole zamun-

[illegible]
$$6 \text{ Bal } 1 \text{ (81 185, HeI } 5505 \text{ \AA) } \sim 5281$$

$$dH \text{ (4), (6)}$$

7 Indian Limitation Act X of 1908, art. 10 of *Amrao Ali v. Bhudo Samundroo* 2 Ind 61 W 116 for a case of a conditional sale. The act that in the meanwhile another pre-emptor has brought a suit, or has obtained a decree for pre-emption does not affect the period of limitation. *Raj Narain Raj v. Dhannu Pandey* (1910) 7 All. J. 209; *Mohi Hassan v. Baghi-chand Pandey* (1915) 11 All. J. 384.

8 *Ibid.* Where there is a co-instrument of sale (and the subject of pre-emption does not admit of physical partition), art 120 will apply, and not art 10, i.e. there will be six years for limitation. *Batal Begum v Mansur Ali* (1901) 24 All 17, *Kanussali v Gopal* [1906] 26 All. W. N. 74.

9 As to *tumbil* see comment to s. 318 (h-t head) above. *khyasamal* means contest.

**SECTION 528D.** **528D.** (1) The right of pre-emption may be established notwithstanding that the assertion of the claim (referred to in s. 528A, above) has not been made, provided that the demand for it is made in the manner referred to in s. 528B, above, at the time when the assertion should be made *i.e.*, immediately on the pre-emptor being informed of the sale.<sup>1</sup>

('Talab-i-muathibat') when unnecessary.

(Shiah law)  
'talab-i-muathibat.'

Sale on credit.

Information of sale to pre-emptor.

(2) *Quære*, whether according to the Shiah law any immediate assertion or 'talab-i-muathibat' is necessary so long as the demand is made without unreasonable delay.<sup>2</sup>

(3) According to Abu Yusuf, where the sale is on credit, the pre-emptor need not assert his claim until the time arrives at which the price is to be paid.<sup>3</sup>

(4) According to Shiah law the pre-emptor need not assert his claim (by the 'talab-i-muathibat') unless information of the sale reaches him through trustworthy sources; but under Hanafi law (in accordance with Abu Yusuf and Imam Muhammad's exposition, which is said to be the most correct), the claim must be asserted by the pre-emptor, as soon as he is informed of the sale, and notwithstanding that he does not believe the information to be true.<sup>4</sup> Abu Hanifa's exposition agrees with the Shiah law.<sup>5</sup>

Knowledge of price  
(b) Prayer to Court to determine price.

**528E.** According to Shiah law the pre-emptor must know the price at which the land is sold before he can validly claim to pre-empt;<sup>6</sup> and he may pray to the Court to

<sup>1</sup> Bail. I 484 (par. 2): *Koromali v. Amir Ali* (1878) 3 C. L. R. 166 *Muhammad Usman v. Muhammad Abdul Ghafur* (1911) 34 All. 1. Cf. s. 5281 *ill* (7) and *Nandoo Pershad v. Gopal Thakur* (1884) 10 Cal. 1008.

<sup>2</sup> Cf. Bail. II 195 (par. 2) (where it is said that even being present at the time of the sale and congratulating the purchaser does not extinguish the claim), Bail. II 181 (par. 2). Cf. *Jas Kaur v. Heera Lal* (1870) 7 N. W. 1. (assertion unnecessary). Cf. the cases cited in the footnote to s. 5289, below.

<sup>3</sup> *Id.* 556 (col. 1). See s. 574, below.

<sup>4</sup> But the presumption would be very light, by reason of the Indian Evidence Act, s. 106. "When any fact is specially within the know-

ledge of any person, the burden of proving that fact is upon him." *Abdul Majid v. Asadul* (1907) 28 All. 618, *Bhagwan Singh v. Mahabir Singh* (1882) 5 All. 185, and see s. 5281, *ills.* (7), (8).

<sup>5</sup> *Id.* 551. Bail. I, 482-483. II 195 (par. 3), cf. s. 531 *ill* (1).

<sup>6</sup> Bail. II 188 (*second*), (a) *Scumble*, this saves the pre-emptor's claims so long as he is not informed of the price. (b) *Quære*, whether it gives him a right to be informed of the price. (c) On deception or mis-information his waiver or non-prosecution of his claim does not affect its existence. Cf. *Abadi Begum v. Imom Begum* (1877) 1 All. 521 (not Shiah case). See s. 5309, below.

determine the sum which has been actually agreed upon as the purchase-money between the buyer and seller,<sup>1</sup> and to decree his claim to pre-emption contingently on his paying the sum so determined;<sup>2</sup> provided that in such a case the burden is on the pre-emptor to show that the real amount of the purchase-money is less than the stated price.<sup>3</sup>

**528F.** Where the right of pre-emption is based on custom or contract, the formalities (if any)<sup>(a)</sup> with which it must be asserted, demanded, and enforced, must be determined by an interpretation of the said custom or contract.<sup>5</sup>

**528G.** It is not incumbent on the pre-emptor to tender the purchase-money of the land, at the time of asserting or demanding pre-emption.<sup>(a)</sup>

**528H.** Where the Court decrees a claim to pre-emption specifying a day on or before which the purchase-money shall be paid, the pre-emptor's right to appeal from the said decree is not affected by his not paying the said money on or before the said day.<sup>(b)</sup>

<sup>1</sup> *Lajpat Prasad v. Debi Prasad* (1881) 1 All 236, referring to *Eshri Das v. Rawla Prasad* (1801) 8 D. A. (N.W.P.) 1, Part II, 892 C; *Abul Begam v. Imam Begam* (1877), 1 All 521; *Bhatron Singh v. Lalman* (1881) 7 All 23.

<sup>2</sup> But he must offer to pay the same price and to take the land on the same terms as the buyer. *Achabur Panday v. Buckshee Ram* (1861) 2 W. R. 38; *Khandara v. Khuman Singh* [1866] 1 Agra II. C. R. 265; *Durga Prasad v. Nawrozish Ali* (1878) 1 All 591 (omission to aver in plaint willingness to pay actual amount of purchase-money not allowed to be remedied by amendment at last stage); *Nasib Singh v. Kishan Singh* (1881) 3 All. 753 (last cited case distinguished).

<sup>3</sup> See, however, the last footnote to s. 528D (3), above.

<sup>4</sup> In *Fakeer Rawat v. Ewambaksh* [1863] W. R. (F. B.) 143, Beng. L. R. SUPP. VOL. 37 approved in *Jadu Lal v. Janki Kuer* (1912) 39 Cal. 915, 39 T.A., 101; 11 Bom. L. R. 136 (p.c.), it was said that enforcement (by suit)

must always be preceded by observance of forms prescribed in Muhammadan law, cf. *Shayidulla Bop v. Iqbal Ali* (1870) 11 W. R. 265; *Jadu Lal v. Janki Kuer* (1908) 35 Cal. 915, 385.

<sup>5</sup> *Jai Kaur v. Kaur Lal* (1861) 7 N. W. 1 (assertion unnecessary by custom of Hindus of Muhalla Ahupana in the town of Muzaffargarh); *Zamir Hussain v. Daudat Begam* (1882) 5 All. 110; cf. *Ram Prasad v. Abdul Karim* (1887) 9 All. 513.

<sup>6</sup> *Khudat Jau Beebe v. Mohamed Mehder* (1868) 10 W. R. 211, *Karim Baksh v. Khuda Baksh* (1894) 16 All. 247, *Syeda Prasad Thakur v. Gopal Thakur* (1884) 10 Cal. 1008, 1018, *Lajpat Prasad v. Debi Prasad* (1881) 3 All. 236; *Haria Lal v. Moosunt Lal* (1869) 11 W. R. 275, *Bulwood Singh v. Mahadeo Dutt* (1865) 2 W. R. 10, *Nubee Baksh, alias Gadam Nubee v. Kalon Lushker* (1871) 22 W. R. 1.

<sup>7</sup> *Kulai Singh v. Jaisri Singh* (1890) 11 All. 376, *Wara Khan v. Kale Khan* (1892) 16 All. 146.

## SECTION 528I.

'*Talab-i-familik*'  
when unnecessary.  
Voluntary  
transfer.

528I. In some cases it may be unnecessary to institute a suit for the enforcement of pre-emption: as where its subject is voluntarily transferred to the pre-emptor on his claiming it.

## Illustrations.

(1) '*Talab-i-muathibat*' or assertion of claim<sup>1</sup> may be made in the following form: "I have demanded or do demand pre-emption<sup>2</sup>;" but the assertion of the claim need not be in any particular form;<sup>3</sup> and even where the words uttered are ambiguous, it may be inferred that the claim is made from the circumstances under which they are uttered, and from the acts of the parties immediately following such utterance.<sup>4</sup>

(2) If P receives the information of the sale by letter and the information is contained in the beginning or middle of the letter, and he reads it on to the end without assertion of his claim, the right (according to some exponents of Hanafi law) is lost,<sup>5</sup> but according to others and according to Shiah law the right is not lost so long as the pre-emptor uses all proper diligence so far as is customary—so that he need not hurry on a journey, nor interrupt nor delay his prayers or any religious duties for making the assertion.<sup>6</sup>

(3) '*Talab-i-ish hadi*' or demand of the claim<sup>7</sup> may<sup>8</sup> be made in this form: "B has purchased this mansion, and I have demanded the pre-emption,<sup>9</sup> and now do demand it—bear ye witness to this."<sup>10</sup>

(4) '*Talab-i-khususat*' or '*talab-i-tamlik*' or enforcement<sup>11</sup> of the claim may be obtained by a prayer in the following terms: "B has

<sup>1</sup> See s. 528A, above.

<sup>2</sup> Bail, I. 482.

<sup>3</sup> *Uj Deb v. Mohamed* (1905) 50 Cal. 22, 23; *Ameer Ali*, I. 606, citing no authority, but cited in *Mahmood Nazar Khata v. Mahomed Ishtiaq* (1911) 34 All. 53, 56, with the remark, "he cites abundant authority for this proposition."

<sup>4</sup> *Mahmood Nazar Khata v. Mahomed Ishtiaq* (1911) 34 All. 53.

<sup>5</sup> *Ibid.*, 536 (col. ii par. 3); Bail I. 481, citing *Hidayat* IV., 992, 11 *Jafar Khan v. Jahan Mirah* (1885) 10 Cal. 283.

<sup>6</sup> Bail II. 184 (par. 2).

<sup>7</sup> See s. 528C, above.

<sup>8</sup> Not necessarily in any particular form. *Jag Deb v. Mohamed* (1905) 32 Cal. 982; *Ramchander Mawar v. Jaganath Lal Mawar* (1872) 8 Beng. L.R. 155, 17 W.R. 265. But a declaration must be made before witnesses or a sub-judge to this effect that the first assertion has been made. *Gudhara Singh v. Raju Singh* (1875) 24 W.R. 462. It was held in *Sando Prasad Thakur v. Gopal Prasad* (1881) 10 Cal. 1005, by Garth, C.J., and Beveridge, J., that when the first assertion is made in the presence of witnesses, and the

same witnesses are present when the demand (*ish hadi*) is made, it is unnecessary for the pre-emptor to re-assert the same declaration; the declaration that he had already asserted his claim by the '*talab-i-muathibat*'. But that decision was overruled in *Ranjib Ali Chaudhary v. Chaudhary Chandra* (1899) 17 Cal. 343 (1899) and in *Khan Husain v. Asad Jaid* (1904) 16 All. 383; *Abdus Samad v. Asad Husain* (1898) 20 All. 157; and *Ambarat, Ali bin v. Kadar Bawa* (1901) 27 All. 163, the principle was re-stated that the pre-emptor in the domain must distinctly state that he has, prior thereto, made the assertion (*talab-i-muathibat*), and notwithstanding that the same witnesses were present when the assertion was made. *Abul Husain v. Bashir Ahmed* (1898) 20 All. 299.

<sup>9</sup> This relates to the first demand (*talab-i-muathibat*) s. 528A, above) having been already made, is essential. *Mahabub Hussain v. Kayaz Bawa* (1900) 27 All. 160.

<sup>10</sup> Bail I. 183, *Ibid.* 551, cf. *Ganga Prasad v. Lydhat* (1905) 28 All. 24 on the necessity for specific invocation of witnesses.

<sup>11</sup> See ss. 528B and 528C, above.

purchased a mansion" (describing its situation and boundaries) "and SECTION 5281. I am the 'shufco' by reason of a mansion belonging to me" (the boun- Illustrations. daries of which he should also explain). "Order him, therefore, to deliver it up to me."<sup>1</sup>

(5) P made the 'talab-i-muathibat' in the presence of witnesses, but in doing so was neither at the land, nor in the presence of the seller or buyer; this does not operate as a valid 'talab-i-jahad' on the ground that there was no evidence of a demand with invocation of witnesses having been made.<sup>2</sup>

(6) P claims to purchase a specific quantity of land at a specific price; this is not a proper claim of pre-emption, which must be made with an offer to pay the real price whatever it be.<sup>3</sup>

(7) P claims to pre-empt at the real price, alleging that the stated price (*viz.*, Rs. 1,200) is fictitious, and that the real purchase-money was Rs. 250; the first Court held that the real or market value of the land was Rs. 250; this was held sufficient to show that the alleged price of Rs. 1,200 was fictitious—*sed quere*.

(8) P claims pre-emption, alleging that though the stated price is Rs. 775, the real purchase-money was Rs. 75; the buyer, B (a stranger) put in evidence of the sale-deed; and P gave evidence that a share in the neighbouring 'mahal' was sold for Rs. 75; there was no other evidence, neither the seller nor the buyer being called. Edge, C. J., and Broadhurst, J., held that there was no evidence on which the lower Court could have found the price to be Rs. 475, and remanded the case for further evidence being taken (a) as to the real contract price, or (b) as to the market value; intimating that where neither is provided in future there may be no remand, as it is necessarily a part of the plaintiff's case to prove either (a) or (b), in order to show that the stated price was fictitious.<sup>4</sup>

(9) P, a 'pardanashin' lady, on being informed by her nephew and agent P.A. of the sale of the land to B, said: "I am the 'shafi' of the property, how has he purchased it? Go to him and tell him to give me the property." P.A. took witnesses to B, and said, "Meri mumani kathi hai ki main is ahato ki shafi hun," (*i.e.*, "my aunt says that she is

<sup>1</sup> Badl. I, 485. *Quere*, whether this decision is consistent with the Muhammadan Law which gives the "options of inspection and defect": *Hed.*, 553, see s. 549 (1), below. But see comment.

<sup>2</sup> *Jadubabund Singh v. Dulput Singh* (1884) 10 Cal. 561; (*Mitter and Macleod, JJ.*); *Nathu v. Shadi* (1915) 13 All. L.J. 714. See ss. 528B,

and 528D, above.

<sup>3</sup> *Achurbar Panday v. Bakshee Ram* (1864) 2 W. R. 38.

<sup>4</sup> *Seepargash v. Dhanraj Dube* (1887) 9 All. 255. See s. 528D, above.

<sup>5</sup> *Agar Singh v. Raghraj Singh* (1887) 9 All. 471. See s. 528D, above.

SECTION 528I, the 'shafi' of this land") and then told the persons present that he

*Illustrations.*

had told B what his aunt ('mumani') had said; *held*, that the demand ('talab-i-ish-had') was not defective on the ground that no reference was made to the first assertion. Had the demand been made by P in person, Aikman, J., said he would have had no difficulty in holding it defective; but looking to the fact that it was made by an agent on behalf of an absent pre-emptor who was a 'pardanashin' lady, he was of opinion that the words used by the agent were equivalent to the statement that P had asserted and was asserting her right of pre-emption.<sup>1</sup>

(1<sup>o</sup>) S sells the land to B, Bx, Bb, Bc, and Bd; in making the demand of pre-emption, P says in the presence of Bb and Bc, "Whereas B and others have purchased the land and I asserted my right of pre-emption," etc., and proclaims this also at the empty doors of the rest of the buyers; *held* the demand is valid.<sup>2</sup>

#### PRELIMINARY FORMS: SUMMARY OF LAW.

1. The first  
assertion  
'talab-i-  
muathibat'  
(a) as soon  
as pos-  
sible.

(1) The first assertion of the claim (called 'talab-i-muathibat' see s. 528A, above) must be made,—

(a) as soon as possible; it is a question of fact, on which it could hardly be expected that the various dicta as they appear in the reports should be absolutely consistent or reconcilable, even if it could be assumed that the reported words accurately represent the reasoning of the judges where they have to deal with a mass of evidence that is barely alluded to in the judgments; but to this difficulty is added the fact that the Courts have often a strong leaning against decreeing pre-emption and seize any technical objection to be able to refuse it. It has been pointed out in s. 528D (2) and in illustration (2) to the present section that the Shiah law differs in that it does not require such extreme promptness in asserting the claim—and it is doubtful whether it requires the first assertion at all. But there does not seem to be any case decided on this point in accordance with Shiah law.

(b) no form  
neces-  
sary.

(b) No special form is insisted upon with reference to the first assertion, so long as a desire to pre-empt—not merely the fact that he has a right to pre-empt—is asserted; and the surrounding circumstances may be referred to for deciding whether the desire or intention to claim was asserted.

<sup>1</sup> *Akmal Nisak Khan v. Abadi Begam* [1897] 17 All W.N. 23; the judgment relies on *Rajab Ali v. Chandi* (1890) 17 Cal. 543, and *Akbar*

*Hussain v. Abdul Jalil* [1894] All. W. N. 122.  
<sup>2</sup> *Jog Deb v. Mahomed* (1805) 32 Cal. 982.

(2) As regards the (second) demand or the 'talab-i-ish had' (see SECTION 528<sup>1</sup>, s. 528<sup>2</sup>, above) it seems to be settled,—

(a) that witnesses are necessary in British India, though strictly in accordance with the texts it may not be so.

(b) It must be made either,—

(i) on the land; or

(ii) in the presence of the buyer; or

(iii) (so long as the land is in the possession of the seller) in the presence of the seller; but,—

(iv) it is doubtful whether it may validly be made in the presence of the seller if the buyer has taken possession of the land.

(c) It need not be made in any particular form, but three things are essential: (c) form of second demand.

(i) invocation of the witnesses

(ii) declaration that he has already made the first assertion ('talab-i-muathibat');

(iii) adherence to his desire to pre-empt.

Sir R. Wilson makes the following suggestive comment on the necessity of the assertion ('talab-i-muathibat') being made immediately on hearing of the sale: "The same noun ['muathibat'] is used of a poet plunging 'in medias res,' but here the idea is rather of a person jumping from his seat, as though startled by the news of the sale.<sup>1</sup> . . . This particular requirement is traced to an alleged saying of the Prophet, 'the right of shaffa is established in him who prefers his claim without delay.' Its underlying principle is identical with that of the Roman rule barring the 'actio injuriarum' where no resentment appeared to have been displayed by the sufferer at the time of receiving the blow or insult (Inst. iv. 4, 12). Here the ground of the claim is the annoyance generally to be apprehended from the intrusion of a stranger among a body of long-established neighbours, who would usually be kinsmen; and it is supposed that this annoyance can in fact have had no existence in the particular case, and that the subsequent claim of pre-emption must be attributed to other and less legitimate motives, if the announcement of such intrusion as imminent, provoked no immediate protest."<sup>2</sup> Cf. 'Baijnath v. Ramdhari.'<sup>3</sup>

529. The assertion (or 'talab-i-muathibat,')<sup>4</sup> and the <sup>3</sup>stated proof.

<sup>1</sup> Wilson, "Anglo-Muhammadan Law," 393, n., citing Prof. J. de Nauphal's *Cours de droit Musulman, La Propriété* (188) I. 73.

<sup>2</sup> "Anglo-Muhammadan Law," s. 375.

<sup>3</sup> (1908) 35 Cal. 402; 35 I. A. 60.

<sup>4</sup> S. 428B, above. *Jarjan Khan v. Jabbar Meah* (1884) 10 Cal., 393; *Jhotee Singh v. Komul Roy* (1893) 10 W.E. 119; *Abdul Hossain Khan v. Gobind Chandra Shaha* (1899) 11 W. R. 404.

2. Second demand, talab-i-'ish had."  
(a) Witnesses  
(b) presence of land, buyer, or seller

The assertion ('talab-i-muathibat') explained.

SECTION 529. demand (or 'talab-i-ish had,' or 'talab-i-taqir')<sup>1</sup> for pre-emption must be strictly proved<sup>2</sup> to have been made in proper form,<sup>3</sup> and without undue<sup>4</sup> delay.<sup>5</sup>

*Illustration*

On 14th October 1910 the plaintiff, an Inspector of Partition Amins of the Bareilly division, residing at Bareilly heard, while on tour, of the sale at Badaun of a house in the district of Saharanpur, by a sale deed dated 7th September 1910. He immediately performed the 'talab-i-muathibat' in the presence of witnesses and owing to his being at a distance from the vendee he purported to perform the talab-i-ish had by sending a letter by post to the vendee claiming the right of pre-emption and stating that the assertion had been properly made. The letter was signed in the presence of witnesses, and it was duly received by the vendee: held that the demand was not properly made.<sup>6</sup>

Evidence of  
pre-emptor  
alone

As regards the 'talab-i-muathibat' (s. 528A, above)—

(1) On the question whether the evidence of the pre-emptor alone is enough to prove its having been made, see 'Abdool Hossein Khan v Gobind Chandra Shaha.'<sup>7</sup>

What is undue  
delay.

(2) A lapse of twelve hours,<sup>8</sup> or of the night,<sup>9</sup> before the assertion is made has been held to avoid the claim; and that the delay caused by the pre-emptor going either to the land,<sup>10</sup> (the subject of pre-emption) and making the 'talab-i-muathibat' there, or going to his own house to get the purchase-money prior to asserting it<sup>11</sup> is fatal to the claim; still stronger is a case where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, and took out Rs 47-4," and then asserted his claim, and it was held to be such unnecessary delay as avoided the claim.<sup>12</sup> On the other hand it has been held that rising

<sup>1</sup> *Narbhass Singh v. Luckmee Nandan Poojee* (1899) 11 W.R. 307; *Razzeooddeen v. Zeenat Bibee* (1867) 8 W.R. 163; *Bhowanee Dutt v. Lakhoo Singh* [1864] W. R. 60.

<sup>2</sup> *Hosseini Khanum v. Lallan* (1864) W. R. 117; *Israr Chunder Shaha v. Nasir Hossein*, ib. 451; *Jadu Singh v. Rajkumar* (1870) 4 Ben. L. R. (A.C.) 171; *Prakas Singh v. Jogeshwar Singh* 2 Ben. L.R. (A.C.) 12; *Ali Muhammad v. Taj Muhammad* (1876) 1 All. 238; *Sardarjee Lal v. Laboo Mooler*.

<sup>3</sup> See s. 528i, *ib.* (1), (3); and *Muhammed Khalil v. Muhammad Ibrahim* (1915) 38 All. 201; see the illustration to s. 529.

<sup>4</sup> See comment

<sup>5</sup> *Mishra*, 208 (par. 3) (Bk. 18 s. 2) on Shal law; *Balnath v. Ramdhari* (1908) 35 Cal. 402; 35 I.A. 60; *Jarjan Khan v. Jabbar Meah* (1884) 19 Cal. 383; *Ali Muhammad v. Taj Muhammad* (1870) 1 All. 233; *Nasir Khan v. Inayatulla* (1898) 12 All. W. N. 24; *Ram Charan v. Narain*

*Mahton* (1870) 1 Ben. L.R. (A.C.) 216; 13 W. R. 259; *Muhammed Wlayat Ali Khan v. Abdul Rab* (1884) 11 All. 108; *Ajoodkja Poojee v. Sukun Lall*, 7 W.R. 128; *Khahee Buksh v. Mohan*, 25 W. R. 9; *Gholam Hossein v. Abdool Kadir* (1873) 6 N.W. 11; as to delay in making the DEMAND (ISH HAD), cf. s. 528A, above, and footnotes thereto.

<sup>6</sup> *Muhammed Khalil v. Muhammad Ibrahim* (1915) 38 All. 201, 203.

<sup>7</sup> (1869) 11 W. R. 404.

<sup>8</sup> *Ali Muhammad v. Taj Muhammad* (1876)

1 All. 233.

<sup>9</sup> *Nasir Khan v. Inayatulla* (1898) 12 All.

W. N. 24.

<sup>10</sup> *Ram Charan v. Narain Mahton* (1870) 4 Ben. L. R. (A.C.) 216; 13 W. R. 259.

<sup>11</sup> *Mona Singh v. Mostrad Singh* (1866) 5 W. R. 203.

<sup>12</sup> *Jarjan Khan v. Jabbar Meah* (1884) 10 Cal. 383



from the seat<sup>1</sup> before making the claim is not undue delay, and that SECTION 529, taking a short time for ascertaining the correctness of the information is not undue delay; and even that a short time for reflection before making the first assertion is allowed.<sup>2</sup>

As to delay in making the demand ('*talab-i-ish had'*), see *e.* 528B, above, and footnotes thereto.

The Shiah law is different. See s. 528I, illustration (2), above.

**530.** The assertion and demand for pre-emption may be made either by the pre-emptor, or his duly authorized agent,<sup>3</sup> or manager,<sup>4</sup> or guardian;<sup>5</sup> and any person competent to own property, is competent to make them.<sup>6</sup>

Agent, manager or guardian making the preliminary ceremonies.

Where the claim to pre-emption arises in favour of a minor or person of unsound mind, and in accordance with Shiah law his guardian exercises or refuses to exercise it on his behalf, and if the act or omission of the guardian is not for the benefit of the minor, then the pre-emption may be avoided, or enforced on the minor attaining majority or the said person recovering reason. The Hanafi authorities are doubtful on the point.<sup>7</sup> It is difficult to think that the Shiah law would be given effect to in British India except in so far as it may affect the rights between the guardian and his ward, or where the disability of the pre-emptor has not been long in duration and the interests of third parties are not affected. Apart from these general considerations the bearing of the Indian Limitation Act IX. of 1908, s. 8, and Act XV of 1877, s. 6 and s. 7 (paragraph 5) may have to be considered.<sup>8</sup>

Minor and guardian.

In '*Raja Ram v. Bansi*'<sup>9</sup> the '*wajib-ul-arz*' restricted the right to persons competent to contract, and the plaintiff, who was a minor at the time of the sale and unrepresented by a guardian, was held not to be entitled to enforce pre-emption by a suit brought on his attaining majority four years later.

Restriction in '*wajib-ul-arz*' against minor.

<sup>1</sup> *Maharaj Singh v. Lalla Bhonchook Lal* (1864) W. R. 294.

<sup>2</sup> *Amjad Hussain v. Kharag Sen Saha* (1870)

<sup>3</sup> *Ben L. R. (A.C.)* 203; 13 W. R. 299.

<sup>4</sup> *Munna Khan v. Choddu Singh* (1906) 28 All. 601; *Ali Muhammad Khan v. Muhammad Said Hussain* (1896) 18 All. 309; *Harvor Dat v. Sheo Prasad* (1884) 7 All. 41 (laying down rule in general terms); *Abadi Begam v. Inam Begam* (1877) 1 All. 521 (husband for wife); *Ojhoonissa Begam v. Rustam Ali* (1864) W. R. 219; (*Syed*) *Wajid Ali Khan v. Lala Hanuman Prasad* (1860) 4 Beng. L. R. (A.C.) 139; 12 W. R. (F.B.) 484. With reference to agents, see comment

<sup>4</sup> *Sir: Kushan v. Basheha Pande* (1911) 32 All 637 (notice by member of joint Hindu family to accrue for benefit of all); *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575 (manager under Court of Wards); affirmed (1912) 39 Cal. 915; 39 I. A. 101; 14 Bom. L. R. 436 (r.o.).

<sup>5</sup> *Iled. 564-565; Ball. II 180*; see s. 271, above. See comment to s. 530.

<sup>6</sup> *Ball. I. 473 (par. 2)*: "neither are manhood, puberty, and justice or respectability of character, conditions of its exercise."

<sup>7</sup> *Cf. Nanoo v. Tirikha* [1876] 8. D. A. (W. R. F.) 97.

<sup>8</sup> (1876) 1 All. 207.

## SECTION 530.

Agent making  
second demand.

With reference to agents making the 'talab-i-ish had' or 'talab-i-taqir' (see s. 528B, above), the following translation of a passage from the 'Fatawa-i-'Alamgiri' is cited and followed in a recent decision<sup>1</sup> :—

"If a pre-emptor comes to know of the sale while he is on his way to Mecca and makes the 'talab-i-mow-asibat,' but is unable to perform the 'talab-i-ish had' personally he ought to appoint a vakil to make the claim of pre-emption for him. If he cannot find any one whom he may appoint his vakil, but finds a messenger, he ought to write a letter and in this letter he ought to appoint a vakil. If he fails to do so his right of pre-emption will be lost. But if he can neither find a vakil nor a messenger his right of pre-emption will not be lost until he finds one."<sup>2</sup> On the strength of this passage it was held that when the plaintiff was not unable to make the demands himself, nor was there anything to show that he was unable to appoint a vakil, he could not make the 'talab-i-ish had' by sending a letter by post to the vendee, claiming the right of pre-emption and stating that the first demand had been properly made.

The text  
explained.

It will be noticed that the passage from the 'Fatawa-i-'Alamgiri,' cited above, implies that the actual 'talab-i-ish had' has to be performed personally: to have held that despatching the letter was tantamount to performing the ceremony, would not have merely added a new mode for performing the ceremony, it would have totally altered the substance of the ceremony. The letter is referred to in the 'Alamgiri' not for performance of the ceremony, but for the appointment of a vakil to perform it. The rule, it is submitted, is that during the period during which the pre-emptor is not able either

(a) to go himself to the premises or to the seller or purchaser  
or

(b) to appoint a messenger for so going, —

he is excused for not performing the ceremony—or to use the phraseology of the law of limitation "time does not run against him"—his non-performance of the ceremony during that period does not make him forfeit his right. The rule is not, that on his proving such inability, the ceremony may be performed without any person going to the premises or to the purchaser or seller. It seems necessary to state this as the reporter's head-note to the decision referred to, may be misleading, if read by itself.<sup>3</sup>

<sup>1</sup> *Muhammad Khalil v. Muhammad Ibrahim* (1916) 38 All. 201, 203.

<sup>2</sup> This passage is referred to in Maenaghten, precedents, 183.

<sup>3</sup> This point seems also to have been overlooked in Wilson, Anglo-Muhammadian Law, s. 377.

(3) *Terms on which Pre-emption Allowed.*

SECTION 530A.

530A. The pre-emptor must take the bargain as it was made, and cannot alter the terms of the sale either as regards the property sold, (to which s. 540, below, refers) or the price to be paid, or any other essential term. *semble*, not having reference to the personal relation between the seller and buyer.<sup>1</sup>

Pre-emptor  
bound by terms  
of the sale.

The principle contained in s. 530A seems to be clear, but it is not always easy to distinguish the essential parts of the bargain from the arrangements that are merely personal to the original buyer and seller, and which therefore cannot be transferred when the pre-emptor steps into the shoes of the original buyer. Thus it has been held that the benefit of an arrangement by which a portion of the price was to remain with the buyer in order that he might pay off a mortgage debt was personal to the seller and buyer and the pre-emptor was not allowed to claim the same terms;<sup>2</sup> but that the pre-emptor was entitled to a deduction from the price originally fixed when after the sale the seller and buyer agreed that the buyer should recover for his own benefit certain moneys due to the seller at the time of the sale and the buyer did<sup>3</sup> recover such sums. Again where the District Court had decreed a conveyance to the pre-emptor upon payment of Rs. 71, though the price paid by the purchaser was Rs. 141, on the ground that though the seller proposed to sell 5 annas he had only 2½ annas, this decision was reversed by the High Court.<sup>4</sup> On the other hand a different decision was given where the facts were as follows: Certain persons purported to sell an 8 annas share of a village, they had title to 6 annas 8 pies thereof but none to the other 1 anna 4 pies share; the owner of the latter first instituted a suit to have his title declared to the 1 anna 4 pies and obtained a decree; then he claimed pre-emption of the other 6 annas and 8 pies, and it was held that he had to pay only a proportional price.<sup>5</sup>

The principle  
illustrated  
by decisions.

<sup>1</sup> *Madhub Chunder Nath Bineas v. Tomes Bawa* (1867) 7 W. R. 210; *Tavakkul Rai v. Lachman* (1883) 6 All. 341; *Nihal Singh v. Kokale Singh* (1886) 8 All. 29 (pre-emptor not to have benefit of peculiar incidents of the payment of the purchase money as arranged between the seller and buyer, viz., that the balance of the purchase money should remain on credit and be secured by hypothecation deeds). See also *Sitaram Bhaurao v. Sayad Strafal Khan* (1917) 41 Bom. 636, and the comment.

<sup>2</sup> *Gulam Ayhya v. Mungul Singh* (1878) 13 W. R. 435.

<sup>3</sup> *Tajammul Husain v. Uda* (1880) 3 All. 668.

<sup>4</sup> *Madhub Chunder Nath Bineas v. Tomes Bawa* (1866) 7 W. R. 210.

<sup>5</sup> *Muhammad Latif v. Gobind Singh* (1884) 5 All. 382. See also *Nihal Singh v. Kokale Singh* (1886) 8 All. 29; see the footnote to s. 530A, above, as to the facts of this case.

## SECTION 530B.

True price  
and market  
price.

**530B.** It has been held that where the true price agreed upon between the seller and buyer cannot be ascertained because they do not give reliable evidence regarding the agreed price, the Court will itself ascertain the market price of the property, and assume that the agreed price must have been equal to the market price; provided that the burden of proving the market price is on the pre-emptor.<sup>1</sup>

It is submitted that the decision on which s. 530B is based ought not be taken as laying down a fixed rule for every case. It is in the first instance for the pre-emptor to prove his case, and to give evidence as to the price on which the sale was made, and the terms on which he himself claims to pre-empt. The price, however, that he has to prove primarily, and as part of his case, is not the market price, but the price for which the property was actually sold, and that matter being peculiarly within the knowledge of the buyer and seller is it for them under the Indian Evidence Act to produce evidence relating to it, and in the absence of any satisfactory evidence produced by them, the Court may in some cases be inclined to raise presumptions against the buyer and seller, and even to throw upon the seller the burden of showing that the price was higher than that offered by the pre-emptor.<sup>2</sup> The author of the 'Minhaj,'<sup>3</sup> a treatise on the Shafi'i law, states that in case of disputes between the purchaser and pre-emptor upon the subject of the price, the presumption is in favour of the purchaser's statement: see s. 5B, above.

### '§ 4.—Loss of Right of Pre-emption.

#### (1) Omission to Claim: Acquiescence.

Loss of right  
of pre-emption  
by omission to  
claim or by  
acquiescence.

**531.** The right of pre-emption cannot be established where the pre-emptor omits duly to assert demand or enforce his claim,<sup>4</sup> or acquiesces in the sale of the land,<sup>5</sup> or any part thereof;<sup>6</sup> and by such acquiescence it is avoided

<sup>1</sup> *Iyer Singh v. Raghubar Singh* (1887) 9 All. 471, cf. s. 523, III. (8).

<sup>2</sup> *Ram Naray Sahu v. Karamullah Khan* (1914) 36 All. 464.

<sup>3</sup> *Minhaj*, Bk. 18, s. 2. Howard's Transl., 207.

<sup>4</sup> See ss. 523 and 540.

<sup>5</sup> *Ball*, I. 743.

<sup>6</sup> Omitting to sue for part of the subject is

of the right of pre-emption is to prevent the intruder; not to give the pre-emptor capricious choice of ousting a stranger of the land as he may choose to pre-empt (Mahmood, J.) *Durga Prasad v. Munai* (1884) 6 All. 423.

notwithstanding that it may have been already asserted SECTION 531. and demanded.<sup>1</sup>

**Explanation.**—Associating in a suit to enforce pre-emption a co-plaintiff who has no claim to it, is a waiver of part of the claim,<sup>2</sup> and extinguishes the whole of it.<sup>3</sup>

(1) S sells land to B, and P, who has a right to pre-emption, on receiving information<sup>4</sup> of the sale,—

- (a) omits without sufficient cause to ascertain immediately his right,<sup>5</sup> or
- (b) makes an offer for the house to B,<sup>5</sup> or
- (c) asks him if he will give it up to him,<sup>5</sup> or
- (d) takes a lease of it,<sup>6</sup> or
- (e) agrees to cultivate it in 'muzariat' or jointly with B,<sup>5</sup> or
- (f) on the day of the sale P obtains a written agreement from B to sell to P the land any time within a year, and then P pays the price and purchases it for himself,<sup>7</sup> or
- (g) P acts as the agent of S in the sale,<sup>8</sup>—

in each of these cases P will be taken to have acquiesced in the sale,<sup>9</sup> and has no right to pre-empt the land.

(h) If P acts as the agent of B, his right is not extinguished,<sup>8</sup>—

(i) When an agreement similar to that in (f) is entered into while P continues to assert his pre-emptive right, and on the strength of that right, and in his character as pre-emptor, offers, in order to avoid litigation, to take the land from B for the sale price:<sup>10</sup> the distinction between (g) and (h) being stated to be, that, in (g), P must annul the sale which was completed by him in order to pre-empt, whereas in (h) he must enforce the sale to B through whom he claims.<sup>8</sup>

(2) Where property is sold in execution of P's decree,<sup>11</sup> or in execution of a decree at a public auction where P has the same opportunity to bid for the property as other persons: P cannot exercise his right of pre-emption.<sup>12</sup>

<sup>1</sup> Ball. I. 499. See *illustrations*.

<sup>2</sup> See page 690, n. 6.

<sup>3</sup> *Bhawani Prasad v. Damru* (1882) 5 All. 197; *Bhupai Singh v. Mohan Singh* (1897) 19 All. 324 (such misjoinder not allowed to be rectified by amendment<sup>9</sup> of plaint); cf. *Bhawani Kuar v. Narain Singh*. 1887 7 All. W. N. 247.

<sup>4</sup> The more so when the *wajib-ul-ars* requires S to give notice, and S does so, but P takes no action within a reasonable time; *Muhammad Wilayat Ali Khan v. Abdul Rab* (1888) 11 All. 108.

<sup>5</sup> Ball. I. 499.

<sup>6</sup> Ball. I. 499; *Rishan Lal v. Ishri* (1905)

28 All. 237.

<sup>7</sup> *Habibunnissa v. Barkat Ali* (1886) 8 All. 275.

<sup>8</sup> Hed. 562 (col. 1, par. 4).

<sup>9</sup> *Bainath v. Raindhara* (1908) 35 Cal. 402; 35 I. A. 60.

<sup>10</sup> *Muhammad Yunus Khan v. Muhammad Yusuf* (1897) 19 All. 334; *Muhammad Nasir-uddin v. Abdul Hasan* (1894) 16 All. 330.

<sup>11</sup> *Nuzmoodeen v. Kange Jha* (1893) Marsh. 355; 2 Hay. 651. But see s. 525 *ill.* (1) (e), above.

<sup>12</sup> *Abdul Jabul v. Khelat Chandra Ghose* (1868) 1 Beng. L. R. (A.C.) 105; 10 W. R. 165

## SECTION 5

## Illustrations.

(3) P sues for pre-emption, alleging that the true consideration for the sale was less than that stated in the sale deed. P had made no communication to S, the seller, after he became aware that the sale was negotiated, nor did P make it known to S that while he claimed to pre-empt, he declined to pay the ostensible price. *Held*, that P ought to have communicated with S, and not having done so, he must be taken to have countenanced the completion of the sale, and waived his right of pre-emption.<sup>1</sup>

(4) PA and PAA obtained decrees for pre-empting one-fourteenth and thirteen-fourteenths shares of the land on the 29th November, and 23rd December 1907, respectively; a suit was brought on the 17th December 1907 by P, whose claim, as pre-emptor, was prior to that of PA, and PAA. *Held*, that P was entitled to pre-empt, not having been a party to the suits by PA and PAA, and his right was not affected by the said decrees in favour of PA and PAA.<sup>2</sup>

(5) Where the sale was to a co-sharer jointly with two others, who were strangers, the consideration being one integral sum for the whole land sold, the Allahabad High Court *held* that the co-sharer, having associated himself with strangers, must be deemed for purposes of pre-emption, to be himself a stranger; and that the claim of the other co-sharers to pre-empt could not be resisted by him, notwithstanding that the sale deed specified that each of the purchasers took one-third of the land sold<sup>3</sup> and any person whose rights to pre-emption are inferior to those of the plaintiff, is deemed a stranger for the present purpose.<sup>4</sup>

It has been held in England that where the lessee has a right of pre-emption, the purchase by him of a part only of the demised land will destroy his right of pre-emption over the residue.<sup>5</sup>

(2) *of Pre-emptor before Enforcement.*

532. (1) According to Hanafi law the right of pre-emption and a suit for enforcing the right<sup>6</sup> abate on the death of the pre-emptor previous to its being enforced.<sup>7</sup>

Hanafi law:  
abatement.  
Shiah and  
Shafii law:  
devolution.

<sup>1</sup> *Beharion Singh v. Lalson* (1894) 7 All. 23.

<sup>2</sup> *Raj Narain Rai v. Duni Pandey* (1910)

32 All. 340 Cf. comment to a. 527, above.

<sup>3</sup> *Manna Singh v. Ramadhin Singh* (1881)

4 All. 252. *Harjas v. Kanhaya*.

<sup>4</sup> *(Jupleshwar Ram v. Ruti Krishna Ram*  
(1913) 34 All. 542.

<sup>5</sup> *Sparrow v. Cooper* (1888) Hay J. 404j

<sup>6</sup> *Parlab Singh v. Dawlat* (1913) 636 All. 63;

cf. *Sitarom Bhaurau v. Sayad Sirajul Khan*  
(1917) 41 Bom. 636, 653.

<sup>7</sup> *Hod. 561* (col. ii. par. 2); *Ball. I. 500*;  
*Muhammad Hussin v. Nimal-un-nissa* (1897)  
20 All. 88; *Parlab Singh v. Dawlat* (1913) 36 All.  
63; cf. *Sitarom Bhaurau v. Sayad Sirajul Khan*  
(1917) 41 Bom. 636, 653. See however *Wajid*  
*Ali v. Shaban* (1909) 31 All. 623 (rights under  
*Wajid-ul-arz*).

According to Shiah and Shafi'i law, on the death of the pre-emptor it devolves upon his heirs,<sup>1</sup> in the proportion of their rights of inheritance.<sup>2</sup>

(2) Where the pre-emptor, being a Hanafi Mussulman, dies, pending a suit for pre-emption, the right does not, under s. 89 of the Probate and Administration Act, survive to his heirs and representatives who are neither executors nor administrators within the clear definitions of the terms in the said Act.<sup>3</sup> *Quære*, whether the said right survives to executors or administrators within such definitions.<sup>3</sup>

The reason given for the right abating, according to Hanafi law, is that the death of the pre-emptor extinguishes his ownership of his property (see s. 541, below) which is necessary to give rise to the claim, and so it cannot continue in the dead man, as for his heirs, their right in the property devolves upon them after his death, i.e., after the sale; and thus they were not owners at the time of the sale.<sup>4</sup>

The head-notes of both reports<sup>5</sup> of 'Sayyad Jinal Hussain's' case are inaccurate: the Court adjourned the hearing of the appeal on the question of the right surviving to an administrator; though it said, "we cannot doubt but that the intention of the legislature in the enactment was to make large innovations upon the personal law . . . as expressed in the old maxim 'actio personalis moritur cum persona.' Since that in our opinion is unmistakably the effect of s. 89 of the Probate and Administration Act, we think that its operation must be strictly confined to the persons named in it." Compare with this the remark of Lord Macnaghten<sup>6</sup> that the application of the doctrine of 'actio personalis moritur cum persona' is limited to actions in which remedy is sought for a tort or for something which involves at any rate a wrong-doing. This remark was recently cited in deciding that the maxim does not apply where compensation is claimed to property on the strength of express or implied contract.<sup>7</sup> It is difficult to say whether the right of pre-emption as understood by the Hanafi lawyers falls within the category of tort or contract. It arises in many cases from contract,

<sup>1</sup> Hed. 561; Ball. II. 190, 191; the *Shaukh*, i.e. Muhammad-al-Hasan ibn 'Ali Abu Jafar-al-Tusi) author of the *Mabrut*, holds that the right abates.

<sup>2</sup> Ball. II. 191 (*third*).

<sup>3</sup> *Sayyad Jinal Hussain v. Sitarum Bhai* (1911) 36 Bom. 144; 13 Bom. L. R. 1340; *Sitarum Bhai v. Sayad Siraju Khan* (1917)

41 Bom. 636, 653. See comment.

<sup>4</sup> Hed. 562 (col. i, par. 1).

<sup>5</sup> 36 Bom. 144; 13 Bom. L. R. 1340.

<sup>6</sup> *The United Collieries Ltd. v. Simpson* [1909] A. C. 391.

<sup>7</sup> *Chunilal v. Secretary of State* (1910) 12 Bom. L. R. 769, 776.

Effect of  
Probate Act.

Reason for  
abatement.

Effect of maxim  
about 'actio  
personalis' and  
Probate Act.

**SECTION 532.** but its object is to safeguard the pre-emptor from annoyance which may be considered as a species of wrong-doing. See comment to s. 528, above.

(d) *Waiver.*

**Waiver.**

**533.** The right of pre-emption may be waived expressly or impliedly, after it has arisen and before it has been enforced.<sup>1</sup>

*Illustration.*

S makes an offer of sale to P, who refuses to avail himself of it, and consents to a sale to B; P cannot afterwards claim to pre-empt,<sup>2</sup> but where there is neither sufficient proof of the refusal, nor evidence of consent to the sale to B, the right is not lost;<sup>3</sup> nor where there is no absolute surrender, but the refusal has been made simply in consequence of a dispute as to the actual price of the land.<sup>4</sup> *Quære*, whether a mere refusal to purchase is proof of consent to the sale to B.<sup>5</sup>

**Conditional or contingent waiver.**

**534.** The right of pre-emption cannot, according to Hanafi law, be waived conditionally or contingently on the happening of some future event; where the pre-emptor purports so to waive his claim the authorities are divided whether the waiver is operative absolutely (the condition or contingency being ineffectual), or whether the waiver itself is of no effect.<sup>6</sup>

**Waiver on misinformation inoperative.**

**535.** Where the right of pre-emption is purported to be waived, and the waiver is based on misinformation as to the amount or nature of the consideration for the sale, or the identity of the purchaser, the waiver will not affect

<sup>1</sup> Ball. I. 500 (par. 2); II. 105 (par. 2); though some Shiah authorities express a doubt as to waiver by implication.

<sup>2</sup> *Brāja Kishor Surma v. Kirti Chandra Surma* (1871) 7 Beng. L. R. 19; 15 W. R. 247.

<sup>3</sup> *Jehangier Buksh v. Lalla Bikharee Lall* (1868) 11 W. R. 480; 7 Beng. L. R. 24 n.

<sup>4</sup> *Abadi Begum v. Inam Begum* (1877) 1 All. 521; *Kanhai Lall v. Kalka Prasad* (1905) 27 All. 670. Cf. *Shri Kishan Singh v. Bachcha Pande* (1911) 33 All. 637.

<sup>5</sup> *Toral Komhar v. Anchi* (1872) 9 Beng. L. R. 253; 18 W. R. 401; *Sheo Tuhul Singh v. Bava Koor* (1864) W. R. 311; *Kooldeep Singh v. Ram Deen Singh* (1876) 24 W. R. 198. Cf. *Indraj v. Clement* (1915) 13 All. L. J. 288

where S offered to sell the property to P, who offered only Rs 160, and refused to give more; subsequently S sold the property for Rs. 235; held that inasmuch as, according to the custom prevailing in the village, the vendor was bound in the first instance to offer the property for sale to his co-sharers, the refusal of P to purchase must be considered to deprive him of his right to pre-empt.

<sup>6</sup> Hed. 561; Ball. I. 502; but see Ball. I. 500 (par. 3); where it is said that it may be suspended on a condition. The translator points out Ball. I. 502, n. 2, that the condition referred to had already occurred in the one case, and was executory in the latter.



the right in so far as it is made in consequence of the said SECTION 535. misinformation.<sup>1</sup>

*Explanation.*—Refusal to purchase the land at a price which the pre-emptor believes, in good faith, not to be real but fictitious, does not amount to a waiver or affect his rights;<sup>2</sup> nor does the fact that the property was offered to the person claiming to pre-empt before an agreement to sell it had been entered into.<sup>3</sup> But when the vendor informs the pre-emptor of his desire to sell, and he declines to purchase on the ground that he has not the means, or any other similar ground, the vendor may sell to a stranger.<sup>4</sup>

P purports to waive his right of pre-emption on its being misrepresented to him,—

- (a) That the land was sold for Rs. 1,000,—if the real consideration was Rs. 500, the right is not waived; but if it is Rs. 2,000 or Rs. 999, the waiver is valid.<sup>5</sup>
- (b) That the purchaser was B,—if the real purchaser was Ba, the waiver is invalid.<sup>5</sup>
- (c) That the purchaser was B,—if the real purchasers were B and Ba jointly, the waiver is valid as to B's share in it, but not as to Ba's.<sup>5</sup>
- (d) That the whole land had been sold,—and only half of the land is really sold; the right is extinguished according to Hanafi law, but not if the whole is sold and he is informed that only half is sold—*sed quare* and <sup>5</sup>—see *ill. (f)*, below.
- (e) That the land was exchanged for one commodity,—and it was really exchanged for another commodity, the waiver is inoperative.<sup>5</sup>
- (f) That half the land was sold for Rs. 100,—and in fact a fourth was sold for 50, or 'vice versa,'—<sup>6</sup>
- (g) That B and Ba purchased it—and only B had in fact purchased it, or 'vice versa,'—<sup>6</sup>

<sup>1</sup> Bail. I. 501 (par. 2); II. 184.

<sup>2</sup> *Sri Kishan Singh v. Bachcha Pandit* (1911) 33 All. 637.

<sup>3</sup> *Kanhai Lal v. Kalka Prasad* (1905) 27 All. 670, an opportunity to purchase must be given when a definite agreement to purchase at a

fixed rate has been entered into with a stranger.

<sup>4</sup> *Naukhat Singh v. Ram Ratan* (1916) 30 All. 127.

<sup>5</sup> Bail. I. 501; II. 562 (col. II, par. 2) 563; *Minhaj*, 209, (Bk. 18, s. 2).

<sup>6</sup> Bail. II. 187-188 (*first, fourth*)

## SECTION 535.

(h) That A purchased it for himself,—and in fact he purchased it for B, or ‘vice versa,’—<sup>1</sup>  
the right is not extinguished in cases (f), (g), and (h), above.

## (4) Forfeiture of Right.

1. Release  
of right of  
pre-emption.

**536.** Where the right of pre-emption is purported to be released for a consideration to be paid by the pre-emptor to the seller, the right is forfeited, but according to Hanafi law, the pre-emptor cannot claim payment of the consideration from the releasor;<sup>2</sup> whereas the pre-emptor may validly agree to take only part of the land for a like or other part of the price.<sup>3</sup>

2. Transfer  
of subject of  
pre-emption.

**537.** (1) The right of pre-emption is forfeited if the pre-emptor (before enforcing his right) purports to dispose of the subject of pre-emption to a stranger.<sup>4</sup>

## Partition

(2) In cases in which the right can be claimed only by co-parceners, the right is extinguished on a partition being effected.<sup>5</sup>

*Explanation.*—After the decree for pre-emption is obtained, the pre-emptor may sell or alienate its subject, though he has not executed the decree.<sup>6</sup>

A mortgage of the pre-emptor's own share or property prior to the sale does not affect his right to pre-empt; but where the ‘wajib-ul-‘arz’ gives not only a right of pre-emption in case of a sale, but also a right to obtain a mortgage in priority to others, and a co-sharer entitled to such prior right, in anticipation of exercising it himself, encumbers the mortgaged share, he thereby forfeits his prior right.<sup>7</sup>

Sec. 536 refers to a release of the right to the seller, s. 537 to what is practically a transfer of it to an outsider.<sup>8</sup>

<sup>1</sup> Bail. II 187-188 (*Arst*, fourth).

<sup>2</sup> Hed. 561; Bail. I 502; ff. 132 (*6id*); it would seem that according to Shinh law the payment of the consideration may be enforced.

<sup>3</sup> *I.e.*, whether or not the part of the price paid is proportionate to the part of the land taken by the pre-emptor; e.g. he may take half the land for a third of the price—Bail. I. 502 (*II*, 18-22)—in which case he may be considered to release part of his right for part of the purchase money.

<sup>4</sup> *Rajjo v. Lalman* (1882) 5 All. 180. The object of the right being to prevent the intrusion of strangers, not to benefit the co-shares pecuniarily; cf. *Durga Prasad v. Munsif* (1884) 6 All. 423, 425, 226 (*per* Mahmood, J.) See *Minkaj*, 209, (Hk 18, s. 2) for Shafi'i law.

<sup>5</sup> *Muhammad Mahbub Ali Khan v. Raghubar* (1915) 38 All. 27.

<sup>6</sup> *Ram Sahai v. Gaya* (1884) 7 All. 107.

<sup>7</sup> *Rajjo v. Lalman* (1882) 5 All. 180.

<sup>8</sup> Cf. *Sho Narain v. Hira* (1837) 7 All. 536, *Lachmi Narain v. Manog Dat* (1885) 7 All. 291.

**538.** Where the contract of sale is avoided, or it is **SECTION 538.** impossible for the pre-emptor to carry it out, his right of **Sale avoided.** pre-emption is extinguished.<sup>1</sup>

**538A.** The right of pre-emption may be forfeited by <sup>3</sup> the pre-emptor being under some statutory disability as regards the purchase of the land in question.<sup>2</sup> **Contract avoided or impossible of fulfilment.**

Thus where the pre-emptor was not a member of the agricultural tribe within the meaning of the Bundelkhand Alienation Act, (Local Act II. of 1933), s. 3, there being no provision in the Act, which entitled an intending purchaser to get the sanction of the Collector to bring a suit for pre-emption, it was held that the Court could not grant to the claimant to pre-emption a decree as prayed; and that the Act by providing that the property should not be sold to the pre-emptor, entirely absolved the vendor from any obligation to first offer the property to the pre-emptor, as the vendor would have been bound to do in accordance with custom.<sup>2</sup> **Illustrations.**

When the 'mahal' in respect of which there exists a custom of pre-emption comes into the ownership of a single individual, the effect has been held to be that the custom is at an end and not merely that the custom is in abeyance.<sup>3</sup> **Mahal being owned by a single individual.**

#### DEVICES FOR DEFEATING PRE-EMPTION.

The devices are mentioned in a later part of the chapter; cf. s. 557.

### § 5.—The Subject of Pre-emption.

**539.** 'Aqar' or land<sup>4</sup> alone can validly be the subject of pre-emption;<sup>5</sup> provided, first, that where the subject of pre-emption consists of a share in a village or **Subject of pre-emption : Land alone.**

<sup>1</sup> Hed. 560 (col. 1. par. 2); Ball. II. 179, (par. 2, liability to pay price), 196 (par. 2); e.g., when the price cannot be determined, or the subject of consideration has perished, if the transfer was to be by way of exchange. Cf. Ball. II. 187, (par. 3); *Najmunnissa v. Ajub Ali Khan* (1900) 22 All. 343; *Ojhasoniya Begum v. Rustom Ali* [1864] W. R. 210. Cf. *Basunt Koomares v. Kali Perand Singh* (1862) Marsh. 11; 1 Hay 32 (pre-emption upon re-sale after first sale has fallen through, with respect to which no claim made).

<sup>2</sup> *Suraj Bhan v. Somnagarpur* (1915) 37 All. 662.

<sup>3</sup> *Kamrunnessa Bibi v. Sugra Bibi* (1917) 39 All. 480.

<sup>4</sup> E.g., Agricultural estate: (*Sheikh Karim Bux v. Kamruddin Ahmad* (1874) 6 N. W. 377. A claim for pre-emption under s. 2 of Act I. of 1841 was held to be sustainable in respect of an imperfect *puttadari* tenure: (*Sheikh Kadir Bux v. Ram Tulul Bhagut* (1871) 3 N. W. 125. Pre-emption was allowed in respect of a *kotee* and *polah* as it was proved that according to local custom such properties were subject to pre-emption: *Kasho Rai v. Binayak Rai* and *Binayak Rai v. Zuchunee Bai* (1868) 3 Agra 179. For *Shanai* law see *Minhaj*, 205 (Hk. 18, s. 1).  
<sup>5</sup> Ball. I. 472; 473 (par. 4); 474; II. 175. See comment and the quotations from the *Sharaya-ul-Islam* and the *Minhaj-ul-Talbin* given therein.

**SECTION 539.** a large estate, neither a neighbour who is not a co-sharer,<sup>1</sup> nor a participator in appendages<sup>2</sup> can claim it on the ground merely of vicinage;<sup>3</sup> and, secondly, that according to Shafi'i law property which is incapable of division cannot be subject of pre-emption.<sup>4</sup>

*Illustrations.*

(1) Movables cannot validly be the subject of pre-emption,<sup>5</sup> but trees<sup>6</sup> or buildings when transferred with the land on which they stand, or a dwelling house sold for occupation, without the ownership of the site,<sup>7</sup> may be the subject of pre-emption.

(2) A claim to mesne profits due before the date on which the right to pre-emption arose, cannot form the subject of pre-emption.<sup>8</sup>

*Meaning of 'aqar.'*

"The strict meaning of the word ('aqar') is 'space covered with buildings,' so that properly speaking the term is not applicable to 'zuyut.' ('Fatawa 'Alamgiri,' III. 605.) But according to the 'Kifayah,' IV. 940, and the 'Inayah,' IV. 263, 'akar' in the sense in which it is liable to pre-emption includes a 'zuyut.' According to Freytag, 'zuyut' is a field whether arable or pasture.<sup>9</sup>

"The Prophet has said that there is no 'shoofa' except in a 'ruba' or mansion, and a 'hàit' or garden ('Hidaya' and 'Kifayah,' IV. 940).

*Of 'hàit.'*

"'Hàit' means properly a wall or that which surrounds, though applied elliptically to the enclosure (Freytag) . . . It would seem that the right of 'shoofa' is, strictly speaking, applicable only to houses and small enclosures of land. It has been held, however, to extend to a whole 'mouza' or village. S.D.A. Calcutta Reports, Vol. III, p. 85."<sup>10</sup>

*Shafi'i law:*

As to the Shafi'i school of Sunni law it is stated in the opening lines of the book on pre-emption in the 'Minhaj-ut-Talibin': "This right does not exist in reference to movable property, but only with regard

<sup>1</sup> But a co-sharer in any land, large or small can pre-empt: *Jehangeer Buksh v. Bhickaree Lal* (1869) 11 W. R. 71; 6 Beng. L. R. 42, n. 8 C. affirmed on review, *Re Petition of Jehangir Buksh*, (1870) 7 Beng. L. R. 24; 11 W. R. 480, *Mahatab Singh v. Ramtahal Misser* (1869) Beng. L. R. 43 n.; 10 W. R. 314

<sup>2</sup> Such as in (*Shaik*) *Karim Buksh v. Kamruddeen Ahmad* (1874) 6 N. W. 377.

<sup>3</sup> *Munna Lal v. Hajra Jan* (1910) 33 All. 28 (where the cases are collected). *Re Petition of Chatternooth Jha*, alias *Jhuna Jha*, (*Sheikh*) *Mahomed Hossein v. Mohsen Ali* (1870) 6 Beng. L. R. 41; 14 W. R. (P.N.) 1 (where Couch, C. J., and Mitter, J., collate the authorities); *Ejnash Koor v. Amjud Ali* (1868) 2 W. R. 261; *Chowdry Jooyul Kishore Singh v. Poocha Singh* (1867) 8 W. R. 413; *Abdul Arim v. Khanidhar*

*Hamed Ali* (1868) 2 Beng. L. R. (A.C.) 63; 10 W. R. 356; *Abdul Rahim v. Kharag Singh* (1892) 15 All. 101; (*Sheikh*) *Mahomed Hossein v. (Sheikh) Mohsen Ali* (1870) 14 W. R. 266; (*Sheikh*) *Karim Buksh v. Kamruddeen Ahmad* (1874) 6 N. W. 377. The Shiah law does not give neighbour's right of pre-emption in any case, cf. s. 511 (3), below.

<sup>4</sup> Hed. 555 (vol. II. par. 1). See comment.

<sup>5</sup> Bail I. 475 (par. 3); II. 176 (par. 1).

<sup>6</sup> The *Minhaj* (a Shafi'i text) adds "and fruit not artificially fertilised;" but the contrary is held by authorities of repute.

<sup>7</sup> *Zakur v. Nur Ali* (1879) 2 All. 99.

<sup>8</sup> *Enamooddeen Sowdagar v. Abdool Soobhan* (1866) 7 W. R. 117.

<sup>9</sup> Bail. I. 472, n. 2.

<sup>10</sup> Bail I. 474, n. 1.

to land and what is naturally included in it, like buildings and trees, and fruit not artificially fertilised. There is no right of pre-emption in the case of a 'hojra' (room) supported on a roof, even a roof held in common; nor in the case of any thing that cannot be divided without lowering the value, such as a hall or a mill."<sup>1</sup>

With reference to Shiah law (1) The 'Sharaya-ul-Islam' mentions that some authorities hold that pre-emption may be established in regard to movables, such as wearing apparel, household utensils, shipping, animals and the like to obviate the inconvenience of division; (2) doubt is also expressed regarding rivulets, ways, baths, and other property the division of which would occasion loss or damage; and (3) as to apparatus of a well, such as wheels and buckets made use of in drawing water, which though strictly movable are by custom never removed from the well. But the correct opinion is stated to be that pre-emption is restricted to lands.<sup>2</sup>

As to the sale of a house, apart from the site on which it stands, it has been held in (a) Allahabad that such a sale can be the subject of pre-emption where the buyer means to occupy it, and does not intend to remove the building as old materials;<sup>3</sup> but (b) that the owner of the land on which it stands is not entitled to pre-empt, "where his property in the land is wholly separate and distinct from the property in the house, which belongs to another person, with whom the owner has nothing in common."<sup>4</sup> (i) It appears from the reports that in case (a) the pre-emptor claimed as a neighbour,<sup>5</sup> but (ii) it does not appear how his vicinago arose—whether he was the owner of adjoining land (or house) or of the site on which the house sold was standing; nor (iii) whether the claimant in case (b) omitted to claim as a neighbour<sup>6</sup> or (iv) was held not to be even a neighbour.<sup>7</sup> The pre-emptor in case (b) may have been a Shiah, and then there would be no difficulty in understanding it.

**540.** The claim for pre-emption must have reference to the whole of the property sold<sup>8</sup> notwithstanding that the claimant is one of several joint pre-emptors,<sup>9</sup> provided, first, that where the right of any pre-emptor arises with reference

<sup>1</sup> *Minhaj* 205, (Bk. 18, a. 1).

<sup>2</sup> *Ball*, II. 175-177.

<sup>3</sup> *Zahur v. Nur Ali* (1879) 2 All. 99.

<sup>4</sup> *Perahadi Lal v. Irshad Ali* (1870) 2 N. W. 100.

<sup>5</sup> Cf. the case of owners of the upper and lower stories of a house who are held to be neighbours and no more: s. 545, *ill.* (7).

<sup>6</sup> *Sheebharas Rai v. Jiah Rai* (1886) 8 All. 462, (per Mahmood, J.). See comment. Of course, where the property is described in the

plaint by an error to be of less area than it is in reality, the plaintiff may be amended by leave of Court, *Barkat Unness v. Muhammad Asad Ali* (1895) 17 All. 288.

<sup>7</sup> *Ball*, I. 482 (*ill.* 15-22), 492 (par. 2); II. 182 (par. 2). *Durga Prasad v. Munsai* (1884) 6 All. 423; *Cazee Ali v. Musseentoolah* (1882) 2 W. R. 285. Cf. *Hukusi v. Sheo Prasad* (1865) 6 All. 455; *Arjun Singh v. Sarfaraz Singh* (1888) 10 All. 182.

Shiah law. Doubt as to pre-emption in regard to movables, &c.

Sale of house apart from site.

One of several lands sold by same contract may be pre-empted. Exceptions.

**SECTION 540.** to a part only of the subject of sale,<sup>1</sup> pre-emption may be claimed with respect to such part alone<sup>2</sup> on payment of a proportionate<sup>3</sup> part of the consideration for the sale,<sup>4</sup> and, secondly,<sup>5</sup> that in accordance with a decision of the Allahabad High Court<sup>6</sup> where the purchaser is a person whose rights of pre-emption are equal in degree to those of the pre-emptor,<sup>7</sup> the claim of pre-emption need not include that part of the land which would not be allotted to the pre-emptor in competition with the purchaser.<sup>8</sup>

Pre-emption cannot be claimed as to part only of the land.

**Explanation.**—Where two or more distinct properties are sold by the same contract, one or more of them may be pre-empted without the other, notwithstanding that the pre-emptor is the same in respect of each of them.<sup>9</sup>

**Illustrations.**

(1) S sells land, over which P and PA have rights of pre-emption, and (P being absent) PA asserts his claim to half the land by pre-emption; or (both being present,) they each assert a claim to half of it. In either case the assertion of the claim is void.<sup>10</sup>

(2) S sells several houses in a street where there is no thoroughfare, and P desires to pre-empt one of them; if P's right of pre-emption is based on partnership in the way, he cannot take a part of the property sold, for this would be to divide the bargain without any necessity; but if his right be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.<sup>11</sup>

<sup>1</sup> As, for instance, if shares in two tenements are sold, and the pre-emptor is co-sharer in only one of them: *Saligram v. Debi Pershad* (1874) 7 N. W. 38. Or, if the buyer is himself a pre-emptor, and the rights of the plaintiff are of no higher degree: see s. 527, above; e. g., if the buyer is one of the two co-parceners of the seller, if the 3rd co-parcener claims to pre-empt, he has, according to the Allahabad High Court, the right to pre-empt, and he can get half of the land: *Amir Hasan v. Rahim Baksh* (1897) 19 All. 466; *Abdullah v. Amanatullah* (1899) 21 All. 202.

<sup>2</sup> *Ball. I. 492* (par. 1), *II. 177* (par. 3), 883 (par. 2); *Abdullah v. Amanatullah* (1899) 21 All. 202; *Roushun Koor v. Ram Dihal Ray* (1883) 18 Cal. L. R. 45. In such a case, the buyer has, according to Muhammadan law, no option to rescind the sale of the part which is not pre-empted, because the claim of shoofa is supervenient on what is his own property; *Ball. II. 183*.

<sup>3</sup> Where the several parts of the land vary

in price, they may have to be separately valued, e. g., in *Saligram v. Debi Prasad* (1874) 7 N. W. 38.

<sup>4</sup> *Cf. Muhammad Latif v. Gobind Singh* (1888) 5 All. 382.

<sup>5</sup> The second proviso applies only to the decisions of the Allahabad High Court referred to in s. 527, above; the Calcutta High Court having taken a different view, and held that in the circumstances mentioned there is no claim to pre-emption, the further question dealt with in s. 540 (viz., to what portion of the land the claim must refer), does not arise.

<sup>6</sup> *Abdullah v. Amanatullah* (1899) 21 All. 202.

<sup>7</sup> I. e., co-sharers or *khalids* or neighbours, as the case may be. See s. 527, n.

<sup>8</sup> *Ball. II. 187* (par. 2); *Jazatula v. Rikharu Molla* (1870) 6 Beng. L. R. 386; 14 W. R. 469; *Raphusandan Singh v. Masbuti Singh* (1868) 10 W. R. 379; 6 Beng. L. R. 387, n.

<sup>9</sup> *Ball. I. 482* (par. 1).

<sup>10</sup> *Ball. I. 492* (par. 1).

(3) A, as the agent of B and BA, purchases plots of land from S **SECTION 540.** and SA respectively; P cannot pre-empt one of the plots without the other (provided he has a right to pre-empt both).<sup>1</sup>

(4) A and AA are both agents of B, and purchase plots of land from S. P may pre-empt either plot without the other.<sup>1</sup>

(5) S purported to sell his own share, and that of SA, a minor, in certain property to B, with a covenant to compensate B if SA did not ratify the sale on coming of age. P sued for pre-emption. On the lower appellate court holding that P could not enforce his claim in respect of SA's share, at its suggestion the plaint was amended so as to refer only to S's share. *Held*, that P was bound to claim his right against all the shares, and could not enforce it in respect of some only.<sup>2</sup>

(6) P has a right to pre-empt the whole subject of sale consisting of (i) a share in a village, and (ii) a plot of land in a city, but omits to make a prompt assertion of his claim. *Held*, that he cannot pre-empt even (i), notwithstanding that he is willing to pay for it, the consideration for both (i), and (ii), and to leave (ii) (as to which his right to pre-empt is not established) in the buyer's hands.<sup>3</sup>

"The principle or 'ratio decidendi' of denying the right of pre-emption except as to the whole of the property sold," said Mahmood, J., "is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property, and leave the worst part of it with the vendee." The learned judge went on to say that where "the shares are separately specified, and the sale to the stranger is distinctly divisible, the reason for the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated; and the rule should be so limited, for it would be a very great hardship, if the vendee by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser and the price which he had paid for it are distinctly specified in the sale deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same

Reason of rule that pre-emptor must take the bargain in its entirety.

Limitations to the rule.

1 Bail. I. 493 (par. 1; II. 4, 5, of par. 2).

2 *Abdul Gaffoor v. Nurbanu* 10 W. R. 111; 1 Beng. L. R. (A. C.) 78. *See quere*: (a) the sale of SA's share might be considered (i) as unauthorised (see ss. 260, 272 (3) above); (ii) as a sale subject to an option in SA (see s. 526A, above); (b) it may be held for some

other reason that P had no right of pre-emption against SA's share. In cases (i) & (b) P could pre-empt S's share by itself.

3 *Muhammad Wilayat Ali Khan v. Abdul Raz* (1811) 11 All. 101, followed in *Musjib Ullah v. Umed Bibi* (1898) 21 All. 119.

**SECTION 540.** deed of sale. Moreover, even under the strict rule of pre-emption, the pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he objects to the intrusion of only one of the purchasers, and wishes to exclude him by pre-empting the specific share which such purchaser has individually acquired.”<sup>1</sup>

Distinction  
between joint  
sellers and joint  
purchasers.

Abu Hanifa held that when a person has the right to pre-empt any portion of the subject of the sale, he has the option of pre-empting the whole; but this view is opposed to that of Imam Muhammad and the Shiah authorities<sup>2</sup> and the decisions in British India.<sup>3</sup> It is stated in Hanafi texts<sup>4</sup> (a) that where several sellers jointly sell the land to one purchaser, the right of pre-emption can only be exercised as to the whole of the land sold; on the other hand (b) when several purchasers buy land from one seller, the portion of land agreed to be sold to each seller may by itself form the subject of pre-emption: the reason that is assigned being that in the case (a) it would “occasion a discrimination in the bargain to the purchaser and be productive of very great inconvenience to him, whereas in the case (b) the ‘shafee’ being merely the substitute of one of the (five) purchasers, no discrimination in the bargain is occasioned,”<sup>5</sup> so that it would seem that the real rule is that the bargain should not be split up, irrespective of the number of sellers or purchasers.

### § 6. *The Pre-emptor.*

#### (1) *Persons Entitled to Pre-empt.*

Who may be  
pre-emptor.

**541.** (1) According to Hanafi law the right of pre-emption arises in favour of the ‘sharik’ (or co-sharer), the ‘khalit’ (or participator in appendages) and the ‘jar,’ (or neighbour) as defined respectively in ss. 541A, 541B and 541C, below,<sup>6</sup> and of no others.<sup>7</sup>

Shafi'i law :  
amongst  
co-sharers alone.

(2) According to Shafi'i law the right of pre-emption arises only in favour of co-sharers, and not of participators in appendages, nor of neighbours.<sup>8</sup>

<sup>1</sup> *Sheobharas Rai v. Jaach Rai* (1886) 8 All. 462, 466.

<sup>2</sup> *Ball*, I. 493 (par. 2); *Ball*, II. 177 (par. 3); Abu Hanifa al-o seems to have held the same opinion at one time.

<sup>3</sup> *Surdhars Lall v. Laboo Moodie* (1876) 25 W. R. 499, 500.

<sup>4</sup> *Ball*, I. 492; *Hed*. 564.

<sup>5</sup> *Hed* 564. The reason given in *Ball*, I. 492 for rule (b) is that the “bargain has been separate from the beginning.”

<sup>6</sup> *Hed* 548; *Ball*, I. 473-474.

<sup>7</sup> *Cf. Pershad Lal v. Irshad AK* (1870) 2 N. W. 100.

<sup>8</sup> *Minhaz*, 205 (Bk. 18 a. 1) *Hed*. 548, 549.



(3) According to Shiah law, the right of pre-emption arises only where two persons are co-sharers in undivided property, and one of them sells his share; and it does not arise in favour of any other person,<sup>1</sup> nor if there are more co-sharers than two.<sup>2</sup>

SECTION 541.

Shiah law :  
only two  
co-sharers.

Sections 541 to 541H, should be read together. They all form part of a single section in the first edition of this work. The illustrations to all of them will be found after s. 541H, below. The relative priorities of pre-emptors are stated in s. 545, below.

541A. By the 'sharik' or co-sharer,<sup>3</sup> is meant the owner<sup>4</sup> of an undivided<sup>5</sup> share in the property<sup>6</sup> of which the subject of pre-emption forms a part or share.<sup>7</sup> This definition is subject to ss. 541N—541H, below.

1. Co-sharer  
of seller.

For the purposes of the present section and s. 545, below, it has sometimes to be decided whether two pieces of land form separate estates, or whether their owners are co-sharers. Moreover, partition extinguishes the relation of co-sharers, and may, therefore, extinguish the right of pre-emption, where the right inheres only in co-sharers. It has been held that properties bearing separate numbers in the Collector's front-roll are separate estates, implying a bar to pre-emption based on co-parcenary;<sup>8</sup> and where, at a settlement of a village, constituting single 'mahals,' a record of rights was framed, giving certain pre-emptive right to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate 'mahals,' it was held

Owners of  
adjoining land.

<sup>1</sup> Syed Ameer Ali says that a *khalif* has a right of pre-emption under Shiah law, but does not cite any authority for the proposition, "Mahomedan Law," I. 615.

<sup>2</sup> Bell. II. 179; *Abbas Ali v. Maya Ram* (1888) 12 All. 229; neighbours have no right. There is some doubt whether, where there are more joint owners of land than two, they have no right, and in *Daim v. Ashooa Bebee* (1870) 2 N. W. 380, it was said that the Shiah authorities being doubtful on the point, and the practice of the Court being not to defeat a claim on this ground, the claim should be allowed. See also *Tafazzal Hussain v. Hadi Hasan* (1870) 6 All. W. N. 199. Both these decisions were disented from in *Abbas Ali's* case, 12 All. 229.

<sup>3</sup> The mortgagee of a co-sharer is not a co-sharer: *Nand Lal v. Bansi* (1898) 20 All. 19; nor does a person who buys a plot of grove-land in a village thereby become a co-sharer in the village so as to entitle him to enforce

a right of pre-emption under a *wajib-ul-ars* which confers such right upon co-sharers; *Muhammad Ali v. Hukam Kunwar* (1905) 28 All. 246. See also *Kateshar Rai v. Nabiban Dibi* (1906) 28 All. 612; *Ali Hussain Khan v. Tasadduq Hussain Khan* (1905) 28 All. 124.

<sup>4</sup> The manager of a Hindu temple, who as such manager holds zamindari property on behalf of the temple, is considered the owner for the purposes of s. 541: *Lekhras v. Gurda* (1904) 26 All. 212.

<sup>5</sup> See *id.*, (5) following s. 542N, below.

<sup>6</sup> As a share in a zamindari: *Akhoy Ram Shahayee v. Ram Kant Roy* (1871) 15 W. R. 228.

<sup>7</sup> Under (Hanafi and Shafi'i) law the right of pre-emption may be exercised by one or more of a plurality of co-sharers: *Nunda Pershad Thakur v. Gopal Thakur* (1884) 10 Cal. 1008.

<sup>8</sup> *Joodras Singh v. Tookun Singh* (1870) 14 W. R. 476.

**SECTION 541A.** that no right of pre-emption existed in favour of the co-sharers in any one 'mahal' in respect of land situated in another 'mahal'.<sup>1</sup> See also the cases collected in the footnote.<sup>2</sup>

See the illustrations following ss. 541H, and s. 545, below.

2. Participator  
in appendages.

**541B.** By the 'khalit' or participator in appendages,<sup>3</sup> is meant the owner<sup>4</sup> of property to which is annexed or on which is imposed a private<sup>5</sup> right of way or of water<sup>6</sup> [or other easement or appendage] such right being also annexed to, or imposed upon, the subject of pre-emption.<sup>7</sup> This definition is subject to ss. 541D, 541F and 541G, below.

See the illustrations following ss. 541H, below. 'Khalit' literally means 'mixed up.' Baillie says that though rights of water and way are given as examples, it does not appear that a 'khalit' in any other right than these has the right of pre-emption.<sup>8</sup> See s. 545, below, and comment thereto.

3. Neighbour.

**541C.** By the 'jar' or neighbour,<sup>9</sup> is meant the owner<sup>1</sup> of property adjoining the subject of pre-emption.<sup>7</sup>

See the illustrations following ss. 541H, and s. 545, below.

Right must  
'inhere' at time  
of sale.

**541D.** The co-sharer or participator or neighbour referred to in ss. 541, 541A, 541B, and 541C, above, must be the owner of the share or property by virtue of which he claims pre-emption at the time of the sale,<sup>10</sup> and until the institution of a suit to enforce partition,<sup>11</sup> and, *semble*, also until the decree for pre-emption is passed<sup>12</sup> by the primary Court<sup>13</sup>:

<sup>1</sup> *Chure v. Man Singh* (1895) 17 All. 226; *Ram Gopal v. Puri Lal* (1890) 21 All. 441.

<sup>2</sup> *Abdul Haq v. Nain Singh* (1897) 20 All. 92; *Janki Prasad v. Ishar Das* (1899) 21 All. 374; *Shyam Chunder v. Amanat Begum* (1887) 9 All. 231 (the original *waqf-ul-ars* is binding notwithstanding partition, until it is shown that a new one has been made). Cf. s. 541H, below, and footnotes thereto.

<sup>3</sup> (Sheikh) *Karim Bukh v. Kumruddin Ahmad* (1874) 6 N.W. 377. *Contra Karim v. Prigo Lal Bose* (1905) 28 All. 127.

<sup>4</sup> *Lekhraj v. Gunda* (1904) 26 All. 212 (manager of temple).

<sup>5</sup> Not a thoroughfare, *Karim Baksh v. Khurda Baksh* (1894) 16 All. 240.

<sup>6</sup> *Rokaiya Begum v. Ahmadi Khanam* (1912) 9 All. L. J. 769.

<sup>7</sup> *Hed. 548*; *Bail. I.* 473-474.

<sup>8</sup> *Bail. I.* 176, n.

<sup>9</sup> See s. 539, above, (as to large estates).

<sup>10</sup> See *id.* (7) following s. 542H, below, so, of course, his having mortgaged it on a previous occasion does not affect his right; *Ujagar Lal v. Jia Lal* (1896) 18 All. 382; *Gokul Chand v. Ram Prasad*, 9 All. W.N. 127.

<sup>11</sup> *Janki Prasad v. Ishar Das* (1899) 21 All. 274; *Muhammad Mahbub Ali Khan v. Bhagubhar* (1915) 38 All. 27.

<sup>12</sup> *Ram Gopal v. Puri Lal* (1890) 21 All. 441; *Samrat Das v. Gur Parshad* (1908) 10 Punj. L.R. 561 (P.B.) over-ruling *Faiz Baksh v. Ramji-das* [1875] Punj. Rec. 34; cited and followed in *Nuri Mian v. Ambica Singh* (1916) 44 Cal. 47, 58; but see *id.* (7) following s. 541H, below, and *Narain Singh v. Purbar Singh* (1901) 23 All. 247; but not necessarily at the execution of the decree for pre-emption; *Ram Sakat v. Gopa* (1884) 7 All. 107.

<sup>13</sup> *Nuri Mian v. Ambica Singh* (1916), 44 Cal. 47.

the right of pre-emption does not arise in favour of one who has<sup>1</sup> a mere expectancy of inheritance, or reversionary, or any kind of contingent, right, or any interest falling short of full ownership;<sup>2</sup> but<sup>3</sup> possession is neither necessary<sup>4</sup> nor a substitute for such ownership;<sup>5</sup> nor is such ownership affected by the said share or property being mortgaged.<sup>6</sup>

The question has been raised whether the Courts should insist on the claimant for pre-emption being entitled to claim it up to the time that the decree for pre-emption is passed, or whether it is enough that the right should inhere in him at the time of the institution of the suit.<sup>7</sup> It has been held in several decisions that the right should inhere until the decree of the primary Court is passed. This may involve the necessity for the Court considering events after the institution of the suit. In the latest reported decision<sup>8</sup> the texts on pre-emption have been considered together with the cases in which it is incumbent upon a Court of justice to take notice of events that have happened since the institution of the suit, and to mould its decree according to the circumstances as they stand at the time the decree is made.<sup>9</sup>

See the illustrations following s. 541H, below.

**541E.** Where the purchaser acquired the status of a co-sharer 'pendente lite' it was held that the plaintiff was not deprived of his right to pre-empt.<sup>10</sup>

**541F. (1)** A secret 'benami' purchaser of a share in the land is not constituted a co-sharer for the purposes of ss. 541, 541A and 541D, above,<sup>11</sup> nor is the presumptive heir of a

<sup>1</sup> So that if he sells the property (or his share in it) his right is extinguished: *Hed. 562* (col. 1, par. 3); *Janki Prasad v. Ishar Dass* (1899) 21 All. 274. But see s. 541H, below.

<sup>2</sup> *Hed. 562*; *Sakina Bibi v. Ameran* (1888), 10 All. 472 (per Mahmood, J.). See s. 541, *ill.* (8) following s. 541H, below.

<sup>3</sup> *N.g.*, a tenant cannot pre-empt: *Gooman Singh v. Tripodi Singh* (1867) 8 W. R. 427. Cf. *Bhajan v. Mushtak Ahmad* (1883) 5 All. 324. FA sells his property to P in 1870, on condition that FA has an option to repurchase it at any time during 18 years: P is the owner of the property, and not FA, until the option is exercised.

<sup>4</sup> See s. 541H, below.

<sup>5</sup> *Behares Ram v. Shubhendra* (1868) 9 W. R. 455.

<sup>6</sup> *Ujagar Lal v. Jis Lal* (1896) 18 All. 382; *Gokul Chand v. Ram Prasad*, 9 All. W.N. 129; *Ali Ahmad v. Rahmat Ullah* (1892) 14 All. 195.

<sup>7</sup> See s. 541D.

<sup>8</sup> *Nuri Mian v. Ambica Singh* (1916) 44 Cal. 47.

<sup>9</sup> *Ching Rai Charan Mandal v. Biswa Nath Mandal* (1914) 20 Cal. L. J. 107, where the cases are collected.

<sup>10</sup> *Rohan Singh v. Bhan Lal* (1909) 31 All. 530; cf. *Kaleshwar Rai v. Nabibai Bibi* (1906) 28 All. 642; and *Ram H't Singh v. Narain Rai* (1904) 26 All. 389.

<sup>11</sup> *Beni Shanker Felhat v. Mahpal Bahadur Singh* (1887) 9 All. 480; cf. *Gunga Ram v. Moolis* (1870), 2 N. W. 200.

**SECTION 541D.**  
Expectancy or contingent right does not give right to pre-empt.

Purchaser getting right of pre-emption 'pendente lite.'

'Benami' purchaser or presumptive heir not co-sharer.

**SECTION 541F.** living Mussulman (as defined in s. 285 (11), above) a co-sharer in his property with him during his life-time.<sup>1</sup>

(2) Pre-emption as declared in the Oudh Laws Act, 1876, is not enforceable where the person who would be entitled to pre-emption denies the title of the person who proposes to sell, alleges that they are not co-sharers, and claims to be himself solely entitled to the whole of the property.<sup>2</sup>

'Khalit' is not necessarily owner of heritage dominant or servient to land.

**541G.** It is not necessary that the property referred to in s. 541B, above, and the subject of pre-emption should mutually be dominant and servient heritages;<sup>3</sup> if the owners participate in the beneficial enjoyment of the appendages referred to, each becomes the 'khalit' of the other;<sup>4</sup> and where the appendage consists of an easement, it is not necessary that it should have become absolute<sup>5</sup> by having been peaceably enjoyed during the period of prescription.<sup>6</sup>

Effect of partition.

**541H.** Where<sup>7</sup> there is a complete<sup>8</sup> partition, the community of interest ceases for the purpose of ss. 541 and 541A, above;<sup>9</sup> and it does not continue where an

<sup>1</sup> *Fida Ali v. Muzaffer Ali* (1882) 5 All. 65; cf. comment to s. 526, above.

<sup>2</sup> *Abdul Wahid Khan v. Shabb Baris* (1893) 1 Cal. 496; 21 T. A. 26. The Oudh Laws Act recognises the following as having the right of pre-emption: co-sharers in the sub-division, co-sharers of the whole mahal, members of the village-community and the proprietor (if the property be an under-proprietary tenure).

<sup>3</sup> In *Ranchoddass v. Jugaldas* (1898) 24 Bom. 414, the subject of pre-emption was the servient heritage (right of way); in *Chand Khan v. Nasim Khan* (1899) 3 Beng. L. R. (A. C.) 296; 12 W. R. 162, it was the dominant heritage (irrigation).

<sup>4</sup> (*Sheik*) *Karim Balsh v. Kamruddin Ahmad* (1874) 6 N. W. 377 (a common appurtenance in the shape of an undivided plot of land, a few trees and tanks attached); *Mahatab Singh v. Ramtahal Misser* (1868) 10 W. R. 314; 6 Beng. L. R. (F. B.) 43 n. (fishing rights).

<sup>5</sup> *Baldeo v. Badri Nath* (1900) 31 All. 619.

<sup>6</sup> Cf. Indian Easements Act, s. 15.

<sup>7</sup> See. 541H stood as illustration (6) to s. 541, in the first Edition. See s. 541D, above, and *Janki Prasad v. Issai Das* (1899) 21 All. 274.

<sup>8</sup> Not an imperfect one; *Muhammad Usman*

*v. Muhammad Abdul Ghafur* (1911) 34 All. 1.

<sup>9</sup> *Munna Lal v. Hajira Jan* (1910) 33 All. 28, s. 18 (11) below *Digambar v. Ram Lal* (1887) 14 Cal. 761; *Baj Nath Singh v. Dooly Mahatoon* (1869) 11 W. R. 215; *Mahadeo Singh v. (Mussamat) Zerratulunnisa* (1869) 11 W. R. 160; 7 Beng. L. R. 43 n. (f. c. 545 (11), (4) below (*Chandry*) *Jogul Keshore v. Poocha Singh* (1867) 8 W. R. 413) separate agreements with a zamindar by co-sharers in a taluk to pay rent (each being liable for his own share of rent only) subject to which arrangement the lands continue *ijmal*, do not affect right of pre-emption. *Wajid-ul-Perz*: pre-emption that after partition no claim; *Dalgunjan Singh v. Kalka Singh* (1899) 22 All. 1 (F. B.); *Ganga Singh v. Chudi Lal* (1911) 33 All. 605; *Mahadeo v. Jagar* (1916) 38 All. 260. The Privy Council in *Dunbar Singh v. Ahmad Sayeed Khan* (1914) 13 All. L. J. 236 (P. C.) was not prepared to dissent from Bannerji, J.'s statement that where "a fresh *vajid-ul-arz* has not been prepared, it does not follow as a matter of law or principle that the custom or contract in force before partition is no longer to have effect or operation". *Dalgunjan Singh v. Kalka Singh* (1899) 22 All. 1, 30.

inconsiderable part of the estate is left out of division by **SECTION 54**,<sup>1</sup> oversight; but where an integral portion of the property, as a wall, is purposely left joint and undivided, the community of interest continues.<sup>1</sup>

(1) (a) The wife of a Mussulman is not (for claiming pre-emption) *Illustrations.* a co-sharer with him in his property during his lifetime,<sup>2</sup> (b) nor is a Hindu widow who—(i) by virtue of a compromise with the brother of her deceased husband, is in possession of property for her life, the agreement containing strict provisions against her alienating it,<sup>3</sup> or (ii) is in possession of the property of her husband in lieu of maintenance, even though under a decree of Court;<sup>4</sup> (iii) but if she has inherited it from her husband she is the owner of it;<sup>5</sup> (iv) and the daughter, a Hindu widow, to whom the widow had relinquished a share in a village, (of which share she was in possession of a widow's estate), may be entitled to pre-empt;<sup>6</sup> (v) members of a joint and undivided Hindu family, though not recorded in the Collector's book as sharers in the 'mhal,' are co-sharers.<sup>7</sup>

(2) S makes a gift of his mansion to R in 1900. In 1901 an adjacent mansion is sold, and then S revokes the gift he had made. He has no right of pre-emption,<sup>8</sup> because S was not owner of the mansion at the time when the ground for the claim of pre-emption arose.

(3) Part of a land is 'waqf,' and the other part belongs to S, who sells it to B. Neither the 'mutawalli' of the 'waqf' nor the beneficiary under it, "not even if he be a single individual," can pre-empt.<sup>9</sup> "If a mansion were sold by the side of a 'wukf,' the appropriator would have no right of pre-emption; nor could the 'mootuwalee' or superintendent take it under that right."<sup>10</sup> These two statements are from books on the Shiah and Sunni law respectively. Under the Punjab Pre-emption Act II. of 1905, s. 13 (1), *seventhly*, the 'mutawalli' may however pre-empt.<sup>11</sup>

<sup>1</sup> *Lalla Prag Dutt v. Banda Hossain* (1871) 7 Beng. L. R. 42; S. C. *Lalla Purag Dutt v. Hundey Hossain*, 15 W. R. 225; and, on review *Bundey Hossain v. Lalla Purag Dutt* (1871) 16 W. R. 110.

<sup>2</sup> *Fida Ali v. Muzaffar Ali* (1882) 5 All. 65; cf. *Amajd Ali v. Mushtaq Ahmad and others* (1895) 17 All. 454, 15 All. W.N. 95, (1897) 17 All. W. N. 121.

<sup>3</sup> *Imamuddin v. Surjadi* (1894) 15 All. W. N. 15.

<sup>4</sup> *Dinkari v. Jagannath Kuar* (1887)

<sup>5</sup> All. 17; *Karan Singh v. Muhammad Ismail Khan* (1885) 7 All. 860; *Bhupal Singh v. Mohan Singh* (1897), 19 All. 324, following

*Phopi Ram v. Rukmin Kuar* [1895] All. W. N. 84; and *Imamuddin v. Surjadi* [1895] All. W. N. 85.

<sup>6</sup> *Phulman Rai v. Dani Kaur* (1877) 1 All. 452.

<sup>7</sup> *Muhammad Yusuf Ali Khan v. Dal Kuar* (1898) 20 All. 148; *Nabiban Bibi v. Shukh Medu* (1905) 2 All. L. J. 775 (in this case she was recorded as being in possession in lieu of dower).

<sup>8</sup> *Gandharv Singh v. Sahib Singh* (1885) 7 All. 184.

<sup>9</sup> *Bail. I.* 126 (par. 3).

<sup>10</sup> *Bail. II.* 178; I. 473 (6th).

<sup>11</sup> *Bail. I.* 474 (ll. 12-14).

<sup>12</sup> *Junda Ram v. Musan Baksh* (1914) 69 *Punjab Rec.* 197 (No. 59).

## SECTION 541H.

*Illustrations.*

(4) The pre-emptor sells his own share of the land before he is informed of the ground for pre-emption ; the right of pre-emption is lost.<sup>1</sup>

(5) S sells land to B, reserving an option to himself to dissolve the sale ; then the adjoining house is sold ; S can pre-empt the house under Hanafi law (being the neighbour). But if the option to dissolve the sale had been reserved by B (and not S), B would have had the right to pre-empt the adjoining land. Now if P has the right of pre-empting the land he can exercise it, but he does not acquire the right of pre-empting the adjoining house, because he was not owner of the land at the time when the right of pre-empting the house arose.<sup>2</sup>

(6) Where subsequently to the sale from which pre-emption is alleged to arise, a co-sharer sells his share to a stranger, that stranger cannot claim and enforce pre-emption under a 'wajib-ul-arz' which gives the right to co-sharers.<sup>3</sup>

(7) P institutes a suit to enforce her right of pre-emption, which is resisted and dismissed on the ground that she has no interest in possession in the land ; she files an appeal, and eight days after, her share in the land is sold in execution of a decree in another suit ; held, that (a) want of possession does not affect the right of joint owners to pre-empt ; (b) the sale of the share pending the suit, cannot prejudice her rights which existed at the time when the suit is filed.<sup>4</sup>

(8) On the 20th of June 1907, P purchased a share in a zamindari at an auction sale in execution of a decree. The sale was confirmed on the 24th. On the 23rd, S sells his share in the same zamindari to B. Held, that under the Civil Procedure Code, 1882, s. 316, P acquired the share on the 24th, and so was not entitled to pre-empt. But that the effect would be different under the Civil Procedure Code of 1908, s. 65, under which the property is vested in the auction purchaser from the date of the sale, and not from the time when the sale becomes absolute.<sup>5</sup>

(9) Neither the facts (a) that P irrigates his field in one 'mahal' from a well situated in another 'mahal' belonging to S ;<sup>6</sup> nor (b) that P and S have the same burial ground and 'chaupal' (i.e., village meeting place)<sup>7</sup> make P the 'kalit' of S.

<sup>1</sup> Ball, II. 191, (fourth). The *Shakh* holds otherwise (see a. to s. 532 (1)).

<sup>2</sup> Hed. 500 (col. I. par 3). See s. 541A, above.

<sup>3</sup> *Sho Narain v. Hira* (1885) 7 All. 535. Illustrations (4) and (6) are the converse of each other.

<sup>4</sup> *Sakina Bibi v. Amiran* (1888) 10 All. 472 (Mahmood, J.). But, *semble*, where the sale is voluntary, it may amount to waiver of right of pre-emption ; and see *Ram Gopal v. Piar*. See s. 541D, above.

<sup>5</sup> *Hasan Ali v. Mian Jan Khan* (1910) 33 All. 45. See s. 541D, above ; and *Sakina Bibi v. Amiran* (1888) 10 All. 472.

<sup>6</sup> *Munna Lal v. Hayira Jan* (1910) 33 All. 21, 33.

<sup>7</sup> *Abdul Rahim Khan v. Kharag Singh* (1893) 15 All. 104 : the right to the burial ground and *chaupal* being common to all the inhabitants of the place, could hardly be referred to as being appurtenances to the ownership of land.

(10) P brings a suit for pre-emption: pending the suit, a decree for partition is made on the 1st of July under an application originally commenced by P, but from which P has withdrawn. On the 9th of July the Court dismisses P's suit for pre-emption on the ground that by reason of the partition he is no more a co-sharer in the property; and this is upheld in first and second appeal.<sup>1</sup>

(11) S takes a building lease of a land from P, and erects a house on it; held, that P has no right to claim pre-emption as he is neither a co-sharer nor a participator in the appurtenances of the house, nor the owner of neighbouring land—*sed quære*.

See 'Fida Ali v. Muzaffar Ali'<sup>2</sup> on the meaning of the term 'stranger' in the Muhammadan law of pre-emption. It has been held that the word 'khalit' is not improperly used to designate in a plaint for pre-emption, a 'sharik' or partner in the substance of a thing; and if it is not clear whether the plaintiff claims as 'sharik' or 'khalit' it may be shown by express words, or inferred from the written statement.<sup>4</sup> In another case it was held that 'sharik' may refer to persons occupying other houses in the same mansion.<sup>5</sup> On the other hand, a claim as 'khalit' was not allowed to be amended into a claim as a neighbour.<sup>6</sup>

On the question whether one co-parcener can claim pre-emption when another co-parcener is the buyer, see s. 527, above.

The territorial extent of the law of pre-emption is considered in s. 523 (3), above, and in the footnotes thereto. Under Act X. of 1877, s. 310, and Act XXIII. of 1861, s. 14, certain rights of pre-emption arose out of Court sales.

**542.** Any person who is competent to hold property is competent to pre-empt;<sup>7</sup> provided that where the right arises under a contract or custom, it may be restricted to persons competent to contract.<sup>8</sup>

It has been stated that where the Government has acquired land permanently, it does not become a co-sharer in the village to which the

<sup>1</sup> *Tafazzul Hussain v. Than Singh* (1910) 32 All. 567. See also *Nuri Mian v. Ambika Singh* (1916) 44 Cal. 47, 49.

<sup>2</sup> *Ferozshahi Lal v. Irfan Ali* (1870) 2 N.W. 100.

<sup>3</sup> (1882) 5 All. 65. Cf. *Baidoo v. Baderi Nath* (1909) 31 All. 519 and *Mahomed Tukkes v. Hujjoo alias Khuffjo* (1873) 5 N. W. 142.

<sup>4</sup> *Lala Prag Dutt v. Bandi Hussain* (1871) 15 W. R. 255 on review 16 W. R. 110. See s. 541k.

<sup>5</sup> *Gurreeboollah Khan v. Kebul Lall Mitter* (1870) 13 W. R. 124.

<sup>6</sup> *Govind Row v. Girdharoo Sahoo* (1875) 24 W. R. 355.

<sup>7</sup> Ball. I. 473; II. 110 (par. 2); *Punna v. Juggar Nath* (1866) 1 Agra 236; *Ram Khelawan Rai v. Shiva Dass* (1867) 2 Agra 76; *Jinda Ram v. Hussain Baksh* (1914) 40 Punj. Rec. 197, 200 (No. 97).

<sup>8</sup> *Raja Ram v. Bansil* (1870) 1 All. 207.

**SECTION 542.** land originally appertained and the provisions contained in the 'wajib-ul-'arz' which deal with sales by co-sharers in the village are not applicable.<sup>1</sup>

(Shiah law.)  
Guardian pre-empting war property.

**543.** According to Shiah law the father or grandfather may pre-empt the share of his minor child or grandchild in property which belongs to them jointly;<sup>2</sup> *sed quaere*, in British India.

Guardian a trustee.

The doubt as to the operation of this rule of Shiah law is based on the fact that the father and grandfather are the legal guardians of the property of their minor child or grandchild; and it is explained that their pre-empting the minor's share is tantamount to purchasing it (which is permitted according to Shiah law).<sup>3</sup> In British India a purchase by the guardian of his ward's property would not be permitted.<sup>4</sup>

Executor.

Doubt is expressed on the point whether an executor can pre-empt; as regards Shiah law the question is answered in the 'Sharaya-ul Islam' in the affirmative.<sup>5</sup>

Pre-emption by guardian on behalf of ward.

**544.** (1) The right of pre-emption may be enforced on behalf of [one who is absent,<sup>6</sup> or] a minor or person of unsound mind by his guardian, provided that it is for the benefit of the ward to enforce it.<sup>5</sup>

Avoiding such pre-emption.

(2) *Quaere*, whether where the right of pre-emption is enforced by a guardian, and it is not for the benefit of the ward, he may avoid it on attaining majority, or becoming of sound mind.<sup>5</sup>

#### (2) Priorities amongst Pre-emptors.

Priority in claim of pre-emption.

**545.** Co-sharers of the land have priority in the right of pre-emption over participators in appendages,<sup>6</sup> and the latter have priority over neighbours.<sup>7</sup> *Quaere*, whether

<sup>1</sup> *Gaya Singh v. Ram Singh* (1905) 28 All. 235.

<sup>2</sup> *Bail. II.* 180 (par. 4). See comment.

<sup>3</sup> *Bail. II.* (par. 4).

<sup>4</sup> *Cf.* the Guardians and Wards Act, s. 20. See s. 272, above.

<sup>5</sup> *Cf.* s. 271, above; *Bail. II.* 110 (par. 2); it is difficult to say what the reference to an absent person imports. The manager of an estate appointed by the Court of Wards may perform the ceremonies and claim pre-emption for his ward, *Jadu Lal v. (Maharani) Janki*

*Koer* (1912) 39 Cal. 915; 39 L.A. 101; 14 Bom. L. R. 436 P. C. on appeal from Calcutta.

<sup>6</sup> *Hed.* 548, 549; *Bail. I.* 476. See comment. *Ranchoddas v. Jaguddas* (1899) 24 Bom. 414; *Gulam Ali Khan v. Agurjeet Roy* (1872) 17 W. R. 343; *Hur Dyal Singh v. Heera Lal* (1871) 16 W. R. 107; *Gopal Saki v. Ojoodha Perhad* (1865) 2 W. R. 47; *Khairuddin v. Gulam Mohiuddin* (1914) 49 Panj. Rec. 147 (No. 48).

<sup>7</sup> *Karim v. Priyo Lal Bosa* (1905) 28 All. 127; *Chand Khan v. Nisamat Khan* (1864) 3 Beng. L. R. (A.C.) 296.



generally those whose interest in the land is closer have SECTION 545. priority over those whose interests are less close;<sup>1</sup> but it has been held that a 'khalit' who is also a neighbour does not have any priority over another who is not a neighbour<sup>2</sup> and that a co-sharer who is a neighbour [or 'khalit'] has no priority over a co-sharer who is not a neighbour [or 'khalit'].<sup>3</sup>

(1) P is joint proprietor of part of the land sold, and PA has *pro-illustrations* perty contiguous to the whole of the land; the right of P has priority over that of PA.<sup>4</sup>

(2) PA has laid beams on the wall of a neighbouring house. This does not make him a joint owner, but he remains a neighbour; similarly if two persons are joint owners of a beam laid on the top of the wall, they are classed as neighbours;<sup>1</sup> and if PA has the right of collateral support from the party wall separating his property from that of S, PA is only the neighbour of S, and not his 'khalit'.<sup>5</sup>

(3) S and P are joint owners of a house in a street; S agrees to sell his share in it to B; (a) P has the first right of pre-emption; (b) if P waives it, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous, and those who are not, for they are all 'khalits' in the way, (c) if they all surrender the right, it belongs to a 'musalik' or contiguous neighbour, who is not a 'khalit' in the way.<sup>6</sup>

(4) S<sup>7</sup> and P are joint owners of a house in Queen's Road, (a public thoroughfare) with a right of way over a private street;<sup>8</sup> PA owns a house in the said street and has a right of way over the same; PB is the owner of a house situated in the Queen's Road, adjoining<sup>9</sup> S and P's

<sup>1</sup> This seems to be implied in *Bail. I. 476* (last line) "because they are more specially intermixed with it." In deciding that in large estates neighbours had no right of pre-emption, but co-sharers had, Mitter, J., referred to the "very sound principle, viz., that the right should be co-extensive with the inconvenience which it is intended to avoid," (*Shrik Muhammad Hossein v. (Shrik) Mohsun Ali* (1870) 14 W. R. (F.B.) 1; 6 Beng. L. R. 41 (penultimate sentence, *per* Mitter, J.); and Syed Amir Ali says that if P has a right of way over the land, and PA has the right to discharge the water of his house on the land, or if P is a nearer neighbour than PA, then in either case P has priority over PA ("Mahomedan Law," I. 602, no authority is cited). Cf. on the construction of the *wajib-ul-arz*: *Lakhan Singh v. Bishan Nath* (1910) 33 All. 209;

*Jasoda Nand v. Kandhatya Lal* (1891) 13 All. 373 (provision in *wajib-ul-arz* that co-sharer or same family to have precedence over stranger), distinguishing *Ram Prasad v. Abdul Karim* (1887) 9 All. 513.

<sup>2</sup> See *id.* (3); *Karim Baksh v. Khuda Baksh* (1894) 16 All. 247.

<sup>3</sup> *Roshan Mahomed v. Mahomed Euleem* (1897) 7 W. R. 150.

<sup>4</sup> *Hed. 549* (col. 1. par. 3).

<sup>5</sup> *Ranchoddas v. Jugaldas* (1899) 24 Bom. 414; cf. *Karim v. Priso Lal* (1905) 28 All. 127.

<sup>6</sup> *Bail. I. 476*; or rather a private way, as it is not a thoroughfare; *Bail. I. 477* ll. 8-15; *Gooman Singh v. Tripool Singh* (1869) 8 W. R. 437.

<sup>7</sup> *Bail. I. 476-477.*

<sup>8</sup> Or a right of watering their vineyards from a small channel.

<sup>9</sup> Not on opposite sides of a thoroughfare.

**SECTION 545.** house, without participating in the said right of way.—Then P is co-sharer, PA ‘khalit,’ and PB neighbour.<sup>1</sup> The same is the case if the houses of S and P, of PA and of PB are all in the same “mansion” [compound or enclosure<sup>2</sup>], and PA has the same entrance from Queen’s Road but PB has a separate door [passage] of his own.<sup>1</sup>

*Illustrations*

(5) P, the owner of land through which the subject of pre-emption receives irrigation, has priority over PA, a neighbour.<sup>3</sup>

(6) S and P had certain proprietary rights in an eight annas ‘patti’ of a certain ‘mahal.’ S mortgaged his share in the ‘patti’ to B and BA, who foreclosed. B’s brother had a small share in the other eight annas ‘patti’ of the same ‘mahal.’ *Held*, that P was entitled to pre-empt, for though the co-parcenary of the ‘mahal’ could not be said to have ceased, nor those who were co-parceners in it to have become strangers to one another, yet there being a finding that the ‘pattis’ were separate, a partition by metes and bounds was not necessary, and that a private partition, if full and final between the parties, would have the same effect on rights of pre-emption as a formal partition.<sup>4</sup>

(7) S is entitled to and sells the upper floor of a house together with a right of way through the house of a third party P; PA is the owner of the lower floor underneath S’s floor; *held*, that P is a ‘khalit’ and has priority over PA who is only a neighbour,<sup>5</sup> *sed quære*;

(8) In a ‘pattidari’ village the sharers in each ‘patti’ have a preferential claim to the right of pre-emption in that ‘patti.’<sup>6</sup>

As to whether any priority is obtained by the pre-emptor being the buyer in the first instance, see s. 527, above.

This section is based on the following passages: “A ‘shureek’ (or partner in the substance<sup>8</sup>) is preferred to a ‘khuleet’ (or a partner in its rights as of water or of way<sup>9</sup>).” “‘Khuleet’ means literally ‘mixed with.’ Though rights of water and way are given as examples, it does not appear,” says Baillie, “that a ‘khuleet’ in any other right than these has the right of pre-emption.”<sup>9</sup> See, however, s. 541G, and comment to s. 541H, above.

Where the right is claimed under a ‘wajib-ul-‘arz,’ the priorities depend upon the terms of the ‘wajib-ul-‘arz’ which may be on a principle

<sup>1</sup> Ball. I. 476-477.

<sup>2</sup> See B. Wilson suggests “court.”

<sup>3</sup> *Chand Khan v. Naimat Khan* (1860) 8 Beng. L. R. (A.C.) 296; 12 W. R. 162.

<sup>4</sup> *Digamber Misser v. Ram Lal Roy* (1887) 14 Cal. 761.

<sup>5</sup> *Ganeshi Lal v. Luchman Dass* (1878) N. W. 31 (custom amongst Hindu residents of a town).

*Maharaj Singh v. Bechook Lal* (1894) 1

W. R. 233. Cf. *Farzand Ali v. Ahimullah* (1879), 1 All. 272; *Sangam Ram v. Sheobari Bhagat* (1882), 3 All. 112; *Mahabir Parashad v. Debi Dial* (1879) 1 All. 261.

<sup>7</sup> Ball. I. 476 (H. 1-2).

<sup>8</sup> “The explanations within parentheses are from the *Hidayat*, vol. IV., p. 1 (413).”—Ball. I. 476, n. 1.

<sup>9</sup> Ball. I. 476; n. 1.

differing from that of general Muhammadan law: see s. 523, above: as, for **SECTION 545**, instance, priority may be given to share-holders in a 'patti' then to those in a 'mahal' and lastly to those in a village; and such priorities may subsequently be taken away by a new arrangement.<sup>1</sup> Where two separate co-sharers have brought two separate suits claiming pre-emption, there is no necessary priority in favour of the one that has instituted the first suit, but a decree may be made in favour of each plaintiff in respect of half of the property.<sup>2</sup>

**546.** Where the person who has priority in the right of pre-emption waives his claim (before enforcing it) the person next after him becomes entitled thereto;<sup>3</sup> provided that he has asserted his claim immediately on getting information of the sale,<sup>4</sup> and his right is otherwise established in accordance with s. 528, above.

On waiver by prior pre-emptor accrues to next in degree.

### (3) Reciprocal Rights of Pre-emptors Equal in Degree.

**547.** Pre-emptors who are equal in degree are, according to Hanafi law, entitled to pre-empt the land in equal shares, notwithstanding that they are co-sharers holding unequal shares in it.<sup>5</sup> According to Imam Shafi'i the rights of co-sharers are in proportion to their respective shares.<sup>6</sup> The Hanafi rule has been applied to a case of pre-emption under a 'wajib-ul-arz.'<sup>7</sup>

Co-owners rights equal.

(1) S, P, PA, and Pb own a plot of land jointly in shares of  $\frac{3}{8}$ ,  $\frac{1}{8}$ ,  $\frac{1}{8}$ ,  $\frac{1}{8}$ , *Illustrations*.  
 $\frac{1}{8}$ ,  $\frac{1}{8}$ , respectively, and S sells his  $\frac{3}{8}$  share in it. Then under Hanafi law—

(a) P, PA, and Pb can each take a  $\frac{1}{8}$  of the part sold, i.e.,  $\frac{1}{8}$  of the whole;

(b) if P waives his claim before it has been enforced the whole belongs to PA and Pb in equal shares (i.e.,  $\frac{1}{4}$  each).

<sup>1</sup> *Daria v. Harkhal* (1909) 31 All. 274; *Yad Ram v. Cheda Lal* (1913) 35 All. 478.

<sup>2</sup> *Saiq Ram v. Kali Shankar* (1905) 27 All. 465.

<sup>3</sup> Hed. 549 (col. 1); Ball. I. 476. Abu Yusuf holds that the person with a prior right absolutely excludes one who is next after him, so that the latter cannot come in at all.

<sup>4</sup> He must not wait till he hears of the waiver: Ball. I. 482 (*ll.* 11-14). So that the latter must assert his claim at the same time

as the one having the prior claim, if both hear of the sale together.

<sup>5</sup> Hed. 549; Ball. I. 494-495; *Baldeo v. Badri Nath* (1909) 31 All. 519; *Maharaj Singh v. Lalla Bheerchuck Lal* (1865) 3 W. R. 71 (as to co-sharers); (*Mier Khan Kurun v. Seeta Ram* (1870) 2 N. W. 257 (as to neighbours).

<sup>6</sup> *Minhaj*, 208 (par. 2) (Bk. 18, s. 2); Hed. 549 (col. II. par. 3).

<sup>7</sup> *Jai Ram v. Mahabir Basi* (1885) 7 All. 720, 728; see comment.

**SECTION 547.** (c) if P is absent, and PA and PB alone claim pre-emption, they each take equally (i.e.,  $\frac{1}{2}$  of the whole), and then if afterwards P appears and claims his share he must get  $\frac{1}{4}$  from PA and PB each (i.e., a  $\frac{1}{2}$  from the portion coming to each) and P will not get more, notwithstanding that after PA and PB had enforced their claims PA waives his claim.<sup>1</sup>

(2) S sells land; and PA, a neighbour, pre-emptes in the absence of P (who is a 'khalit' thus having a claim of pre-emption prior to PA). Afterwards P returns, and if he claims to pre-empt, he will get the whole of the land from PA.<sup>2</sup>

Hanafi and Shafi'i law as to proportion of rights of co-owners.

Mahmood, J., has expressed the view that the rule of Hanafi law that each co-sharer should have an equal share in the land pre-empted, is in consonance with justice, equity and good conscience, because the reason upon which the law of pre-emption is framed is that the intrusion of a stranger is disagreeable to the pre-empted property. "This disagreeableness," the learned judge continues, "is not to be estimated in reference to the share in the property possessed by each pre-emptor, but in reference to each pre-emptor personally, and I hold that the equitable rule is to apportion the rights of the pre-emptors 'per capita.'"<sup>3</sup> It may however be respectfully observed that Mahmood, J., in speaking of "the well-known rule of Muhammadan law," seems to have overlooked that Imam Shafi'i held a different view; and, secondly, that a co-sharer may have an infinitesimally small share in the property. It may be very unfair that such a sharer should claim to pre-empt on terms of equality with another co-sharer whose interest in the property is substantial.

On one joint pre-emptor waiving his claim the other joint pre-emptors become entitled to whole.

**548.** (1) Where there are two joint pre-emptors, and one of them waives his claim, the other acquires the right to pre-empt the whole land;<sup>4</sup> provided that the waiver is made before pre-emption has been enforced either by the Court decreeing it,<sup>5</sup> or by possession of the land being transferred to the pre-emptor without such decree; [after being so enforced, the rights of the pre-emptor who waives them, lapse, and do not accrue to the other joint pre-emptor].<sup>6</sup>

(2) Where one of two joint pre-emptors acquires (as above referred to) the right of the other, he must exercise

And must exercise the whole or waive the whole claim.

<sup>1</sup> Bail. I. 494-495; Hed. 549-550.

<sup>2</sup> Bail. I. 495 (par. 3); Hed. 550.

<sup>3</sup> *Jus. Ram v. Mahabir Bai* (1885) 7 All. 720, 728.

<sup>4</sup> Hed. 549 (vol. II.); Bail. I. 494, 495 (par. 2)

<sup>5</sup> Where the decree is itself conditional on

something being done (e.g., payment of the price), the right cannot be said to be enforced until the condition is fulfilled, see *id.* (1).

<sup>6</sup> *Ibid*; *quære*, can it be waived after being enforced without the consent of the seller or purchaser?

the right to pre-empt the whole land, or must relinquish SECTION 548. it entirely; he cannot pre-empt the share either only of himself, or only of the other pre-emptor.<sup>1</sup>

(3) The rules contained in this section apply with the necessary mutations where there are more pre-emptors than two and where one or more than one of them waives or waive his or their claim.<sup>2</sup>

P and PA having rights of pre-emption equal in degree (under a *‘wajib-ul-arz’*) brought two rival suits to enforce their rights. The Court gave to P and PA decrees respectively having reference to a three annas and a two annas six pies share, conditionally on their paying the price within 30 days; and directed that in case P made default in payment PA should have the right to pre-empt P's share, on paying the price of that share within 15 days of such default, and 'vice versa'. Both P and PA made default in paying within 30 days; and then PA paid into Court (within 15 days of the default by P) the price of P's share; *held*, (affirming Mahmood, J) that PA's claim was inadmissible, as it would not cover the whole subject of pre-emption.<sup>3</sup>

### § 8.—Legal Effects of Pre-emption.

549. (1) On the right of pre-emption being enforced, the pre-emptor acquires the rights, and becomes subject to the obligations, arising between the seller and the purchaser under the sale;<sup>4</sup> provided that the pre-emptor is not entitled to the option of dissolving the sale which the purchaser has for three days under Muhammadan law;<sup>5</sup> but, *semble*, he has the options of inspection and defect under the said law,<sup>6</sup> except in so far as the said options may be inconsistent with the terms in which the claim is decreed by the Court.

(2) Where the sale has been completed at the time when the claim to pre-emption is enforced, the purchaser becomes the vendor, with the pre-emptor as the vendee.<sup>7</sup>

<sup>1</sup> See *ibid.* to s. 548; cf. s. 540, above, and comment thereto.

<sup>2</sup> *Hed.* 549 (col. 1); *Bail.* I. 494, 495 (par. 2).

<sup>3</sup> *Arjun Singh v. Sarfaraz Singh* (1888) 10 All. 182.

<sup>4</sup> *Bail.* I. 473 (par. 3); II. 195 (*ibid.* 4-6).

<sup>5</sup> *Hed.* 560 (col. 1, par. 2).

<sup>6</sup> *Hed.* 563, (col. 1, par. 4). See comment.

<sup>7</sup> *Bail.* I. 490-491; for the sale having been completed, the buyer has become the owner of the property. See comment.

## SECTION 549.

Contingent charges.

(3) The pre-emptor does not become liable for any contingent charges incurred by the purchaser, such as brokerage, agency, or the like.<sup>1</sup>

Messe rents and profits.

(4) The purchaser is entitled to receive or retain the rents and profits of the land during the interval between the date of its sale to himself and its transfer<sup>2</sup> to the ownership of the pre-emptor.<sup>3</sup>

Proof of title.

(5) A pre-emptor is not entitled to put the vendor to proof of his title to the subject of pre-emption.<sup>4</sup>

Interest in land.

(6) It is doubtful whether the right of pre-emption creates an interest in the land.<sup>5</sup>

Illustrations.

(1) S agrees to sell to B land which is mortgaged to M for Rs. 50. P enforces his claim to pre-emption, and takes possession of the land. P is liable to M for payment of the mortgage debt, notwithstanding that P may have had no notice of the mortgage at the time when he claimed pre-emption.<sup>6</sup>

(2) S sold certain property to B, in September 1908, for Rs. 1,150. P had the right to pre-empt it; but before his suit for pre-emption had been barred, B sold it to a third party, Ba, for Rs. 4,000. *Held*, that P was entitled to pre-empt the property on the terms of the sale of September 1908 (*viz.* at Rs. 1,150) making Ba a party to the proceedings.<sup>7</sup>

(3) During the pendency of a suit for pre-emption, the purchaser re-sold the property in suit, to a person who originally had a pre-emption right superior to that of the plaintiff, but who at the date of the sale was barred by limitation from enforcing it. *Held*, that the plaintiff's claim was not defeated by the re-sale.<sup>8</sup>

It is stated that the pre-emptor takes the property from the buyer, and not the seller;<sup>9</sup> and that the buyer must always be a party to the

Whether pre-emptor takes from buyer or seller.

<sup>1</sup> Ball II. 182, *verbatim*.

<sup>2</sup> Under s. 561, below.

<sup>3</sup> *Deekinandan v. Sri Ram* (1880) 12 All. 234 (F.R.); Mahmood, J., dissenting, thought that the buyer was entitled to the profits until he actually obtained possession. See also *Ajudhis v. Baldeo Singh* (1884) 7 All. 674; and *Deonadhan Prasad Singh v. Randhari Choudhri* (1916) 44 Cal. 675, 686 (F.C.); *Deo Datt v. Ram Astar* (1886) 8 All. 502 as to messe profits. The point is now specifically covered by the form in which the decree has to be framed. See s. 550, below, and comment thereto. Cf. s. 539, *ult.* (2) above.

<sup>4</sup> *Sahmura Bibi v. Bagishwar Singh* (1915)

13 All. L. J. 711 (the plaintiff alleged that the vendor was entitled to a much smaller share in the property than he purported to sell, but that if the Court found that the vendor was really entitled to the whole property then the plaintiff was willing to pre-empt the whole).

<sup>5</sup> *Sitaram Bhawan v. Sayed Sirajul Khan* (1917) 41 Bom. 638, 650.

<sup>6</sup> *Tejpal v. Girdhari Lal* (1908) 30 All. 130.

<sup>7</sup> *Khellar Chandra Banu Mallik v. Nabin Kaki Devi* (1913) 35 All. 385; *Kamla Prasad v. Mohan Bhagat* (1909) 32 All. 45.

<sup>8</sup> *Ramla Prasad v. Ram Jag* (1913) 36 All. 60.

<sup>9</sup> Ball. II. 185 (par. 3) n. 7; cf. Ball. II. 175 (*ult.* 1-3), 183 (par. 2).

suit,<sup>1</sup> but after he has taken possession of the land, the presence of SECTION 549. the seller may be dispensed with;<sup>2</sup> even before he has taken possession he is said to be the proprietor, and the seller the possessor;<sup>3</sup> still, if, before the sale is completed by transfer of possession to the buyer, the pre-emptor claims it from the buyer, he may require the pre-emptor to take it direct from the seller.<sup>4</sup>

These incidents of pre-emption may have been in the minds of Peacock, C.J., and Mitter, J., when they expressed the view in 'Kudratulla's case'<sup>5</sup> and Pearson, J., in 'Chundo v. Alimoodin'<sup>6</sup> to the effect that the pre-emptor takes the property from the buyer and that the seller passes out of the transaction. Mahmood, J., and his colleagues held, however, upon the texts cited by him that the original notion underlying pre-emption was different.<sup>4</sup>

The pre-emptor's interest in the subject of pre-emption before he has paid the amount fixed by the decree for pre-emption in his favour, is an interest, the attachment of which has been held<sup>5</sup> to be prohibited by s. 266 (k) of the Code of Civil Procedure, 1882, to which s. 60 (m) of the Civil Procedure Code, 1908, corresponds.<sup>6</sup>

It has been held (not without difference of opinion) that the question whether the sale is complete so as to give rise to the right of pre-emption must be determined in accordance with the Muhammadan law.<sup>7</sup> But

the point with which the present section deals, is the legal effect of enforcing the right of pre-emption, and there seems less reason to doubt that this must be determined in accordance with Muhammadan law, in so far at least as the express terms in which the decree is passed leaves any point undetermined. Two of the most important incidents of Muhammadan law are referred to in the present section, *viz.*, the options of inspection and defect.<sup>8</sup> The option of inspection is the right (under the Hanafi law) of retracting from a purchase made without inspection. This option is only to the purchaser, and not to the seller (who, if he has sold an article belonging to him without having seen it, is bound by his act) and may be asserted at any time till something takes place repugnant to the nature of it. Imam Shafi'i does not recognise this option, for according to him the purchase of an

<sup>1</sup> Hed. 552 (col. 1.); Ball. I. 485 (H. 26-33).

<sup>2</sup> *Hira Lal v. Ramjas* (1883) 6 All. 57.

<sup>3</sup> (1870) 4 Beng. L. R. (N.B.) 184; 13 W. R. (N.B.) 21.

<sup>4</sup> (1873) 6 N. W. 28. See penultimate paragraph of comment to s. 524, above.

<sup>5</sup> *Gorakh Singh v. Sida Gopal* (1906) 28 All. 383.

<sup>6</sup> Which is in the following terms: "An

expectancy of succession by survivorship or other merely contingent or possible right or interest" "shall not be liable to such attachment or sale."

<sup>7</sup> See s. 526, above.

<sup>8</sup> On which see Hed. 255, 258 (Book XVI. ch. 117, IV); see also Baillie, "Muhammadan Law of Sale."



**SECTION 549.** article without seeing it, is void.<sup>1</sup> The option of defect is the right of a purchaser who discovers that the article purchased and taken possession of by him is defective, to reject the article.<sup>2</sup> The question whether these options can be exercised in British India has apparently not had to be considered by the Courts, and it is obvious that the Hanafi law cannot be enforced in its original form under the changed condition of modern India.

When the land transferred to pre-emptor.

**550.** (1) The subject of pre-emption<sup>3</sup> is not transferred to the ownership of the pre-emptor, unless the Court decrees the claim to pre-emption; or possession of the land is otherwise given to and taken by the pre-emptor.<sup>4</sup>

Pre-emptor insulating on decree of Court.

(2) The pre-emptor may refuse to take possession of the land without an order of the Court, notwithstanding that the buyer or seller may be willing to transfer it to him.<sup>5</sup>

Form of decree.

(3) The Courts of British India, in decreeing a claim to pre-emption, will specify a day on or before which the purchase money<sup>6</sup> shall be paid,<sup>6</sup> and order that on such payment possession of the land shall be delivered to the pre-emptor, or, where there are several pre-emptors equal in degree, to them respectively, in proportion, to the right of each.<sup>7</sup>

Decree not transferable.

(4) A decree for enforcing pre-emption is a purely personal one and cannot be transferred.<sup>8</sup>

<sup>1</sup> Hed. Book XVI, ch. III.

<sup>2</sup> Hed. Book XVI, ch. IV.

<sup>3</sup> Or the pre-empted property. Hed. 550 Ball, I. 485.

<sup>4</sup> Hed. 550: Ball, I. 485. Refusal of the pre-emptor to take possession would, no doubt, be considered by the Court in dealing with the costs. It is also stated that the seller must be a party to a suit for pre-emption, so long as possession is not transferred to the purchaser,—after which he need not be a party.

<sup>5</sup> It is a sufficient compliance with such order to deposit the purchase-money less the costs due to the pre-emptor: *Iskri v. Gopal Saran* (1814) 16 All. 351; *Permaund Rao v. Gobaudhan Sahai* (1906) 28 All. 678; 3 All. L.J. 804; *Bichas Singh v. Shama Nath* (1910) 8 All. J., notes, 27; *Ali Husein v. Aminullah* (1912) 10 All. L.J. 153 though a different view was taken by Tyrrel J. in *Balmakand v. Pancham* (1888) 10 All. 400.

<sup>6</sup> Where there was an appeal against the

order that the money be paid within a month, and pending the appeal, the time expired, and the lower appellate Court dismissed the suit on that ground, held, by the High Court that the dismissal on this ground was wrong, inasmuch as the condition was itself the subject of appeal, *Kharahed-un-nisa v. Alimunnissa* (1912) 10 All. L.J. 421.

<sup>7</sup> See comment. According to strict Muhammadan law, the purchaser may refuse to give possession of the land to the pre-emptor until the pre-emptor pays the price for it: notwithstanding that the Court may have ordered him to deliver it; Hed. 552 (vol. II, par. 3).

<sup>8</sup> But this cannot prevent the pre-emptor mortgaging the property subsequently to the decree for the purpose of paying the price; *Bela Bibi v. Akbar Ali* (1901) 24 All. 119; or even selling it to a stranger and permitting him to pay the purchase-money into Court: *Ram Sahai v. Gayu* (1884) 7 All. 7. See s. 637 (explanation), above.



The Civil Procedure Code, O. XXV. r. 14 contains the form for a **SECTION 550.**  
decree in a pre-emption suit :— Form of decree.

“(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property, and the purchase-money has not been paid into Court, the decree shall—

- (a) specify a day on or before which the purchase-money shall be Payment of consideration.  
so paid,<sup>1</sup> and
- (b) direct that on payment into Court of such purchase-money <sup>1</sup> Delivery of possession.  
together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

“(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,— Several claims.

- (a) if and in so far as the claims decreed are equal in degree, that (a) equal in degree.  
the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,
- (b) if and in so far as the claims decreed are different in degree, (b) different in degree.  
that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.”

It will be seen that the form of the decree given above specifically provides for that being expressly provided for which follows as the result of the substantive Muhammadan law,—in accordance with which the decree of the Court, and payment of the purchase-money, are necessary for the completion of pre-emption.<sup>2</sup> Thus, on the one hand, where after making an assertion and demand of a claim to pre-emption but Payment into Court effectuates the transfer or completes the pre-emption.

<sup>1</sup> Where the appellate Court in a pre-emption suit enhanced the amount decreed to be payable by the pre-emptor in the first Court, but omitted to fix any time within which the enhanced amount should be paid, it was held that the pre-emptor was entitled to a reasonable time for payment and having regard to the enhanced amount, Rs. 801, the time within which it was in fact paid (one month

and one day after the decree) was reasonable and the plaintiff was entitled to execute his decree : *Debi Suran Tuarai v. Gupta Tuarai* (1914) 36 All. 511.

<sup>2</sup> Cf. *Dronadhan Prasad Singh v. Ramdhari Choudhri* (1916) 44 Cal 675 (P.C.), which was decided on s. 214 of the Code of Civil Procedure, 1882, which, however, was less elaborate than the corresponding provision in O. XXV. r. 14.

**SECTION 550.** before enforcing it, the pre-emptor dies, or forfeits his claim (e.g., if he sells the property, the ownership of which gives him the right to pre-empt), the claim is avoided under Muhammadan law<sup>1</sup> (see however s. 532, above); and on the other, the pre-emptor is entitled to the profits of the land accruing after he has enforced pre-emption by payment of the purchase-money,<sup>2</sup> notwithstanding that there may be a delay in the formal transfer of the land,<sup>3</sup> but he is not entitled to the rents and profits before payment;<sup>4</sup> while again, as soon as the payment is made into Court, the money is (so to say) converted into the subject of pre-emption, and so can no more be considered the property of the pre-emptor;<sup>5</sup> finally even the pre-emptor's non-compliance with the terms of the decree and non-payment of the purchase-money cannot affect his right of appealing from the decree.<sup>6</sup>

Act of buyer does not affect pre-emptor's claim, but effective until pre-emption enforced.

**551.** The claim to pre-emption is not affected by any act on the part of the buyer purporting to transfer or alienate the land, nor by his death; provided that any such act takes effect until the Court decrees the claim to pre-emption.<sup>7</sup>

*Illustration.*

• If the buyer B purports to sell the land to BA, the pre-emptor can claim it either from B or BA; and similarly, if B purports to make a gift or 'waqf' of it, or to convert it into a mosque or cemetery, or to let it on hire, the pre-emptor may annul the said acts.<sup>8</sup>

Pre-emptor not affected by alterations in terms of completed contract for sale.

**552.** The pre-emptor is not affected by any alterations in, or additions to, the terms of the contract of sale after it has been completed;<sup>9</sup> provided first that according to Sunni (but not according to Shiah) law, where, after the contract is completed the seller abates the price without

<sup>1</sup> Bail. I. 485.

<sup>2</sup> *Deo Dai v. Ram Anwar* (1886) 8 All. 502 (Oldfield and Mahmood, JJ.).

<sup>3</sup> *Deeknandan v. Sri Ram* (1889) 12 All. 234 (F.B.), decree vests the ownership in pre-emptor from date of payment of price; and does not postpone the vesting till he obtains possession; *Buldeo Pershad v. Mohan* (1866) 1 Agr. (REV.) 30.

<sup>4</sup> Hed. 552 (col. II. par. 3) the decree under O. XX. r. 14, provides for this: "whose title shall be deemed to have accrued from the date of such payment."

<sup>5</sup> The money is no more the pre-emptor's, as soon as it is paid into Court, and so his creditors

cannot attach it: *Abdus Salam v. Willayat Ali* (1897) 19 All. 256. See however *Sheo Gopal v. Najib Khan* (1914) 36 All. 308.

<sup>6</sup> See s. 528H, above.

<sup>7</sup> Bail. I. 497 (par. 2); II. 185 (par. 2); Hed. 562 (col. I. par. 2).

<sup>8</sup> Bail. II. 185 (par. 2).

<sup>9</sup> Bail. II. 182-183; so that if the purchaser subsequently agrees to pay a higher price to the seller, the pre-emptor is not bound to pay the enhancement, which must be "considered in law . . . a gift." Similarly, if the price is abated, the pre-emptor must, according to Shiah law, pay to the purchaser the full price agreed upon.

remitting it altogether, the pre-emptor is entitled to the benefit of the abatement; but where the price is entirely remitted, the buyer has the benefit thereof; provided secondly that where, after the completion of the sale, some defect is discovered in its subject, and the seller agrees to compensate the buyer for the defect, the pre-emptor is entitled to receive the compensation.<sup>2</sup>

*Explanation.*—The right of pre-emption is not affected by the seller and buyer dissolving the contract of sale after it has been completed,<sup>3</sup> or the buyer agreeing to pay a higher price than was originally agreed upon.<sup>4</sup>

The converse of what is stated in the *explanation* is also referred to, it being stated that if the pre-emptor acquiesces in the sale, and then the seller and buyer agree to cancel it, the pre-emptor cannot on the ground that the cancellation of the sale is a fresh transfer, claim to exercise the right of pre-emption.<sup>5</sup>

**553.** The purchaser must (subject to ss. 553A to 553E, below) give the land to the pre-emptor in the same condition in which it was when the seller gave possession thereof to the purchaser.

**553A.** According to Hanafi law, where the purchaser has made alterations or improvements, the pre-emptor has, subject to s. 553D, below, the option of either demanding that the land be put back into its original state, or of taking the land with the said alterations or improvements, on payment of their value.<sup>6</sup>

**553B.** Where the subject of pre-emption [perishes or] becomes damaged after demand<sup>7</sup> by the pre-emptor, the pre-emptor has the option of enforcing<sup>7</sup> his claim on payment of the full consideration, or of waiving pre-emption;

<sup>1</sup> Hed. 555 (col. 1. par. 2).

<sup>2</sup> Bail. II. 187 (par. 4).

<sup>3</sup> Bail. II. 184 (par. 3); *Bhodu Mahomed v. Radha Churn Bolia* (1870) 4 Beng. L. R. (A.C.) 219; *S. C. Bhodu Mahomed v. Radha Churn Bolia* 13 W. R. 332.

<sup>4</sup> Hed. 555 (col. 1. par. 3); see the footnote

to the word "completed" in s. 552, above.

<sup>5</sup> Bail. II. 185 (ll. 1-5).

<sup>6</sup> Bail. I. 496, Hed. 556 (col. 1. par. 2).

<sup>7</sup> The expressions demanding and enforcing pre-emption are of course used here in the sense explained in s. 522 (2) (c), above, viz., as referring to the *talab-i-ish had* and *talab-i-tamlik*.

SECTION 552A.  
Abatement  
or remission  
of price.

Defect in  
subject

Cancellation  
of sale

Pre-emptor  
gets land in  
same state as  
purchaser.

Improvements  
and alterations.

Subject  
deteriorating.

SECTION 553B. provided that where the damage is caused by the act of the purchaser he is responsible to the pre-emptor for the loss occasioned thereby.<sup>1</sup>

Improvements  
in land

553C. According to Shiah and Shafi'i law, where the purchaser has planted trees or erected buildings on the land, and subsequently pre-emption is demanded, (a) the purchaser has the option of removing the said trees or buildings, and is not obliged to level the ground; (b) and if he elects to remove them, the pre-emptor has the option of waiving his claim, or paying the full price for the land after the trees or buildings have been so removed; (c) if the purchaser declines to remove them, the pre-emptor has the option (i) of removing them himself, paying to the purchaser compensation for any loss that he may sustain thereby; or (ii) of taking possession of the whole, paying additional price as compensation for the said lands or trees; or (iii) of waiving the right of pre-emption.<sup>2</sup>

Cultivated  
land.

553D. Where the land has been cultivated, the pre-emptor cannot oblige the purchaser to take up the seed, but must wait until the ripening of the crops, after which he must pay to the purchaser the full price of the land without any deduction for its rents during the said period.<sup>3</sup>

Compensation  
for pre-existing  
defect  
subsequently  
discovered.

553E. Where a defect which existed in the land prior to the sale, is discovered subsequently, the pre-emptor has the option of avoiding the transfer to himself from the purchaser; if he elects to exercise it, the purchaser has the option of avoiding the sale, or of demanding compensation, from the seller;<sup>4</sup> and if he elects to demand compensation, the pre-emptor has the option of pre-empting the property with an abatement in the price.<sup>5</sup>

<sup>1</sup> Hed. 557 (col. ii. par. 2); Bnl. II. 187, 188. There is some dissent as to the proviso amongst the Shiah authorities.

<sup>2</sup> Bnl. II. 186 (par. 2, 3); Hed. 556 (col. ii. par. 2); Abu Yusuf's exposition of Hanafi law is to the same effect.

<sup>3</sup> Bnl. I. 196 II. 188 (*Shiah*), Hed. 557 (col.

I. last 9 lines) where it is stated that this is a special exception to the rule in s. 553A.

<sup>4</sup> Bnl. II. 192, 193 (*eighth*). See, however, comment to s. 549, above, with reference to these options.

<sup>5</sup> Bnl. II. 187 (par. 4), 193 n. 8.

**554.** Where the land is sold on the term that the price is not to be paid until a specified future period of time, the pre-emptor has, according to Hanafi and Shiah law, the option of paying the price either immediately or at the said future period, and in either case the land is not transferred to him until the price is paid;<sup>1</sup> provided that where the said future period is uncertain<sup>2</sup> [or unspecified] the pre-emptor has no option to defer payment, but must pay it immediately if he wishes to exercise his right of pre-emption.<sup>3</sup> According to Shafi'i law the pre-emptor has the right of taking immediate possession of the land, and can delay payment of the price until the said future period.<sup>4</sup>

**SECTION 554.**  
Sale on credit :  
right of  
pre-emptor.

S agrees to sell to B land on the terms that the price is not to be paid for a year ; P exercises his right of pre-emption : (a) he has the option of paying the price immediately or after a year ; (b) if he enforces his right of pre-emption after the land has been transferred to B, he must pay the price to B, not to S ; (c) if after such transfer P elects to enforce his claim, and pays the price immediately, then B is not thereby bound to pay the price over to S until after the expiration of the year.<sup>5</sup>

*Illustration.*

**554A.** Where, under the circumstances referred to in s. 554, above, the pre-emptor elects to pay the price immediately, and the land has prior thereto been already transferred to the purchaser, and the sale completed, the purchaser's right to defer payment of the price to the seller is not affected by the pre-emptor's election to pay the price immediately.<sup>6</sup>

Purchaser's  
right to defer  
payment to  
seller not  
affected by  
pre-emption.

**555.** Where the ground for the claim of pre-emption is an exchange of the land for some perishable object which perishes, the pre-emptor may give to the seller its value in lieu of it.<sup>7</sup> The same rule applies where the object to be given in exchange is such that "there is no similar to it."<sup>8</sup>

Exchange of  
land : the  
consideration  
perishing.

<sup>1</sup> Hed. 555 ; Bail. I. 491 ; II. 190.

<sup>2</sup> As, for instance, if credit is given "till harvest," or "the treading out of the corn" Bail. I. 491.

<sup>3</sup> Hed. 555 ; Bail. I. 491 ; II. 190.

<sup>4</sup> Hed. 555 (col. ii. par. 3).

<sup>5</sup> Bail. I. 491.

<sup>6</sup> Bail. I. 491 ; Hed. 556 (col. i).

<sup>7</sup> Bail. I. 488 (par. 2.)

<sup>8</sup> Bail. II. 183 (par. 3) though some Shiah authorities hold that in such a case the right drops.

## SECTION 556.

§ 8.—*Devices for Evading Pre-emption.**Pre-emption not favoured by the Law.*

Devices  
permissible

556. Pre-emption is not favoured by the law,<sup>1</sup> and any device may be adopted (which is not fraudulent, or forbidden by any law for the time being in force), in order to prevent the right of pre-emption from arising, or to defeat the provisions of the law in favour of the pre-emptor.

Compare ss. 522, 523, above, and comment thereto, also s. 5, above.

Attitude of law  
towards pre-  
emption.

"The right of 'shaffa' is but a feeble right, as it is a dispossessing another of his property merely in order to prevent apprehended inconveniences."<sup>2</sup> (This is stated to show why it is requisite for the 'shafi' without delay to disclose his intentions by making the demand,—which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the Qazi). In Madras pre-emption has been held to be opposed to justice, equity and good conscience (see s. 5, above). Nevertheless, Imam Muhammad considered evasions abominable, though Abu Yusuf did not take that view. Mahmood, J., in his elaborate judgment in *Gobind Dayal v. Inayatullah*,<sup>3</sup> has supported the existence of pre-emption, and apparently disclaimed the proposition contained in s. 556.

Instances of  
devices.

The following devices are mentioned in the texts.<sup>4</sup> (1) transfer in the form of a 'hiba bil-'iwaz,' (not of a sale)—the land being nominally the subject of gift, and the consideration the 'iwaz';<sup>5</sup> (2) giving a portion of the land to the purchaser prior to sale by way of gift or 'sadaqa,' demarcating or dividing it off<sup>6</sup> with a right of way thereto<sup>7</sup> common to the seller and purchaser, (3) sale of trees on the land with their foundations to the purchaser, thus making him a co-owner of the land with priority over either a 'khalit' or a neighbour; (4) ostensible statement of the consideration at a figure higher than that really

<sup>1</sup> See comment. As *Ajab Nath v. Mohdurn Prasad* (1886) 11 All. 164 may be mentioned.

<sup>2</sup> Hed. 550, cited in *Ram Charan v. Narbir Mahtun* (1870) 4 Beng. L. R. (A.C.) 216, 13 W. R. 256, and see *Dakshinai v. Chundol* (1915) 38 Bom. 183, 187; *Nusrat Raza v. Umbul Khayr Hibe and others* (1867) 8 W. R. 309; *Ali Muhammad v. Taj Muhammad* (1876) 1 All. 283; *Kudratulla v. Mahom. Mohun Shaha* (1870) 4 Beng. L. R. (F.B.) 134; 13 W. R. (F.B.) 21.

<sup>4</sup> (1885) 7 All. 775 (F.B.) (ad fin.).

<sup>5</sup> Bail. I. 501-506, II. 196-197; Hed. 563.

<sup>6</sup> As the 'iwaz must be agreed upon at the

time of the *hiba* it would not be a *hiba bil-'iwaz* but be turned into a *hiba ba shart ul-'iwaz* to which pre-emption would apply; see s. 525 *ult* (1), 526, above. Where the transfer was discovered to be really a sale, though disguised as a gift, pre-emption was allowed: *Chiragh Din v. Allah Din* (1916) 51 Punj. Rec. 208 (No. 70).

<sup>6</sup> This is necessary under Hanafi law in order that the gift may be void under the doctrine of *muhasa*.

<sup>7</sup> The right of way makes the grantee a *khalit*, thus giving him priority over a neighbour.

agreed upon; and subsequent composition of the price ostensibly agreed upon for an article of the value of the real price];<sup>1</sup> (5) [declaration that the sale is invalid or with an option to the seller]; (6) leaving unsold a strip of land along the boundary of the pre-emptor's land, so that his land actually does not adjoin the portion sold.<sup>2</sup>

It has been held by the Allahabad High Court that the claim of a co-sharer to enforce pre-emption may be defeated if before a suit is brought for enforcing pre-emption the buyer sells back the property to a co-sharer of the seller.<sup>3</sup>

### § 9.—*The Punjab and Oudh Laws Acts.*

557. Under the Punjab<sup>1</sup> and the Oudh<sup>1</sup> Laws Acts, Pre-emption under the Acts. the right of pre-emption is presumed to exist in all village communities and extends to the village-site, and the houses and lands within the village boundary, and is enforceable in accordance with the terms of the said Acts within the said limits.

The portions of the Punjab Laws Act (IV. of 1872) referring to pre-emption are set out below, the terms of the Oudh Laws Act (XVIII. of 1878), where they differ, being given in footnotes:—

9. [8]<sup>5</sup> The right of pre-emption is a right of the persons herein- Right of pre-emption. after mentioned or referred to, to acquire, in the cases hereinafter specified, immovable property in preference to all other persons. "It arises in respect of sale (whether under a decree or otherwise) of immovable property and of foreclosures of rights to redeem such property."<sup>6</sup>

10. [7]<sup>5</sup> Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the settlement-record or not, be presumed—

- (a) to exist in all village-communities however constituted, and
- (b) to extend to the village-site, to the houses built upon it, to all land and shares of lands within the village-boundary, and to all transferable rights of occupancy affecting such lands.

<sup>1</sup> Here the pre-emptor would be entitled to pre-empt on the terms of the real contract of sale, and not the ostensible or fictitious one.

<sup>2</sup> This device can defeat only a neighbour; besides it is imperfect, for it leaves the strip undisposed of: Ball. I. 506, n.

<sup>3</sup> *Narain Singh v. Purbal Singh* (1901) 23 All. 247. Contrast with this *Kamta Prasad v. Mohan Bhagat* (1909) 32 All. 45; *Khettar Chandra*

*v. Nabin Kati* (1913) 35 All. 385.

<sup>4</sup> Figures or words enclosed in [ ] do not form part of the Punjab Laws Act (but only of the Oudh Laws Act).

<sup>5</sup> Figures enclosed in [ ] refer to the Oudh Laws Act.

<sup>6</sup> Words enclosed in " " do not form part of the Oudh Laws Act (but only of the Punjab Laws Act).

## SECTION 557.

Its existence  
in towns to be  
proved.

11. [8]<sup>1</sup> The right of pre-emption shall not be presumed to exist in any town or city or any sub-division thereof, but may be shown to exist therein, and to be exercisable therein by such persons and under such circumstances as the local custom prescribes.

12.\* "If<sup>2</sup> the property to be sold, or the right to redeem which is to be foreclosed is situate within, or is a share of, a village, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,—

Devolution of  
right when  
property to be  
sold or foreclosed  
is situate within  
a village.

- (a) first, in the case of joint undivided immovable property, to the co-sharers ;
- (b) secondly, in the case of villages held on ancestral shares, to co-sharers in the village, in order of their relationship to the vendor or mortgagor ;
- (c) thirdly, if no co-sharer or relation of the vendor or mortgagor claims to exercise such right, to the landowners of the patti or other sub-division of the village in which the property is situate, jointly ;
- (d) fourthly, if the landowners of the patti or other sub-division

<sup>1</sup> The figures enclosed in [ ] refer to the Oudh Laws Act.

<sup>2</sup> Words enclosed in " " do not form part of the Oudh Act but only of the Punjab Act.

\* Sect 12 of the Punjab Act is so different from the corresponding section [9] of the Oudh Act that the two have to be separately printed. The Oudh Laws Act, s. 9, is as follows :—

Devolution of  
right when  
property to be  
sold or foreclosed  
is a proprietary  
or under-  
proprietary  
tenure.

9. If the property to be sold or foreclosed is a proprietary or under-proprietary tenure, or a share of such a tenure, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,—

- 1stly, to co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of the relationship to the vendors or mortgagor ;
- 2ndly, to co-sharers of the whole mahal in the same order ;
- 3rdly, to any member<sup>3</sup> of the village-community ; and
- 4thly, if the property be an under-proprietary tenure, to the proprietor.

Where two or more persons are equally entitled to such right, the person to exercise the same shall be determined by lot.

<sup>3</sup> *E.g.*, a person holding an under-proprietary interest in a mahal sold by the Court of Wards on behalf of the proprietor of the mahal: *Drig*

*Bijai Singh v. Deputy Commissioner of Gonda* (1902) 24 All. 42 (F.B.)



make no joint claim to exercise such right, to such land-SECTION 557.  
holders severally ;

- (e) fifthly, to any landholder of the village ;
- (f) sixthly, to the tenants (if any) with rights of occupancy in the property ;
- (g) seventhly, to the tenants (if any) with rights of occupancy in the village ;

“ Provided that when the property is land, to the trees standing on which the Government is entitled, such right belongs to the Lieutenant-Governor of the Punjab in preference to all other persons.

“ Where two or more persons are equally entitled to such right the vendor or mortgagor may determine which of them shall exercise the same.

“ Nothing in the former part of this section shall be deemed to affect the Punjab Tenancy Act, 1887, section 53 ; but if a landlord refuse or neglect to exercise the right conferred on him by that section, such right belongs, first, to the tenants (if any) with rights of occupancy in the property concerned, and secondly, to the tenants (if any) with rights of occupancy in the village in which such property is situate.”<sup>1</sup>

13. [10]<sup>2</sup> When any person proposes to sell any property, “or <sup>1</sup> Notice to pre-emptors.  
to foreclose the right to redeem”<sup>3</sup> any property, in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell such property, or of the amount due in respect of the mortgage, as the case may be.

Such notice shall be given through any Court within the local limits of whose jurisdiction the property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck up on the chaupal or other public place of the village, town, or city in which the property is situate.

14. [11]<sup>4</sup> Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within three months from the date of “giving”<sup>1</sup> such notice he <sup>2</sup> Loss of right of pre-emption.  
“to <sup>3</sup> the person so proposing to sell the price aforesaid or the fair market-value of the property or deposits the same in the Court from which the notice issued. When any money is so deposited, the Court shall give notice of such deposit to the vendor or mortgagor as the case may be.”<sup>1</sup>

<sup>1</sup> Words enclosed in “ ” do not form part of the Oudh Act, but only of the Punjab Act  
<sup>2</sup> Figures enclosed in [ ] refer to the Oudh Laws Act.

<sup>3</sup> Oudh Laws Act read: “or when he fore-

closes a mortgage upon ”

<sup>4</sup> For Oudh Laws Act, read: “or his agent pays or tenders the price aforesaid to the person so proposing to sell.”

**SECTION 557.**

Right of  
pre-emptor on  
foreclosure

**15** [12]<sup>1</sup> When the right of pre-emption arises in respect of the foreclosure of the right to redeem "any" property "any" person entitled to such right may, at any time within three months after the giving of the notice required by section 13, [10]<sup>1</sup> pay or tender to the mortgagee or his successor in title the amount specified in such notice, or the amount really due on the footing of the mortgage, and shall thereupon acquire a right to purchase the property.

On completion of the purchase, the person exercising the right of pre-emption shall be bound to pay to the mortgagee or his successor in title the amount specified in such notice, together with interest on the principal sum secured by the mortgage, at the rate specified by the instrument of mortgage, for any time which has elapsed since the date of the notice, and any additional costs which may have been properly incurred by the mortgagee or his successor in title.

Suit to enforce  
right of  
pre-emption.

**16.** [13]<sup>1</sup> Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds, (namely):—

- (a) that no due notice was given as required by section 13 [10];<sup>1</sup>
- (b) that tender was made under section 14 [11]<sup>1</sup> or section 15 [12]<sup>1</sup> and refused;
- (c) in the case of a sale, that the price stated in the notice was not fixed in good faith;
- (d) in the case of a foreclosure, that the amount claimed by the mortgagee was not really due on the footing of the mortgage, "or"<sup>4</sup> was not claimed in good faith, "or"<sup>4</sup> that it exceeds the fair market-value of the property mortgaged.

If, in the case of a sale, the Court finds that the price was not fixed in good faith, the Court shall fix such price as appears to it to be the fair market-value of the property sold.

If, in the case of a foreclosure, the Court finds that the amount claimed by the mortgagee was not really due on the footing of the mortgage, or that it was not claimed in good faith, or that it exceeds the fair market-value of the property mortgaged, the amount to be paid to the mortgagee shall not exceed what the Court finds to be such market-value.

Power to require  
payment into  
Court.

**16A.** "When" any suit is instituted under section 16, the Court may in its discretion require the plaintiff to pay into Court the price of market-

<sup>1</sup> Figures enclosed in [ ] refer to the Oudh Laws Act.

<sup>2</sup> Words in " " do not form part of the

Oudh Act, but only of the Punjab Act.

<sup>3</sup> Oudh Laws Act read: "a mortgage."

<sup>4</sup> For Oudh Laws Act read: "and."

value of the property, or, in the case of a right to redeem property, the SECTION 557. amount really due on the footing of the mortgage, and, if such requisition is not complied with in such time as the Court directs, may reject the plaint."<sup>1</sup>

19. "In<sup>1</sup> case of sale by joint owners, no person who has been a party to sale by party can withdraw his own share and claim a right of pre-emption as joint owners. to the rest."<sup>1</sup>

20. "In<sup>1</sup> villages in which the chakdari tenure prevails, the co-sharers in a well have a right of pre-emption as to shares in such well in preference to a general proprietor in any such village having no share in the well but merely receiving a haq zamindari from the chakdars."<sup>1</sup>

The Oudh Laws Act, ss. 14, 15, provide that the decree shall specify Date of payment: a day for payment, and that if payment is not made on that day, the Preferential right in well right of pre-emption will be lost. These sections are unrepealed under chakdars. though the Civil Procedure Code provides the same now (see s. 550, above) and the sections corresponding to them in the Punjab Laws Act (ss. 17, 18) have been repealed.

<sup>1</sup> Words enclosed in " " do not form Punjab Laws Act, part of the Oudh Laws Act, but only of the

## CHAPTER XII.

### ADMINISTRATION.

#### § 1.—*Preliminary.*

Terms.	558. In this chapter unless there is something repugnant in the subject or context,—
Probate.	(1) “ Probate ” means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator. <sup>1</sup>
Executor.	(2) “ Executor ” means a person to whom the execution of the last will of a deceased person is by the testator’s appointment confided. <sup>1</sup>
Administrator.	(3) “ Administrator ” means a person appointed by competent authority to administer the estate of a deceased person where there is no executor. <sup>1</sup>
Estate.	(4) “ The estate ” means all the property of any description whatsoever which a deceased Mussulman owns at the time of his death, and in which his interest is not limited to his lifetime. <sup>2</sup>
Deceased.	(5) “ The deceased ” means a deceased person whose estate has to be administered.
Illustrations.	(6) In the illustrations the deceased is generally referred to as P ( <i>propositus</i> ) ; his heirs as H, HA, etc. ; his creditors as C, CA, etc. ; transferees of the assets of the deceased as T, TA, etc. Italic letters refer to females. <sup>3</sup>

The executor in Muhammadan law is called the ‘ wasi.’ The word is derived from the same root from which ‘ wasaia,’ (or will) is derived, and

<sup>1</sup> *Verbatim* from the Probate and Administration Act (referred to in the footnotes as to this Chapter as P. & A. Act) s. 3.

<sup>2</sup> The word “ estate ” is used in this work in one of three meanings : (a) In this chapter (*i.e.*, for the purposes of administration) it means the gross estate ; (b) In the next chapter (*i.e.*, for testamentary purposes) it means the net estate,

*viz.*, after the funeral expenses and debts have been paid ; (c) In the final chapter (on Inheritance) it means what is left over after the funeral expenses, debts and legacies have all been paid

<sup>3</sup> In the footnotes to this chapter the Probate and Administration Act is referred to as P. & A. Act.

means "one who is recommended," and denotes the administrator appointed by the Court, as well as the executor appointed by the testator. **SECTION 558.**

**559.** The law applicable to the estate of a deceased Mussulman is the Sunni or Shiah law according as he professed to be a Sunni or Shiah at the time of his death.<sup>1</sup> The Probate and Administration Act applies to all Mussulmans, and takes the place in British India of the Muhammadan law on all points covered by the said Act.

The general principle that the rights and liabilities of the deceased should, as regards third parties, be left, as far as possible, in the same state in which they would have been had he continued to live, is subject to certain necessary exceptions. A simple rule of chronological priority cannot be applied. According to pure Muhammadan law, there are four distinct purposes to which the estate of the deceased is successively applicable: (1) his funeral expenses, (2) his debts, (3) his legacies, (4) the claims of his heirs.<sup>2</sup> The Muhammadan law has now been replaced by the Probate and Administration Act, ss. 101-105, the effect of which is that funeral expenses ought to be paid before all debts (s. 101); that expenses of judicial proceedings for obtaining Probate or Letters of Administration ought to be paid next (s. 102); that the wages for services within three months of the death of the deceased ought next to be paid (s. 103). Under s. 104: "Save as aforesaid no creditor is to have a right of priority over another. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend." "Debts of every description must be paid before any legacy" (s. 105).

**560.** According to Hanafi law, debts of which there is no proof except an acknowledgment by the deceased while in death-illness ('marz-ul-maut')<sup>3</sup> are postponed to all debts of which there is other proof.<sup>4</sup> *Quaere*, whether this rule of law is abrogated in British India by the Probate and Administration Act or otherwise.

<sup>1</sup> See s. 7, above.

<sup>2</sup> Bail. I, 683, *Minhaj*, 246 (Bk. 28, s. 1)

<sup>3</sup> See Bail. I, 623-624.

<sup>4</sup> The "proper dower" of a widow of the deceased has to be paid as a debt, and not a legacy, though he may have married her in death-illness: s. 108; cf. footnote to the word

"debt" in s. 563, below.

<sup>5</sup> On *marz-ul-maut* see s. 359 *Explanation* and comment

<sup>6</sup> Bail. I, 640, 684; Hed. 436-438, 684-685; cf. *Minhaj*, 188 (Bk. 15, s. 1) as to Sha'fi law which is different from Hanafi law.

Law governing estate of a Mussulman.

Mohammedan law.

1 Funeral expenses.

2 Debts.

3 Legacies.

4 Inheritance.

Probate Act.

1 Funeral expenses.

2 Judicial proceedings.

3 Wages.

4 Legacies

Equal and rateable payment.

Debts acknowledged on death-bed.

**SECTION 560.**

Insistence on  
payment of debts  
in Islam.

This rule of Hanafi law seems in one of its aspects to be a portion of the substantive law of wills: the acknowledgment of a debt, when fictitious, is hardly distinguishable from a legacy. It need not of course be fictitious, and may refer to a debt which is not capable of being proved in Court, or of moral obligation only. Sir R. K. Wilson, in connection with the favour shown to such acknowledgments, refers to the "anxiety of Muslims not to run any risk of sending a dying man before his Maker with his just debts undischarged."<sup>1</sup> The same considerations made the Muslim lawyers hold that the release by a widow of her dower even to a deceased husband, "is valid on a favourable construction of the law"<sup>2</sup> The strength of feeling in the minds of Mussulmans in this matter can be understood by referring to the Quran II. 280-286, and to the traditions<sup>3</sup> in which the Prophet is reported to have refused to pray over those who died in debt without leaving any means for paying it, until their creditors' claims were provided for, and to have said that "even martyrdom repeated thrice would not atone for debt undischarged."

Death-bed  
acknowledgment  
of debt.

When the testator acknowledges a debt on his death-bed, and there is no other proof of the debt, it ranks, in regard to priority, under Hanafi law, midway between a legacy and a debt; it is of no effect if it is in favour of an heir (except under the Shiah 'Ithna 'ashari' law); on the other hand, as regards strangers, it is effectual apparently against the whole and not merely a third of the estate, having priority over legacies; this priority must be attributed partly to the anxiety referred to above, that debts should be discharged, and partly to the fact that should the acknowledger recover from his illness, the liability will remain on him to discharge the acknowledged debt to the full extent: it will not be in the nature of a 'donatio mortis causa.'<sup>4</sup> See s. 600, below, and illustrations thereto.

### § 2.—Representatives of a Deceased Mussulman.

1. Executor or  
Administrator.

**561.** (1) The executor or administrator (where there is any) of a deceased Mussulman is his legal representative for all purposes in British India.<sup>5</sup>

<sup>1</sup> "Anglo-Muhammadan Law" (3rd ed.) s. 286.

<sup>2</sup> Bail. I. 544 and 544, n.

<sup>3</sup> *Nisכות-ul-Mamūh*, Book XII, Ch. 9, parts I, II and III.

<sup>4</sup> Cf. Justin. II vii, 1, on *donationes mortis causa*, with the very apt quotation from Homer there cited. Cf. s. 349, above.

<sup>5</sup> P. & A. Act, ss. 4, 88; cf. (*Mirza Kurrut-ul-ain v. (Naumb) Nazhat-ul-Dowla* (1905) 33 Cal. 116; 32 L.A. 24; 7 Bom. L.R. 876. The executor can therefore sell the property of the deceased for the purpose of paying off his debts: *Abdul Majeeth v. Kriehnamachari* (1916) 40 Mad. 248, 248.

(2) Where the deceased dies without appointing any executor,<sup>1</sup> and no person obtains letters of administration to the estate,<sup>2</sup> the whole of it devolves, as from the time of his death, upon his heirs, in severalty<sup>3</sup> in proportion to their respective rights of inheritance,<sup>4</sup> and subject to their liability<sup>5</sup> to pay (in the same proportion),<sup>6</sup> out of their shares in the estate, the charges referred to in the Probate and Administration Act, ss. 101—104, and subject also to the legacies (if any) validly bequeathed by him.<sup>7</sup>

(3) According to Hanafi law the executor of a deceased person may validly appoint a successor to himself for carrying out the purposes of the will under which he was made executor.<sup>8</sup> In the absence of such appointment, Abu Yusuf holds that the right devolves upon the survivors of two or more executors; Abu Hanifa and Imam Muhammad hold that an application to the Court is necessary for its directions.<sup>9</sup>

(4) In accordance with Shiah law the executor may be authorised so to appoint a successor to himself, but, in the absence of being so authorised, the better opinion is stated in the 'Sharaya'-ul-Islam' to be that he cannot validly do so.<sup>10</sup> Where there are several executors, and one of them dies without validly appointing a successor to himself, the right under Shiah law devolves upon the survivors,<sup>11</sup> and it is stated to be doubtful whether the

<sup>1</sup> If an executor is appointed the P. & A. Act applies, whether probate has been obtained or not: (*Shurk*) *Moosa v. (Shurk)* *Esau* (1881) 8 Bom 241, 255, 256.

<sup>2</sup> Cf. *Sakina v. Muhammad Ishak* (1910) 37 Cal. 1839. During the interval that must elapse between the death of the deceased, and the grant of letters of administration, the heirs (it would seem) initially represent the estate, but on the grant of the letters, the rights of the administrator relate back to the death of the deceased: P & A. Act, ss. 11, 15.

<sup>3</sup> *Abdul Khader v. Chudambaram Chettiar* (1909) 32 Mad. 276; *Abdul Majid v. Krishnamachariar* (1916) 41 Mad. 213, 234.

<sup>4</sup> *Jafri Begam v. Amir Muhammad Khan* (1885) 7 All. 822; cf. *Hasan Ali v. Mehdi Husain* (1877) 1 All. 533; *Abdul Majeed v. Krishnamachariar* (1916) 40 Mad. 243, 253, (per Abdul Rahim, J.). See *Pathamanabai v. Vitil Unmadhabai*, (1902) 26 Mad. 734, 739.

<sup>5</sup> Cf. *Bholanath v. Magbul-un-nissa* (1903) 26 All. 28.

<sup>6</sup> *Pethi Pal Sunk v. Hussain Jan* (1882) 4 All. 361.

<sup>7</sup> *Amir Duhun v. Bajwanth Singh* (1891) 21 Cal. 311, 315; *Jafri v. Amir* (1885) 7 All. 822, 842.

<sup>8</sup> *Bail. I. 672* (par. 4). *Hafeez-oor-Rahman v. Khadun Hosseini* (1871) 1 N. W. 106.

<sup>9</sup> *Bail. I. 671* (par. 2, 3). Abu Yusuf holds that the survivor may act by himself after the death of his colleague, just as one of several co-executors may act alone during the lifetime of the others.

<sup>10</sup> *Bail. II. 250* (par. 5), 249 (par. 3).

<sup>11</sup> *Bail. I. 622*, cf. *Munkaj*, 267 (Bk. 29, s. 7).

SECTION 561. Court has jurisdiction to appoint a successor to a deceased executor so long as there is any surviving executor.<sup>1</sup>

*Illustrations.*

(1) T says to E,—(a) “thou art my agent after my death;”<sup>2</sup> or (b) “attend to my children after me;” or (c) “pay my debts,” being then in a death-illness;<sup>3</sup> or (d) “to thee is the hire of 100 ‘dirhams’ on condition that thou wilt be my executor”—E is executor in each case, and in (d) he is also an unconditional legatee of 100 dirhams.<sup>4</sup>

(2) T makes a will giving shares in his property to his widow, son and grandchildren, and to charity, and directs that the son “should continue in possession and occupancy of the full sixteen annas of all the estate. . . All the matters of management in connection with this estate should necessarily and obligatorily rest ‘always’ and ‘for ever’ in his hands.” He also purports to restrict the right of alienation. The son retains possession and management till his death. *Held*, the son’s son cannot prevent the plaintiff, a sharer, from taking the full proprietary right in it.<sup>5</sup>

(3) P executes a bond in favour of C, and then dies, leaving H and HA as his heirs. C sues H and HA, describing them as P’s representatives, and also as being in possession of his estate. H and HA are not proved to be in possession of the estate: *held*, that the suit should not on that account be dismissed, but a decree passed for payment out of the property of P, and if there is no such property, the decree will remain unsatisfied; costs to be paid out of the estate (if any), and not by H and HA personally.<sup>6</sup>

Muhammadan  
law of adminis-  
tration not  
applicable

Except for the devolution of the property upon the heirs, most parts of the law of administration are adjective law, and Muslims must accordingly be governed by the British Indian, and not by the Muhammadan law of administration.<sup>7</sup> The Indian Succession Act, ss. 187, 190, 239, (not having been incorporated in the Probate and Administration Act) do not apply to Muslims, who are consequently under no necessity to apply either for probate, or letters of administration (see s. 563, below).

<sup>1</sup> Eas. II. 250 (par. 5), 249 (par. 3).

<sup>2</sup> Bail. I. 622; cf. *Munhu*, 267 (Bk. 29, s. 7).

<sup>3</sup> *Ibid.* Baillie translates *marz* literally by “sickness”; in legal language that word means *marz-ul-maut*, as stated in the ‘*Alumguri*. See also *Bismillah Begam v. Shahr Bano Begam* (1913, Sep.) 18 Ind. L. J. 179, 184.

<sup>4</sup> *Ibid.* (l. 4-6). This is contrary to the Indian Succession Act, s. 128, which applies to Hindus but not to Mussulmans.

<sup>5</sup> *Muhammad Abdul Majid v. Fatima Bibi* (1885) 8 All. 39; 12 I. A. 759.

*Madho Ram v. Dillour Mahal* (1870) 2

N. W. 149; cf. the following, quoted from the *Qaz. Khan in Jafri Begam v. Amir Muhammad Khan* (1885) 7 All. 822, 841: “If the debtor has died without leaving any property in the hands of the heir, even then the heir will be (impleaded as) defendant, for the claimant of the debt (that is, the creditor), and evidence will be taken and decree will be passed as to the debt, in order that the creditor may take any assets of the deceased which may be discovered.”

<sup>7</sup> *Jafri Begam v. Amir Muhammad Khan* (1885) 7 All. 822, 812, (*per* Mahmood, J.)



Where there is no executor or administrator, the heirs become the legal representatives, and they administer the estate, taking the place of the executor or administrator.<sup>1</sup>

SECTION 561.  
Representation  
of estate by  
the heirs.

The Privy Council have stated that the rules applicable to heirs of a Mussulman when they represent his estate "are quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personality."<sup>2</sup> It has, however, been held that the heirs are not bound to postpone the distribution of the estate till all the debts are paid.<sup>3</sup>

#### PERSONS WHO REPRESENT A DECEASED MUSSULMAN

##### I. When a Mussulman dies leaving a will -

###### (1) The executor is the legal representative—

- (a) as to one-third of the property for purposes of the will,
- (b) as to the rest as a bare trustee<sup>4</sup> for the heirs.

###### (2) The executor may, but need not, obtain probate—

- (a) if probate is obtained he represents the estate for all purposes, as stated in clauses (a) and (b) above,
- (b) if probate is not obtained, he cannot sue for debts—for the purpose of suing for debts—
  - (i) in the Presidency towns other than Bombay, probate is required;
  - (ii) in the city of Bombay, probate, or a certificate under Bombay Regulation VIII. of 1827 is required;
  - (iii) in the Mufassal,<sup>5</sup> probate, or a certificate under the Succession Certificate Act, or (in Bombay) a certificate under the said Regulation, is required.

##### II. When a Mussulman dies intestate -

- (1) the estate devolves on the heirs, who are the legal representatives;
- (2) letters of administration may, but need not, be obtained—

- (a) if they are obtained, the administrator represents the estate for all purposes: [cf. clauses (a) and (b) above; ]

<sup>1</sup> *Id.*; cf. *Hanan Ali v. Mehdi Ali* (1877), All. 533; see also *Rholanath v. Maqbul-un-nissa* (1903) 20 All. 28.

<sup>2</sup> And their Lordships refer to Sugden's "Vendors and Purchasers" (1862) p. 665, and Williams on Executors, p. 872; *Bazayet Hoosain v. Dool Chaud* (1878) 1 Cal. 402, 407, cf. *Hamir Singh v. Lakia* (1875) 1 All. 67, 68; *Pathumamah v. Vidhi Ummachadi* (1902) 26 Mad. 734, 738. The last cited case was over-ruled in *Abdul Mateeh Khan Sahib v. Krishnamacharur* (1910) 40 Mad. 243, on the point that one of

several heirs can be sued as representing the whole estate, provided that heir is in possession of the whole estate.

<sup>3</sup> *Pirthi Pal Singh v. Hananji Jan* (1882) 4 All. 361. In a Hindu case Sale J. said "under ordinary circumstances the widow and heiress would be the legal representative of the deceased": *Chandumull v. Ramee Soonderry Dossee* (1894) 22 Cal. 259, 262.

<sup>4</sup> See the note to "bare trustee" in a. 562, below, s. 1, i.e., where the Succession Certificate Act applies.

## SECTION 561.

(b) if they are not obtained, the heirs are the legal representatives, but cannot sue for debts except after obtaining a certificate under the Succession Certificate Act, or Bombay Regulation VIII. of 1827

### § 3.—Powers and Duties of the Representative.

Powers and duties of executors and administrators.

**562.** (1) After the payment of the funeral expenses and debts of the deceased, his executor or administrator is an active trustee for the purposes of the will as to one-third of the rest of the estate,<sup>1</sup> and a bare trustee<sup>2</sup> for the heirs as to the remaining two-thirds thereof.<sup>3</sup>

(2) The powers and duties of executors and administrators are defined in the Probate and Administration Act, which applies to all persons in British India including Mussulmans.<sup>4</sup>

Muhammadian executor or administrator in British India

Muhammadian law has been superseded in British India by the Probate and Administration Act, and the Privy Council have laid down the rule as stated in s. 562 (1) with reference to an executor who has obtained probate.<sup>5</sup> The position of the administrator (whether with or without the will being annexed to the Letters) would be similar. And it has been held that the Probate and Administration Act applies even where there is a will, and no probate has been obtained.<sup>6</sup> The rule has, therefore, been stated in the section without restricting it to an executor who has obtained Probate.

Muhammadian law of administration compared with Probate and Administration Act.

1 One of several executors acting alone  
2 Joint 'Wasi' appointed by Qazi when incompetent executor

Some of the rules of pure Muhammadian law are compared below with the provisions of the Probate and Administration Act. (1) Where there are several executors, the Muslim authorities are not quite unanimous whether one of several executors can act by himself without the concurrence of the others. The better opinion is, however, that he cannot act alone, except for the preservation of the goods of the deceased, or for providing his funeral expenses, or for the

<sup>1</sup> See s. 558 (4), above

<sup>2</sup> A bare trustee has been defined as a trustee to whose office no duties were originally attached, or who although such duties were originally attached to his office would on the requisition of his *cestui que trust* be compellable in equity to convey the estate to them or by their direction. *Chesley v. Orington* (18, 6) 1 Ch. D. 279, 281 (*per* Hall, V. C., adopting Daint's Vendors and Purchasers, 5th ed., 517); *In re Cunningham and Fawling* [1891] 2 Ch. 567, 572 (*per* Stirling, J.) See, however, *Morgan v. Swanson* (1878) 34 Ch. D. 582 (*per* Jessel, M. R.). See also *Indian Trusts Act*, s. 56; Halbury, "Laws of England," XXVIII, 86, Trusts, § 186.

<sup>3</sup> (*Mirza Kusrat-ul-ain Bahadur v. (Nawab) Nazhat-ul-daula* (1905) 33 Cal. 116; 32 I. A. 241.

<sup>4</sup> The provisions of the P. & A. Act are not dealt with in this chapter, unless the law in the case of Mussulmans differs from the general law of British India

<sup>5</sup> (*Shah v. Moosa v. (Shah) Essa* (1884) 8 Bom. 241, 255, 256; see *Sakina v. Muhammad Ishak* (1910) 37 Cal. 839.

immediate necessity of his family, or property.<sup>1</sup> S. 92 of the Act SECTION 562, empowers any one executor to exercise the powers of all. But it has been held that this power is restricted to cases where probate has been obtained. So that there is no conflict of laws. See also s. 11 of the Act. (2) The Muhammadan law empowers the Court to appoint a joint 'wasi' (administrator) when the executor appointed by the testator is weak or incompetent.<sup>2</sup> There is no such power under the Act, ss. 6, 16. (3) The more approved Shiah law agrees with s. 11 of the Act by which representation accrues to the surviving executors on the death of the others.<sup>3</sup> The Hanafi authorities also differ amongst themselves, but apparently the executor of a deceased executor takes the place of the latter.<sup>4</sup> (4) An executor, who is a minor, may act as such under Muhammadan law, but on application being made to the 'Qazi,' he may be removed.<sup>5</sup> The Act prevents a minor from applying for probate (s. 8), but is silent as to his capacity to act as such without obtaining probate. The limited grant of administration where a minor is appointed executor, has its counterpart in Shiah law, and (according to the two disciples) in Hanafi law.<sup>6</sup> (5) Remarks similar to the last apply to executors who are not Mussulmans.<sup>6</sup> (6) It has been held that probate cannot be refused on the ground that the Court does not think that the duly appointed executor (though not incapacitated by law) is not a fit person.<sup>7</sup> Similarly, under Muhammadan law, one who has been nominated an executor, cannot be removed except for malversation; though an administrator may be appointed to act jointly with him. (7) Under the Hanafi law it is no part of the duty of an executor to partition the property amongst the heirs; but in the partition he represents the minors. The legatee of a fraction of the estate is in the same position as an heir.<sup>8</sup> (8) Except by operation of the Act the property did not vest in an executor under Hindu or Muhammadan law.<sup>9</sup> (9) Under pure Muhammadan law the moral duty of accepting an executorship when asked to do so<sup>10</sup> and the legal incapacity from renouncing after accepting, are not always kept quite distinct.<sup>11</sup> (10) The Muhammadan authorities differ on the question whether an executor can purchase

3. Survival of powers of joint executors.

4. Minor executor.

6. Non-Muslim executor.  
6. Removal of executor.

7. Partitioning no part of 'wasi's' duty.

8. Property did not vest in 'wasi.'

9. Executor purchasing deceased's property.

10. Liability for misapplication of funds.

<sup>1</sup> Bail. I. 670; II. 248, 249. *De'agan-ul-Islam* (Notes) see also *Ayderman Kuttis v. Syedal* (1912) 37 Mad. 514.

<sup>2</sup> Bail. I. 669.

<sup>3</sup> Bail. II. 250, 251, 249.

<sup>4</sup> Bail. I. 671, 672, 678.

<sup>5</sup> Bail. II. 248, 249; I. 669; cf. P. & A. Act. ss. 31, 32.

<sup>6</sup> Bail. I. 669; II. 249, 251; cf. s. 564, below.

<sup>7</sup> Cf. P. & A. Act, ss. 8, 85.

<sup>8</sup> Bail. I. 673-674; cf. P. & A. Act, sec. 4.

<sup>9</sup> *Ibid.* ss. 4, 90; *Joykai v. Submath Chait-*

*lugh* (1864) 2 Beng. L. R. (O.L.J.) 1, (Pharaj); *Kherodumoney Dutt v. Doongamoney Dutt*, (1878) 4 Cal. 453; C. L. R. 315 (Markby, J.); *(Murza) Kurat-ul-amin v. (Nasab) Nazhabud-daula* (1905) 33 Cal. 116; 32 I. A. 244.

<sup>10</sup> Bail. II. 250.

<sup>11</sup> Cf. Bail. II. 250; Bail. I. 665-667; *Aysha Bai v. Ebrahim Haji Jirab* (1908) 32 Bom. 364, per Davar J., following *Rogers v. Frost* (1827) 1 Y. & J. 409; and cf. *Re Goods of Viega*, 32 L.J. (P. & M.) 9; cf. P. & A. Act, s. 16, and the Indian Trusts Act, s. 10.

- SECTION 562.** any part of the property of the deceased, but it seems he may do so at a fair valuation.<sup>1</sup> (11) The rule of Muhammadan law that "an executor is an 'ameen' or trustee and, therefore, not responsible for any loss or destruction of the deceased's property unless occasioned by his departure from the conditions or rules of his office or by some personal neglect,"<sup>2</sup> may be compared with s. 146 of the Act. (12) Under s. 117 of the Act the executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death: this repeals the Muhammadan law under which "in the case of a bequest, the transfer is to be decreed from the death of the testator and not from the time of taking possession."<sup>3</sup> (13) The Muhammadan law allows the executor remuneration for his work as such, to which he would not be entitled under the English law. See s. 344, above, and comment thereto.

Paying legacies  
out of claims  
as realized.

**562A.** Where the estate consists wholly or in part of claims against third parties, and the legacies amount to more than one-third of the assets realised by the executor or administrator, the legacies are to be paid only to the extent of one-third of the assets actually in his hands, and as the further claims are realised, the legatees are to be paid one-third out of the sums so realized.<sup>4</sup>

#### § 4.—Forensic Recognition of Representative.

##### (1) Forensic Recognition how far Necessary.

Forensic recog-  
nition not  
necessary

**563.** The executor or a legatee under the will of a deceased Mussulman can establish his rights as such in any Court in British India without production of the probate of the will under which the right is claimed, or letters of administration with the will or an authentic copy thereof annexed; <sup>5</sup> provided that no Court will pass a decree against a debtor of a deceased Mussulman for payment of the debt <sup>6</sup>

—except for  
taking legal  
proceedings  
against debtor  
of deceased.

<sup>1</sup> Bail II. 250; I. 681; cf. P. & A. Act, s. 91.

<sup>2</sup> Bail II. 250.

<sup>3</sup> Bail II. 207.

<sup>4</sup> Bail I. 631 (par. 2).

<sup>5</sup> *Sakina v. Muhammad Ishtak*, (1910) 37 Cal. 839 (Pugh J.) the same had been held (Sargent, C.J., and Bayley, J.) in *(Shah) Moosa v. (Shah) Essa* (1884) 8 Bom. 244, 255. See also *Sabji Sahib v. Noorin Sahib* (1898) 22 Mad. 139, 141 (*per* Shephard J.), with whom Subramania Aiyar, J., agreed.

<sup>6</sup> Succession Certificate Act, s. 4, cited in

comment. In *Mahomed Ishtak v. Shaik Akramul Haq* (1907) 12 Cal. W. N. 84, the heirs of the wife were allowed, it appears, to sue for her dower without a succession certificate, apparently through oversight; and the Court considered only the question whether it was necessary for all the heirs to be parties to the suit. That *Mahr* is a debt within the terms of the Act was held in *(Sayad) Ahmad Shaik v. Mussammat Buzaydah Begam*, (1811) 26 Fuzj. Rec. 429 (No. 88).

to the heirs or executors (or creditors),<sup>1</sup> or proceed upon their application to execute against such a debtor a decree or order for payment of the debt, unless the heirs or executors (or creditors) have obtained forensic recognition of their right to represent the deceased.

Though probate is not necessary for general purposes, yet in order to be enabled to sue on a debt due to the deceased, it is necessary to get some forensic recognition of the right to represent the estate either under the Probate and Administration Act, or the Succession Certificate Act (VII. of 1889) or Bombay Regulation VIII. of 1827. The last two enactments are considered below.

The Succession Certificate Act VII of 1889, s. 4, is as follows :—

“ 4 (1) No Court shall—

- (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or to any part thereof, or
- (b) proceed upon an application of a person claiming to be so entitled to execute against such a debtor a decree or order for the payment of his debt,—

except on the production, by the person so claiming, of —

- (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased ; or
- (ii) a certificate granted under s. 36 or 37 of the Administrator-General's Act, 1874, and having the debt mentioned therein ; or
- (iii) a certificate granted under this Act, and having the debt specified therein ; or
- (iv) a certificate granted under Act XXVII. of 1860 or an enactment repealed by that Act ; or
- (v) a certificate granted under the Regulation of the Bombay Code No. VIII. of 1827 ; and, if granted after the commencement of this Act, having the debt specified therein.

“(2) The word ‘ debt ’ in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.”

Clauses (i) to (v), above, refer to the various modes of obtaining forensic recognition, and these will now be considered in their order.

<sup>1</sup> See the Administrator-General's Act, s. 37, which is cited in the comment,

## SECTION 563.

(i) Mussulmans may obtain Succession Certificate outside Presidency towns though there is a will.

(i) The Succession Certificate Act, s. 1 (4), provides that "a certificate shall not be granted" under the said Act "with respect to any debt or security to which a right can be established by Probate or Letters of Administration under the Indian Succession Act, 1865, or by probate of a will to which the Hindu Wills Act 1870 applies, or by Letters of Administration with a copy of such a will annexed." Neither the Indian Succession Act nor the Hindu Wills Act applies to Muslims, and as the Probate and Administration Act (under which alone a Mussulman can obtain probate) has been expressly omitted<sup>1</sup> from this clause, it would appear that the representatives of a deceased Mussulman may apply for and obtain a Succession Certificate notwithstanding that the deceased has left a will.<sup>2</sup> Such a certificate can, however, only be obtained from a District Judge; hence, where the deceased has died leaving a will, the executor or heirs are apparently bound, within the Presidency towns, to obtain Probate or Letters of Administration for being enabled to sue for debts due to the deceased.<sup>3</sup>

(ii) Certificate by Administrator-General.

(ii) The Succession Certificate Act, s. 4 (1) clause (ii) applies to the Administrator-General, who (under the Act referring to him, s. 36: see below) is empowered, —in cases where the assets do not exceed Rs. 1,000, and Probate or Letters of Administration has or have not been granted, —to grant certificates entitling the executor or widow or other heir to receive the assets of the deceased.

Administrator-General's Act.

The Administrator-General's Act, s. 36, is as follows:—

In which cases granted.

"Whenever any person<sup>1</sup> shall have died, whether within any of the said Presidencies or not, whether before or after the passing of this Act, and whether testate or intestate, and shall have left assets (whether movable or immovable or both) within any of the said Presidencies,<sup>2</sup> and the Administrator-General of such Presidency is satisfied that such assets do not exceed in the whole one thousand rupees in value, he may, after the lapse of one month from the death, if he thinks fit, or before the lapse of the said month, if he is required so to do by writing under the hand of the executor, or the widow, or other person entitled to administer the effects of the deceased, grant to any person claiming otherwise than as a creditor to be entitled to a share of such assets, certificates under his

<sup>1</sup> The P. & A. Act is expressly mentioned in s. 21 (1), of the Succession Certificate Act.

<sup>2</sup> The same result is brought about for Native Christians by Act VII. of 1901, s. 5.

<sup>3</sup> Obtaining probate or letters or a certificate is referred to as obtaining forensic recognition by Westropp, C.J., in *Pursholam v. Runchhod* (1871) 8 Bom. H.C.B. (A.C.J.) 152, 156.

\* Originally the section began as follows:

"Whenever any persons not being a Hindu, Muhammadan or Buddhist or exempted under the Indian Succession Act, s. 332, from the operation of the Act." The words in italics have been repealed, see p. 741, s. 2, below.

<sup>5</sup> It will be noted that this section applies when there are any assets "within any of the said Presidencies," and ss. 17 and 18 apply only to assets within the Presidency Towns.

hand entitling the claimant to receive the property therein mentioned, SECTION 563. belonging to the estate of the deceased to a value not exceeding in the whole one thousand rupees. Provided that no certificate shall be granted under this section where Probate of the deceased's will or Letters of Administration of his effects has or have been granted, or in respect of any sum of money deposited in a Government Savings Bank."

Not where Probate or Administration granted, nor for money in Government Savings Bank.

By the Administrator-General's Act, s. 37 (which does not apply to Mussulmans), on the failure of any person other than a creditor to apply for such a certificate, the Administrator-General is required either to administer the estate himself, or to grant a certificate to a creditor.<sup>2</sup>

The result is, therefore, that where a Mussulman dies leaving property of less value than Rs. 1,000, the Administrator-General of the Presidency within which the assets of the deceased are, may "grant to any person claiming otherwise than as a creditor, a certificate entitling the claimant to receive the property therein mentioned," but to a creditor of a deceased Mussulman, he cannot grant the certificate (as he can to the creditor of a person to whom the Succession Act applies). Nor may he administer a Mussulman's estate himself, except by order of the Court under s. 17 or 18 of the Act. The remedies available to creditors of a deceased Mussulman are discussed under s. 566, below

Certificate granted—  
(a) When assets less than Rs. 1,000, and  
(b) Applicant other than creditor. Administration by Administrator-General, ss. 17, 18.

(iii) The Succession Certificate Act, s. 4 (iii) refers to certificates under that Act itself, which are granted by the District Court<sup>3</sup> within whose jurisdiction the deceased resided, or, if he had no fixed residence, any part of his property is situated (s. 5), and may empower the person holding the certificate to receive interest or dividends or to negotiate or transfer, or both to receive interest or dividends to and to negotiate or transfer the securities (s. 8). Such certificates are conclusive as against the persons owing the debts or liable on the securities which are mentioned in the certificates, and afford full indemnity to all such persons for their payments or dealings according to the certificate (s. 16).

(iii) Succession Certificate Act.

<sup>1</sup> See the Government Savings Bank Act, V. of 1873.

<sup>2</sup> Administrator-General's Act II. of 1871, s. 36, did not apply to Muhammadan before 1881. But by Act IX. of 1881, s. 5, the words "nor being a . . . Muhammadan" were removed from the first clause of s. 36 and inserted at the end of the second paragraph of s. 37. Then s. 11 (2) of Act II. of 1890, repealed s. 5 of the Act of 1881, in so far as it inserted the said words in s. 37. Later, Act XII. of 1891, Sched. I., Part 1, repealed "so much of s. 5 of Act IX. of 1881, as had not been repealed," and also

s. 11 clause (2) of Act II. of 1890. The said s. 11, was itself repealed by Act I. of 1903.

<sup>3</sup> *I.e.*, a Court presided over by the District Judge: Succession Certificate Act, s. 3 (1). See, 26 empowers the Local Government by notification to invest any Court of inferior grade with the powers of a District Court for this purpose. See Punjab Courts Act, s. 23 (b). See also General Clauses Act, s. 3 (15): "District Judge" shall mean the Judge of a Principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

**SECTION 563.** (iv) The Succession Certificate Act, s. 4 (iv) refers to certificates (iv) Act. XXVII. already granted under previous Acts similar to that Act.<sup>1</sup>

(v) Bombay Regulation. Clause (v) of s. 4 refers to Bombay Regulation VIII. of 1827, which is more fully referred to below.

The Succession Certificate Act s. 15, provides that the certificate shall have effect throughout British India, and s. 16 makes it conclusive as to the debt or liability (subject to s. 25, by which the question can be raised again in a suit), and affords full indemnity to all persons making the payments or satisfying the liability in good faith.

Referring now to Bombay Regulation VIII. of 1827, the preamble recites: "Whereas at the same time that it is in general desirable that the heirs, executors, or legal administrators of persons deceased should, unless their right is disputed, be allowed to assume the management, or sue for the recovery, of property belonging to the estate without the interference of Courts of justice, it is yet in some cases necessary or convenient " [that the Courts should be authorized to grant certificates of heirship or administratorship] And the important sections are as follows: "S. 1. "Whenever a person dies leaving property, whether movable or immovable, the heir or executor or legal administrator may assume the management, or sue for the recovery of the property in conformity with the law or usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognised." Then ss. 2 to 5 provide for the recognition of the right as heir or executor or administrator for the purpose of rendering it more safe for persons in possession of or indebted to the estate to acknowledge and deal with him, and authorize the judge to grant a certificate of heirship, executorship or administratorship after the issue of a proclamation and an investigation. "S. 7. *First*. An heir, executor, or administrator holding the proper certificate may do all acts and grant all deeds competent to a legal heir or administrator, and may sue and obtain judgment in any Court in that capacity. *Second*.—But as a certificate confers no right to the property, but only indicates the person who for the time being is in legal management thereof, the granting of such certificate shall not finally determine nor injure the rights of any person, and the certificate shall be annulled by the Zilla Court upon

11. Bombay Regulation VIII. of 1827. Preamble.

S. 1. Heir or executor or legal administrator may manage or sue.

Ss. 2-5, object of certificate.

S. 7, effect of certificate. Certificate not final.

Annulment of certificate.

<sup>1</sup> It may be noted that by Act XXVII. of 1860, no debt was recoverable without a certificate, "unless the Court should have been of opinion that payment of the debt was withheld from fraudulent or vexatious motives,

and not from any reasonable doubt as to the party entitled," (s. 2). By ss. 3 and 15, as between Probate and Certificate, whichever was prior in time was to invalidate the other, with respect to the debt specified in the certificate.



proof that another person has a preferable right. *Third*—An heir, SECTION 563, executor or administrator holding a certificate shall be accountable for his acts done in that capacity to all persons having an interest in the property in the same manner as if no certificate had been granted. S. 8 provides that the refusal to grant a certificate does not bar a suit. Holder of certificate accountable.  
Section 8, suit.

## (2) Forensic Recognition how Obtained

564. (1) Probate of the will of a Mussulman, or Letters of Administration with the will annexed, can be obtained, whether it is oral or written. Forensic recognition.  
Probate of oral will.

(2) One of several heirs of a deceased Mussulman cannot obtain a certificate under the Succession Certificate Act, VII, of 1889, ss. 2 and 4, for collection merely of part of a debt due from the deceased. Certificate as to part of debt.

(3) According to strict Muhammadan law a non-Muslim may not be lawfully appointed an executor of the will of a Muslim, and where a non-Muslim is purported to be so appointed, on an application being made to the Court, he must be removed, provided nevertheless that, unless and until he is removed by the Court, his acts as executor are valid and effectual; <sup>3</sup> but, *semble*, the Courts in British India will not remove an executor who is a Muslim at the time of his appointment, notwithstanding that he may subsequently have renounced Islam. <sup>1</sup> *Quære*, whether in British India the Courts will remove or refuse to grant probate to a non-Muslim executor. <sup>5</sup> Non-Muslim executor: probate.  
Removal of executor.  
Removing non-Muslim or refusing probate to him.

Under the Probate and Administration Act, s. 6, "probate can be granted only to an executor appointed by the will"; under s. 8, "probate cannot be granted to any person who is a minor or is of unsound mind," when may be refused. Executor alone can get probate; when may be refused.

<sup>1</sup> *In re will of Haji Mohamed Abul, Mar-ambai v. Hasan Ahmed* (1898) 21 Bom. 8, 1 Bom. L. R. 715.

<sup>2</sup> *Ghufur Khan v. Kalawari Begum* (1911) 33 All. 327; *Muhammad Ali Khan v. Pultan Bibi* (1890) 19 All. 129; *Bismilla Begum v. Tanazzul Hussain* (1910) 32 All. 335.

<sup>3</sup> Ball. I. 668; II. 248; 249. Similarly, a minor remains executor until removed; Ball I. 669.

<sup>4</sup> See the Caste Disabilities Removal Act

set out in the comment to s. 1, above.

<sup>5</sup> *Mohammad Amnerooden v. Muhammad Kuberooden* (1825) 4 Cal. S. D. A. 19, (see questions 2 and 3, answers at pp. 51, 52, 55); *Moul., Dig. I. 251* (No. 109). Cf. *Henry Imbach v. Zuharooddeen*, 1 Cal. S. D. A. 301, 303; *Moul., Dig. I. 251* (No. 111); appointment of Christian executor held to be a legal act, per *Leyesator, C. J.*, and *Sealy, J.*, C. Smith second judge dissenting—the parties being Shiaks (see 1 S. D. A. 302). See comment to s. 565

**SECTION 564.** No others are excepted from those to whom probate must be granted, and the Calcutta High Court has held that probate cannot be refused to a duly appointed executor, unless he is disqualified.<sup>1</sup>

Non-Muslim  
executor may  
prove.

It has been held that a non-Muslim executor has sufficient interest in the will to be entitled to prove it,<sup>2</sup> and where a non-Muslim is sole executor, even if it is held that his appointment is invalid, the Court may, if necessary, grant him letters of administration with the will annexed; in any event the will cannot be declared to be invalid because, *e.g.*, a Hindu is appointed executor.<sup>3</sup>

### (3) *Effect of Probate.*

Effect of  
Probate or  
Letters of  
Administration.

**565.** Where probate of a Mussulman's will, or letters of administration to his estate with the will (if any) annexed, is obtained, it establishes conclusively the claim of the executor or administrator to represent the estate as an active trustee as to one-third of the property for the purposes of the said will, and as a bare trustee<sup>4</sup> for the heirs as to two-thirds of the property.<sup>4</sup>

*Illustration.*

*P* died leaving her grandchildren, *H* and *HA* as her heirs. *P* had, before her death, made various gifts to *E*, and appointed him executor of her will, in which she confirmed the gifts. Probate of the will was granted to *E* in 1900,—in spite of caveats by *H* and *HA* who had also meanwhile instituted a suit in 1897, impeaching the gifts and will on the ground of undue influence. *Held*, that probate having been obtained of the will, it established *E*'s claims to one-third of the estate for purposes of the will (*i.e.*, as gifts to *E*) but the gifts to *E* having been shown to be made under undue influence, their confirmation by the will was effective only as a legacy, and valid only as to one-third of the estate, and as to the other two-thirds of the estate, *E* was a bare trustee for *H* and *HA*.<sup>4</sup>

This section refers to some incidents of obtaining forensic recognition having peculiar relation to Muhammadan law. The general law of obtaining probate or letters or succession certificates has so far as necessary been dealt with under s. 563, above.

<sup>1</sup> *Hara Coomarr Sircar v. Doorgunous* (1899) 21 Cal. 195; following *Surethkurl v. Tomlin* (1861) 30 L. J. (PRO.) 269; *Re goods of Sampson* (1873) L. R., 3 P. & D. 48, Williams on Executors (1912 ed.) L. 146.

<sup>2</sup> *Jehon Khan v. C. K. Mandy* (1868) 10 W. R. 1851; Beng. L. R. Short Notes of

Cases, p. XVI.

<sup>4</sup> The expression BARE TRUSTEE is explained in a footnote to s. 562, above, *q. v.*

<sup>4</sup> (*Mirza Kurrat-ul-ain Bahadur v. (Nasir) Nazhat-ul-Dowla Abbas Hossain Khan* (1905) 33 Cal. 116; 32 L. A. 244.

The executor of a Mussulman takes no title as such to the property **SECTION 565.** by virtue of the probate, except under the Probate and Administration Act. Hence the effect of probate must be that which is given by the Act itself, (and mentioned in s. 565) neither more nor less.<sup>1</sup>

(1) The executor appointed by the deceased has (a) the first claim to obtain probate; but if he does not apply for it, the Court may in its discretion appoint (b) another, as administrator with the will annexed; and, in any case, (c) the executor is the representative for the purposes of the will, for only one-third of the estate; the rest of the two-thirds becoming vested in him as a bare trustee for the heirs. (2) the person entitled next after the executor is one to whom letters of administration have been granted under the Probate and Administration Act—who may be an heir, legatee or creditor of the deceased; (3) where there is neither an executor nor administrator, the estate devolves upon the heirs collectively.

Persons entitled to represent the deceased.  
1. Executor.  
2. Administrator.  
3. Heirs.

### § 5.—Legal Position of Heirs as Representatives.

#### (1) General Principles: Alternatives.

**566.** The powers and duties of the heirs of a deceased Mussulman, where there is neither an executor nor administrator of the deceased, are governed by the adjective law of British India<sup>2</sup> and by justice, equity, and good conscience.<sup>3</sup>

Powers and duties of the heirs when they represent the estate.

#### 1. THE LAW TO BE APPLIED WHEN THE ESTATE DEVOLVES ON THE HEIRS

There seem to be no legislative enactments directly governing the circumstances referred to in this section. For the Probate and other Acts do not contemplate any other legal representative except executors and administrators, the latter being defined as persons appointed by competent authority to administer the estate of a deceased person when there is no executor. It has been held, for instance, that the heirs are not bound, as executors or administrators are, to postpone the distribution of the estate till all the debts are paid. This decision was given before the Probate and Administration Act was passed, but decisions after the passing of the Act have held that a rateable distribution of the

The law applicable to heirs as representatives of a deceased Mussulman.

<sup>1</sup> See p. 744, n. 4.

<sup>2</sup> *Jafri Begam v. Amir Muhammad Khan* (1883) 7 All. 822, 841-845.

<sup>3</sup> *Bussunteram v. Kameludin* (1885) 11 Cal.

of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right"—*P. C. in Bussentur Lal Sahoo v. (Maha-*

**SECTION 566.** assets is not necessary.<sup>1</sup> But, *semble*, a distribution of the estate which is done with the idea of fraudulently (or perhaps even unduly) preferring one creditor over another will not be countenanced by the Court

## 2. PARTIES TO SUITS INVOLVING RIGHTS OR LIABILITIES OF THE DECEASED.

Difficulty  
where the strict  
rules of  
procedure  
not observed.

Difficulties and conflict of decisions on this branch of the law have been mainly caused by failure (through neglect, or ignorance, or fraud,) to act on the principle that (a) after the death of a person, his legal representatives must be parties to any transaction based on rights or liabilities arising from the act of the deceased; and that (b) where there is neither an executor nor administrator, all the heirs together, and not merely one or other of them, can represent the estate. The Courts have tried, in disputes under such circumstances, to act so as neither to strain to too great an extent the forms of procedure established for safeguarding the rights of all parties, nor, on the other hand, to make these forms themselves productive of hardship. This has not been always easy. Even in England, where matters are not complicated by the admixture of two systems of law, differences of opinion have occurred.<sup>2</sup> The circumstances of cases coming before the Courts are often such that the general principles have been strained to prevent their operating harshly on some party, and the principles themselves become thereby obscured.

Conflict of  
principles.

The subject may be grouped under the following heads:—

I. Where the  
representa-  
tives  
forensically  
authorized.

I Where the legal representative has obtained forensic recognition<sup>3</sup> (*i.e.*, probate or letters of administration) there seems no doubt that the executor or administrator must be a party to any suit relating to the rights or liabilities of the deceased, and that no one else can represent the estate.

II. Where  
not—*i.e.*, where  
executors, with-  
out probate  
or no will, nor  
letters.

II. Where there is no person authorized to represent the estate under the Probate Act, or otherwise—

<sup>1</sup> *Parthi Pal Singh v. Husain Jan* (1822) 4 All 361; *Veerabakshjee v. Papiah* (1902) 26 Mad. 792 (Hindu case) followed (*Haji Saboo Solick v. Ally Mahomed Jan Mahomed* (1904) 6 Bom L R 1134, cf *Wahidudnessa v. Shubratna* (1870) Beng. L R. 54; and Probate Act, ss. 103, 107, *et al.*).

<sup>2</sup> *Reg. v. Ruyner v. Korher* (1872) 14 Eq 262; *Cole v. Whittington* (1873) 16 Eq. 584. *Re Lord, Ambler v. Lindsay* (1876) 3 Ch. D. 198. *Malins v. C.*, disallowed the plea that, the true legal representative not being a party to the suit, it must be dismissed. These rulings were;

however, not followed by *Romilly, M. R.*, in *Cary v. Hills* (1872) 15 Eq. 79; and dissented from by *Jessel, M R.*, in *Rossell v. Morris* (1873) 17 Eq. 20. See also *Penny v. Watts* (1846) 2 Ph. 119 (where Lord Cottenham felt himself unable to entertain the claim, though there was only a formal defect, which could not be remedied without incurring additional costs); and *Dundas v. Dundas* (1875) 9 Ch. D. 294 (C.A.).

<sup>3</sup> See the footnote to the Succession Certificate Act, s. 1 (4), which is cited in the comment to s. 563, above.

- (1) If there are any executors, they must all act jointly, for s. 92 SECTION 566. of the Act empowers one of the executors to exercise the powers of all, only in cases where probate has been obtained by him,<sup>1</sup> (there being no direction in the will to the contrary) but not where probate has not been obtained.
- (2) If there are no executors, the following five courses are open to the Court
  - (a) To proceed on the basis that all the heirs must necessarily be made parties, and that the absence of any of them makes the suit defective, inasmuch as the deceased is not properly represented. This course, (which might have been proper under the common law of England prior to the amendment of the procedure during the 19th century) has never been followed in the case of Mussulmans in British India.<sup>2</sup>
  - (b) To hold that each heir represents the estate to the extent of his share in it, and is responsible for a proportionate part of every liability of the deceased and thus that each heir may sue and be sued to that extent. This was the conclusion at which Mahmood, J. arrived in a learned and elaborate judgment.<sup>3</sup> In that case three questions were referred to the Full Bench, the answers to which are given at the end of this division of the comment to s. 566.
  - (c) To proceed (as is done in some decisions) on the basis that any one of the heirs (who is in possession of the estate) may sue<sup>4</sup> and be sued on behalf of himself and of the others. The judges who have laid this down have proceeded on the basis that the Muhammadan law is not less insistent than the Hindu law on the necessity of debts of the deceased being paid by the heirs, and so the same principle applies to Mussulmans as that by which a Hindu heir in possession and management of the estate may alienate it for ancestral debts -

Various alternatives where only some heirs sued, the rest not being parties.

(b) Each heir separately represents portion of estate to which he is entitled.

(c) The heir (in possession) represents all others

<sup>1</sup> (*Shaik*) *Moosa v. (ShaiP) Essa* (1884) 8 Bom. 241.

<sup>2</sup> It was suggested, but rejected by Sargent, C.J., and Candy, J., in *Ambahanker Harprasad v. Sayad Ali Bava* (1894) 19 Bom. 273.

<sup>3</sup> *Jafri Begam v. Amir Muhammad Khan* (1885) 7 All. 822. Note that in this case it was alleged that the plaintiff "did not prefer any objection in the course of the suit, notwith-

standing that he had full knowledge of the same" 7 All. 821.

<sup>4</sup> C1. "Any one of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to or by the deceased", II-d. 343. But the Muhammadan law is repealed by the Probate Act: (*Shaik*) *Moosa v. (ShaiP) Essa*, (1884) 8 Bom. 241.

## SECTION 586.

Execution  
against him.  
Voluntary  
alienation  
by him.

(d) Analogy  
with executor  
'de son  
tort.'

(e) Creditor's  
suit likened  
to administra-  
tion suit.

'Jafri Begam  
vs. Amir  
Muhammad  
Khan.'

(i) This was first stated with reference to involuntary alienation by execution of a decree.<sup>1</sup>

(ii) Subsequently the Madras High Court held that where one of several co-heirs is in possession of the whole of the property, he may meet the demand of a creditor of the deceased by a 'bona fide' voluntary sale in the same manner as he may be sued alone, and the property may be put to sale in execution of a decree against him.<sup>2</sup> But this has been over-ruled.<sup>3</sup>

(d) Apart from the question of representation, it has been considered by some judges that whoever is in possession of the property of the deceased, whether a stranger, or an heir—and regarding property beyond the share to which he is lawfully entitled, the heir's position does not differ from that of a stranger—the person who is so in possession is liable to account for it on the same grounds as an executor 'de son tort' is liable.<sup>4</sup> and that though ss. 265, 266, of the Indian Succession Act, reproducing the English law on the subject are not part of the Probate and Administration Act, and do not directly govern Mussulmans, the principle underlying them is applicable as justice, equity and good conscience.<sup>5</sup> It will be necessary to refer to the English law relating to executors 'de son tort' more fully before this view of the present question can be adequately considered: see below.

(e) Lastly, some of the decisions in India have been based on the notion that a suit by a creditor is in the nature of an administration suit,<sup>6</sup> and as such binds the effects of the deceased, and not merely the parties to the suit. This view is considered below next after the abovementioned points.

In the case mentioned above<sup>7</sup> a Full Bench of the Allahabad High Court in answer to questions referred to it. gave the following answers:—

(i) Upon the death of a Muhammadan intestate, who leaves unpaid

<sup>1</sup> See *Deccan v. Bhimaji Dando* (1895) 20 Bom. 338, 344, 345.

<sup>2</sup> *Pathummas v. Fidi Ummachabas* (1902)

29 Mal 734, 739, see below s. 507, *ill.* (10.)

<sup>3</sup> See s. 567, below

<sup>4</sup> *Amir Duhin v. Baij Nath Singh* (1891)

21 Cal 311, 317, 318.

<sup>5</sup> Cf. the Civil Procedure Code, s. 2 (ii) which

includes any person who intermeddles with the estate of a deceased person under the expression "legal representative."

<sup>6</sup> *Jolly Jan v. Ahmed Ali* (1882) 8 Cal 370, *Amir Duhin v. Baij Nath Singh* (1894) 21 Cal. 311.

<sup>7</sup> *Jafri Begam v. Amir Muhammad Khan* (1885) 7 All. 825.

debts, the ownership of the estate devolves upon his heirs immediately, SECTION 566. and not contingently upon payment of such debts.<sup>1</sup>

(ii) A decree relative to the debts of a deceased Mussulman passed in a contentious or non-contentious suit against only such heirs of the deceased as are in possession of his estate, does not bind the other heirs, who are out of possession, and does not convey to the auction purchaser in execution of such a decree, the rights and interests of such heirs as were not parties to the decree.<sup>2</sup>

(iii) The plaintiff in '*Jafri Begum v. Amir Muhammad Khan*:' was not entitled to recover from the auction purchaser in execution of his decree, possession of his share in the property sold, without payment of his proportionate share of the ancestor's debts for which the decree was passed, and in satisfaction whereof the sale took place.

### 3. THE ENGLISH LAW RELATING TO EXECUTORS 'DE SON TORT.'

The English authorities are divided on the question whether an executor 'de son tort' may be sued without joining the proper legal representative; but in a Calcutta case<sup>4</sup> the decisions of Malins, V.C., were cited with approval without referring to the decisions of Lord Romilly, M.R., and Jessel, M.R., which dissent from the Vice-Chancellor's view.<sup>5</sup> It is difficult to say, therefore, whether the reasons for which the decisions of Malins, V.C., are dissented from in England, and the course considered by the Masters of the Rolls as the more proper procedure<sup>6</sup> were present to the minds of their Lordships in Calcutta.

Lord Cottenham has explained the position and the liability of an executor 'de son tort' in England, by saying that though a suit can be brought against him for the purpose of charging him, he does not represent the estate,<sup>7</sup> (as the rightful executor or administrator does, and, in his absence, the heirs as a body do) and that therefore where a general administration is involved, the presence of the executor 'de

Executor  
'de son tort'  
in England.

(i) He may be  
sued, but, true re-  
presentative  
necessary party  
to administration  
suit. However—

<sup>1</sup> See also *Abdul Majerth v. Krishnamachariar* (1916) 40 Mad. 243, 253. From the proposition *Abdur Rahim, J.*, deduces that one heir has no right to deal with the shares of other heirs, ib. p. 255, l. 3. Later on the same page he cites direct authority on the point.

<sup>2</sup> But see s. 567 (2), below.

<sup>3</sup> (1885) 7 All. 825.

<sup>4</sup> *Amir Dulhin v. Baij Nath Singh* (1894) 21 Cal. 311.

<sup>5</sup> See cases mentioned in the preceding four footnotes. The Calcutta judges merely say "it has been held by a Judge of much experience." So that perhaps they knew of the conflict of decisions in England. It need hardly be stated that Jessel, M.R.'s, view carries more weight and

is considered better authority,—the more so as he is supported by Lord Romilly, M. R.

<sup>6</sup> E.g., appointment of a receiver (*per* Lord Romilly, M. R.) *Cary v. Hills* (1872) 15 Eq. 79.

<sup>7</sup> The result being that, though the executor *de son tort* is liable to be sued, he is not the only party necessary to the suit for the purpose of binding the successors of the deceased in reference to the estate. (1 Civil Procedure Code s. 2 (11) ss. 50-52. A legal representative is defined by that Act so as to include one who intermeddles in the estate, so that adding the executor *de son tort* as a party would not be misjoinder, but his presence cannot be sufficient.

- SECTION 566 son tort' is not sufficient; and he held that an allegation that the executor 'de son tort' had received assets sufficient to pay the claim did not enable the Court to dispense with the presence of the personal representative, and that, even if the defendant (i.e., the executor 'de son tort') admitted that all the debts and the other legacies had been paid, the Court would not take his word for it.<sup>1</sup> He, however, also said, 'If a sum had been separated from the mass of the personal estate to answer this legacy, and had got into the hands of the defendants, the Court would decree payment of it to the legatee without involving him in the general accounts of the estate.' To this must be added that payments by an executor 'de son tort' are good against the true representatives of the deceased, where the circumstances are such that the creditors might reasonably suppose him to be the true representative,<sup>2</sup> and the act itself was lawful, and one that the true representative was bound to perform in the due course of administration.<sup>3</sup>

(ii) General administration not always necessary.  
(iii) When executor 'de son tort' may act as representative.

Distinction between English and Muslim law: rateable distribution not recognized in latter hence general administration may often be dispensed with.

Hence, if the decision in *Amir Dulhin v. Baij Nath Singh*<sup>4</sup> referred to under the paragraph marked (d), above, is accepted, where a creditor sues some only of the heirs or other persons who are in possession of the assets of a deceased Mussulman, and a decree is passed without objection being taken as to the absence of the [other] heirs, the defendants may be taken in India to be in the same position as an executor 'de son tort,' and the application of the assets in satisfaction of the decree may, by analogy, be considered in the same light as payments by an executor 'de son tort' of the debts of the deceased: see s. 567 (2), below. There is one important distinction between Muhammadan and English law which must be referred to in this connection. Muhammadan law does not, like English law, require the rateable payment of debts,<sup>5</sup> but every payment on account of a debt is lawful in itself irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of the Code of Civil Procedure, 1882, s. 252 (s. 52 of Act V. of 1908). Now the necessity in English law for the legal representative of the deceased being made a party to a creditor's suit only arises in cases where a general administration is involved, and a general administration can seldom be required unless for the purpose of a rateable

<sup>1</sup> *Penny v. Watts* (1846) 2 Ph. 140; see at 152 (during arguments), 153, 154.

<sup>2</sup> Thus collusion between the creditor and some of the heirs, or knowledge by the creditor that there were other heirs, would prevent the application of the rule. Cf. *Assamathem v. Roy Lucknereput Singh* (1878) 4 Cal. 142.

<sup>3</sup> *Thomson v. Hardung* (1853) 2 Cl. & Bl. 630.  
<sup>4</sup> (1894) 21 Cal. 311.

<sup>5</sup> *Haji Saboo Sidick v. Ally Mahomed Jan Mahomed* (1904) 30 Bom. 270; 6 Bom. L. R. 1135 following *Veerasokkarajee v. Papiash* (1902) 26 Mad. 792; and cf. Hed. 609 (Vol. IV, 545): "The depositor has himself the right to seize and carry away his deposit, if he finds it amongst the effects of the deceased, and the creditor has a similar right with regard to his debt." Cf. also Ball. L. 679.



distribution of the assets amongst the creditors. It would, therefore, SECTION 566. seem that the strict rule of English law requiring the presence of the representative on the record can seldom have application in the case of Mussulmans. In a case like 'Penny v. Watts'<sup>1</sup> regarding a Mussulman's estate, probably the Court would not feel itself bound, as Lord Cottenham did, to order a general administration, against its own inclination.

#### 4. CREDITORS' SUITS AND ADMINISTRATION SUITS.

The proposition that all creditors' suits are in the nature of administration suits, and that consequently in such suits any <sup>Creditors' suits and administration suits distinguished.</sup> heir may bind the whole estate, (see the paragraph marked (c), above) is liable to criticism in two directions. (1) such suits are not like administration suits, and (2) in administration suits one of several heirs cannot by himself sufficiently represent the estate.<sup>2</sup> It is not easy to understand what is meant by the first part of the proposition, but it seems to be mainly based on the fact that in a creditor's suit, as well as in an administration suit, the decree is passed not personally against the defendants, but against the property belonging to the deceased which has come to their hands. The distinction between an administration suit and an ordinary suit by a creditor has been forcibly pointed out by Mahmood, J.<sup>3</sup> At the same time it seems to have been overlooked that according to all the English decisions, in an administration suit the presence on the record of the true representatives of the deceased (i.e., the executor, or administrator, or *all* the heirs of a Muslim) is imperative. Lord Cottenham, in the case referred to,<sup>1</sup> was at pains to show that if an administration of the estate could have been avoided, the action would not have been defective for want of the true representatives,—but he found that administration could not in that case be avoided. One of the reasons why the Courts in India may not consider it necessary to order administration in circumstances where it would be necessary in England has been stated in the last paragraph.

#### 5. APPLICABILITY OF PROBATE ACT WHEN HEIRS REPRESENT THE ESTATE.

Where the heirs are the only legal representatives of a deceased Muslim (i.e., where he has not appointed an executor and letters of administration have not been obtained), it becomes a matter of some importance to consider how far the provisions of the Probate and Adminis- <sup>Position of heirs when they administer estate.</sup>

<sup>1</sup> *Penny v. Watts* (1846) 2 Ph. 149.

<sup>2</sup> *Penny v. Watts* (1846) 2 Ph. 149; *Rossell v. Morris* (1873) 17 Eq. 20; *Cory v. Hills* (1872) 15 Eq. 79. See comment to s. 575, below.

<sup>3</sup> *Jufri Begum v. Amir Ald. Khan* (1885)

All. 822, 844-845. Mahmood, J., refers to the form of decrees in administration suits annexed to the Civil Procedure Code to show the distinction. See now O. XX. r. 13, and Appendix 71), to sched. 1., 17-20.

SECTION 566. tration Act can take effect,—the application of that Act not having been made conditional on probate or letters of administration being obtained, nor even on there being some person<sup>1</sup> who, by his acts, or otherwise, takes the place of an executor or administrator under the Act. Where the deceased has left a will and appointed executors, the effect of the Act on the rights and liabilities of the parties is generally clear; for most, though not all, of the provisions of the Act relating to executors are such, as may be given effect to, irrespective of probate being obtained. Where, however, there is no executor nor administrator, and the whole body of heirs represents the deceased, many of the provisions of the Act become inappropriate, if not inapplicable; and where the sections are not so worded as to restrict their applicability to executors or administrators, difficulty may arise in applying them to the body of heirs. Ss. 101 to 104 of the Act may be instanced. Another illustration is furnished by the devolution of the right of pre-emption.<sup>2</sup> The order in which payments are required to be made by the Act may be capable of being enforced as against an executor or administrator, but it is obvious that when the heirs themselves administer the estate there are no means of enforcing it. It has moreover been held that there is no necessity for the heirs to distribute the assets rateably amongst the creditors;<sup>3</sup> and that the heirs may distribute the estate amongst themselves notwithstanding the circumstance that a small debt is due;<sup>4</sup> some distinction seems to be made whether the debt is small or large in proportion to the estate,<sup>5</sup> but the point to note in the present connection is that the estate may be divided without first either paying off all the creditors, or setting apart funds for doing so.

Difficulty of applying Probate Act to such heirs.

Distribution of assets not necessarily rateable.

Partition need not be postponed till all debts paid.

In a decision given long before the Probate and Administration Act was passed, but which deserves attention for the care with which the relevant passages from the 'Hidaya' are collated, and for the reasoning based on them, it was said that the debts of the deceased must be paid before the estate is divided, but if the creditors be not present to assert their claims, the division of the estate is not to be postponed: the creditors who may subsequently appear and assert their claims, are entitled to set aside the partition of the estate, so as to render it available for the satisfaction of their claims, or they may hold the

<sup>1</sup> *E.g.*, an executor *de son tort*.

<sup>2</sup> See comment to s. 532, above.

<sup>3</sup> (*Bajji Saboo Nudick v. Ally Mohamed Jan Mohamed* (1904) 30 Bom. 270. See p. 750, n. 5.

<sup>4</sup> *Prithi Pal Singh v. Hussaini Jan* (1882) 1 All. 361. See also *Jafri Begum v. Amir Md.*

*Khan* (1885) 7 All. 822; *Amir Duthus v. Bajji Nath Singh* (1891) 21 Cal. 311. (*Syud Indad Hussein v. Musummed Hussein Buksh* (1870) 2 N. W. 327.

<sup>5</sup> *Russendram v. Kamaldeen* (1885) 11 Cal. 421.

heirs personally liable to the extent of and in proportion to the shares they have taken in the estate of the deceased.<sup>1</sup> SECTION 566.

(2) *Suits to which Some but not all Heirs are Parties.*

**567.** (1) Where there is no executor or administrator of a deceased Mussulman, and his creditor sues some one or more, but not all of his heirs (the heirs so sued are herein-after referred to as "the said parties" and the heirs who are not parties to the suit, as "the other heirs," the plural including the singular in each case), the suit is not defective for non-joinder of the other heirs as party defendants; <sup>all heirs not necessary for creditor's suit.</sup> [provided that the said parties are in possession of the whole of the estate].<sup>3</sup>

(2) Where the said parties (i) are sued in their representative capacity,<sup>4</sup> if (ii) they are in possession of property left by the deceased,<sup>5</sup> (iii) they have so acted that the creditor might reasonably suppose them to be rightfully representing the whole interest of the deceased in the said property, and (iv) the debt or liability is such that the other heirs are also bound proportionately to satisfy it,<sup>6</sup> in such a case— <sup>decree in suits to which all heirs are not parties.</sup>

(a) The High Courts of Calcutta and Bombay have held that a decree may be passed for its payment or satisfaction <sup>(a) Calcutta and Bombay decisions.</sup>

<sup>1</sup> (*Syud*) *Imdad Hossain v. (Mussumat) Mussumat Bukh* (1870) 2 N. W. 327; the question for decision being whether the widow was entitled to hold possession of the estate in lieu of dower; Pearson and Turner, JJ. expressed their dissent from (*Mussumat*) *Meerun v. (Mussumat) Najeebun* (1867) 2 Agra. 335, an earlier decision of their own, in which they had said that the widow having got possession on the untenable ground of her being the sole heir, was in wrongful, and not lawful, possession. See s. 108, above.

<sup>2</sup> *Ambashanker Ramprasad v. Sayad Ali Buxi* (1894) 19 Bom. 273, per Sargent, C.J., and Candy, J., on a reference from the Small Cause Court. In remanding the case, the Court referred the judge to *Bussuneram v. Kanatuddin* (1885) 11 Cal. 421; and *Purhi Pal Singh v. Hussaini Jan* (1882) 4 All. 301.

<sup>3</sup> See comment, and the footnotes to s. 567 (2) (c), below, and to s. 561 *id.* (3); also the

paragraph marked (c) in the comment to s. 566, above.

<sup>4</sup> In a case amongst Hindus it was said that where the heirs that are not sued are minors, it strengthens the conclusion that those that are sued, are sued in their representative capacity—per Sargent, C. J. and Haridas, J. in *Jairam Bandabhat v. Jona Kandi* (1896) 11 Bom. 361, 365; this hardly applies to Muslims. See s. 573, below, and comment thereto.

<sup>5</sup> Their possession of the property makes their position analogous to that of an executor *de son tort*. *Amir Duhin v. Baij Nath Singh* (1894) 21 Cal. 311, the Indian Succession Act, ss. 265, 266 and, per Parke B. (delivering the judgment of the Court of Exchequer) in *Bukley v. Barber* (1851) 6 Exch. Rep. 184, 185. *Thomson v. Harding* (1853) 2 El. & Bl. 630.

SECTION 567. out of the whole of the said property,<sup>1</sup> so as to bind also the interests therein of the other heirs;<sup>2</sup> provided that if the said parties are not sued in their representative capacity, or they have not acted as above referred to, or for any other reason the Court thinks it more equitable so to do, it may decree (i) that the whole of the claim be satisfied out of the shares of the said parties in the estate of the deceased;<sup>3</sup> or (ii) that the said parties should pay only parts of the debt proportionate to their respective shares in the said estate.<sup>3</sup>

(b) Allahabad  
decision.

(b) The High Court of Allahabad has held that a decree cannot be so passed as to be binding on the other heirs and that the auction purchaser in execution of a decree against the said parties does not acquire the rights and interests of the other heirs.<sup>4</sup>

(c) Madras  
decision.

(c) The High Court of Madras has held that where the said parties are in possession of all the effects of the deceased—but not otherwise—a decree may be passed binding also on the other heirs, who are neither in possession nor parties to the suit.<sup>5</sup>

Privy Council  
decision.

(3) The Privy Council have approved of the exercise by the Indian Courts of a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family; and have stated that judicial sales should not be disturbed, where (a) there was a debt justly due, (b) the other heirs being minors, (c) to whom no pre-

<sup>1</sup> *I.e.*, the property belonging to the deceased which is in the possession of the heirs who are sued.

<sup>2</sup> Cf. cases given as *dl.* (1)–(4).

<sup>3</sup> Cf. cases given as *dl.* (1).

<sup>4</sup> Cf. cases given as *dl.* (1) (7) (8) and (9).

<sup>5</sup> *Puthanambal v. Vittal Ummachabai* (1902) 26 Mad 744, *re dl.* (8); *Abdul Majid v. Krishnamachariar* (1916) 40 Mad 241, 249, 256. It was also stated incidentally in *De-alava v. Bhonarj Dhoond* (1895) 20 Bom 338, 345: "The creditor can seek his relief against one of several heirs in a case where all the effects are in the hands of that heir." But in *Ambachand v. (Sagad) Ali Rasul* (1891) 19 Bom 274, where the question arose more

definitely, no mention was made of the point, and the Bombay High Court seems to be inclined to follow the Calcutta view, though for different reasons. According to *Amr Duthia v. Bai Nath Singh* (1894) 21 Cal. 313 failure to prove exclusive possession of all the assets, does not involve a failure to establish her representative capacity, *ib.* p. 315; and the heir's liability is to be measured not by the extent of his interest in the estate of the deceased but by the assets which have come into his hands, and which he has not disbursed duly in the discharge of the liabilities to which the estate was subject at her husband's death, *ib.* p. 318. Cf. *a. to s. 561, dl.* (3), above.

judice is shown by their absence,—on the grounds of any SECTION 567. mere irregularities of procedure in obtaining the decrees, or in the execution of them: *e.g.*, the title of persons who buy under a judicial sale may be upheld where the person, named as defendant is ‘de facto’ manager of Hindu family property, or has assets out of which the decree can be satisfied under his control; but their Lordships add the elementary proposition that the Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record.<sup>1</sup>

(1) P dies leaving a widow, W, and a son, S, as his heirs. C a creditor Illustrations. of P, brings a suit against S alone. At the hearing S admits the claim, but points out that W should also be a party; W cannot be added as a party, the suit against her being barred by limitation. Held, that S can be sued alone without adding W as a party, and that S's share in the estate will be bound to pay a proportionate part of the debt. The estate not having been distributed, the Court points out that a question might arise whether S's share in P's estate is not bound to pay the whole debt, and not merely a share proportionate to his interest in the estate.<sup>2</sup>

(2) P dies, leaving as his heirs, H, HA and HB. The estate is in the Calcutta and possession of H and HA, who alone are sued by the creditors of P, and in Bombay decisions. execution of the decrees passed against H and HA, the property left by P is sold, and purchased by D and DA. HB then sues to set aside the decrees on the ground of fraud, which she is unable to prove. Held, that HB is bound by the decree, notwithstanding that she was not a party to the suit in which it was passed, on the ground that all creditors' suits are in the nature of administration suits (*sed quare*), and that, therefore, H and HA were bound to account for the assets come into their hands, and to that extent liable to pay the creditors,—the residue, if any, being divided among the heirs.<sup>3</sup>

<sup>1</sup> *Kharisimal v. Daim* (1904) 32 Cal. 296 (P.C.); cf. s. 567, illustrations (3) and (4).

<sup>2</sup> *Ambabankur v. Sayed Ali* (1894) 19 Bom. 273; see the footnote to the word “parties” in s. 567 (1), above.

<sup>3</sup> *Mutty Jan v. Ahmed Ally* (1882) 8 Cal. 370. Two other views were suggested by Morris, J., as having previously governed similar cases: (a) That “the said parties” were sued in their representative character, and what passed at

the sale was the property of the deceased, citing (*Musammut Nusservan v. (Moulrie) Amee-rooddeen* (1875) 24 W. R. 3; (b) that the principle of Muhammadan law is that one of the heirs may stand as litigant on behalf of all other heirs with respect to anything done to or by the deceased whether it be debt or substance; see also the paragraph marked (c) in the comment to s. 566, above, and *Abdul Majid v. Krishnamachariar* (1916) 40 Mad. 243, 257.

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*Illustrations*

(3) P dies indebted to C, who sues P's widow, W, without making his other heirs parties. *Held*, that the suit is properly brought against W, whose liability is to be measured not by the extent of her interest in her husband's estate, but by the assets come to her hands, which she had not duly disbursed in the discharge of the liabilities to which the estate is subject at her husband's death.<sup>1</sup>

(4) P is indebted to C for repairs to a house, and dies, leaving H and HA, a daughter and a sister, as his heirs. H obtains a certificate under Act XXVII. of 1860 (repealed by the Succession Certificate Act) and directs further repairs to be done to the said house. C then brings a suit against H alone, styling her as the daughter and representative of P, to recover his original claim, and a further sum for repairs executed under H's directions. The suit is undefended, and a decree is obtained against H, in execution of which the house<sup>2</sup> is sold and purchased by T. HA then brings a suit against H and T for possession of her share in the house;<sup>3</sup> *held*, that H did not represent the whole estate, and HA's share could not be sold in the said execution proceedings.

(5) P dies, leaving a son, H, and a daughter, HA. C, a creditor of P, brings a suit on the debt, and obtains a decree against "P deceased, represented by her minor son H, represented by his guardian,"—HA not being a party to the suit. *Held* that HA is equally responsible for the debt, and bound by the decree, and the execution sale passes not only H's but also HA's share in the property of P, and that it cannot be impeached on any ground except that the debt was not due.<sup>4</sup>

(6) P mortgages certain lands in 1862. On his death, the mortgagee sues P's widow, H, and son, HA, and forecloses the mortgage. HB and HC, daughters of P, who are also his heirs, are not parties to the foreclosure suit. *Held*, that HB and HC cannot object to the decree simply because they were not parties to the suit; that H and HA were sued in their representative character (as representing P's estate) and the proceedings against them, as such representatives, were effectual against the whole of the estate, and not merely against the shares of H and HA therein.<sup>5</sup>

<sup>1</sup> *Amir Dulhin v. Baij Nath Singh* (1894) 21 Cal. 311.

<sup>2</sup> So stated by Gaith, C. J. v. *Hendry v. Mutty Lall Dhar* (1876) 1 Cal. 395, 398, l. 3; but in the statement of facts, it is said that "in execution P's interest in the house and land was sold," which would leave nothing to be decided.

<sup>3</sup> *Hendry v. Mutty Jax* (1876) 1 Cal. 395. This case is approved by Mahmood, J., in *Jafis Begum v. Amir Muhammad Khan* (1885) 7 All. 822, 844, but does not seem

to be noticed in any other decision. It is hardly consistent with *Mutty Jan v. Ahmedally* (1882) 8 Cal. 370; and *Amir Dulhin v. Baij Nath* (1894) 21 Cal. 311, i.e., ill. (2) and (3) to s. 567 unless it can be brought in under the principle of *Assamatham Nissa v. Roy Lutchempul Singh* (1878) 4 Cal. 142, on the ground that the suit of B was undefended.

<sup>4</sup> *Khushebibi v. Keso Vinayak* (1887) 12 Bom. 101 (Sargent, C. J., and Haridas, J.)

<sup>5</sup> *Daralava v. Bhiman Dhondlo* (1895) 20 Bom. 338 (per Ranade and Jardine, JJ.)

(7) P dies, leaving H and HA, his widows, and HB, a minor daughter, as his heirs; HB is in possession of certain properties belonging to P. Decrees are obtained by creditors of P against H and HA, and in satisfaction of the decrees H and HA sell the properties in the possession of HB, purporting to execute the sale-deed on behalf of themselves and of HB, as her guardians (HB having no legal guardian at the time); *Held*, that HB is not bound by the decrees, nor by the sale, and she can recover her share in the properties of P on paying her share of P's debts, in satisfaction of which the sale was effected.<sup>1</sup>

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rulings.

(8) P dies leaving H and HA as his heirs. H alone is in possession of the whole estate of P. C, a creditor of P, sues H and obtains a decree against her, and in execution of the decree the whole estate is sold by auction. *Held*, that HA is not bound by the sale, and on payment by him of his proportionate share of the debt, which was paid off from the proceeds of the auction sale, he can recover his share in the property sold.<sup>2</sup>

(9) P dies, leaving H and HA as his heirs. C, a creditor of P, obtains a decree against H alone as representative of P, H being in possession of the whole estate. H then transfers some portion of the estate to T. After the transfer C attaches the property so transferred, and claims to execute his decree not only against the right, title and interest of H in the said property, but against all the interest that P had in it. *Held*, that H could have objected to more than his share in the property being attached under the decree on the ground that as to the rest he was a trustee for HA, and that T can likewise ask that the attachment be limited to the share of H in the property, even though H had purported to transfer to him both his own and HA's share therein.<sup>3</sup>

(10) P dies, leaving three widows, H, HA and HB, two daughters, HC and HD, and one son, HE. (a) H sold some of the property of P in discharge of P's debts; *held* that H is not like the managing co-parcener in Hindu law, and thus not entitled to administer and manage the estate until partition; that the creditors, however, have a right to sue such heirs as have taken the estate, but that they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir; [but that it makes no difference whether the heir or heirs in possession meets or meet the demand of the creditors by a 'bona fide' voluntary sale, or the property is brought to sale in execution of a decree obtained against

Madras  
rulings.

<sup>1</sup> *Hamir Singh v. Zakat* (1875) 1 All. 57 (F.B.). Turner, A., C.J. Spinkie and Pearson, JJ. The latter points out that the widows were not competent to act as the guardians of HB. The fact that H was in possession of the property is emphasised in *Pathummar*

*v. Abdul Fummachdats* (1902), 26 Mad. 736.

<sup>2</sup> *Muhammad Azees v. Har Sahai*, 1885)

7 All. 716

<sup>3</sup> *Dattu Lal v. Hari Das* (1901) 23 All. 263 (per Strachey, C.J., and Banerji, J.).

**SECTION 567.** him or them. *Held*, therefore, that the sales by *H* for payment of *P*'s debts

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were valid and binding on *P*'s other heirs though they were not parties thereto.<sup>1</sup> (b) Secondly *H* also sold another property (item No. 11) to the 13th defendant in consideration of a debt of Rs. 25 due to him from *P*, and of a further sum paid by him to *H*; *held* that *HB* was entitled to receive her share in the said property on payment of a portion of the debt (Rs. 25) proportionate to her share in *P*'s estate.<sup>2</sup> (c) Thirdly *H* sold 'bona fide' certain other property of *P*, but not in the discharge of *P*'s debts; *held* that *HB* was entitled to have her share in the said property, on payment of her share of the compensation due to the purchaser for improvements effected by him in the said property.<sup>3</sup> (d) Fourthly *H* allowed certain mortgage debtors of *P* to redeem the mortgaged properties on payments of the full amounts due on the mortgage; *held* that *HB* was entitled to recover from the mortgagors her share in the mortgago properties in default of the mortgagors paying her within six months her share of the mortgage money.<sup>4</sup>

See also illustrations (3) and (4) to s. 569, below, and the ruling of the Privy Council referred to in s. 567 (3) with the concluding portion of the present comment.

The question as to who are necessary parties to a suit, has been discussed in its general bearings in the comment to s. 566, above.

Necessity for all the heirs having possession of assets being before the Court.

It has been remarked in the course of more decisions<sup>5</sup> than one that a single heir can be sued without the other heirs being made parties, only in cases where all the assets of the deceased are in the possession of that heir; but the point has never been directly before the Court. *Abdur Rahim, J.*, refers to "the provision of Muhammadan law that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest," as "a part of the processual law of that system," and explains that it is 'not based on the ground that a single heir if he happens to be in possession of the estate of the

<sup>1</sup> *Pathusamabai v. Vitthal Ummachabai* (1902) 26 Mad. 734 (*per* Benson and Bhashyam Ayyangar, JJ.), referring to the alienations of "items" I., xvii. and xi, in favour of defendants 11, 12, 13, respectively—see p. 736 (par. 4), p. 737 (par. 6), p. 739 (par. 2), and p. 740. The part of the ruling enclosed in [ ] is overruled by *Abdul Majid v. Krishnamacharar* (1916) 40 Mad. 243, 257.

<sup>2</sup> In this *id.*, (b) (c) (d) do not apply to s. 567, but it would not be convenient to have the points that were decided in this case scattered in several places. On point (b) see *Abdul Majid v. Krishnamacharar* (1916)

41 Mad. 243, 249.

<sup>3</sup> *Ibid.*, relating to defendants 13, 14, items iii. iv, pp. 737 (par. 6), 739 (par. 2).

<sup>4</sup> *Ibid.*, relating to defendants 18, 19, items x. v, vii., pp. 737 (par. 3, 4) 739 (par. 3).

<sup>5</sup> *Pathusamabai v. Vitthal Ummachabai* (1902) 26 Mad. 734, 738; *Derolasa v. Bhimaji Dhondu* (1895) 20 Bom. 338, 345, referring to *Hod. 349* *et seq.*, "any one of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to or by the deceased," *Hamir Singh v. (Musunnat) Zakia* (1875) 1 All. 57, 59.



deceased represents the rest of the heirs for the purposes of administration generally"; but that "the decree of the 'Kazi' in such a case is in reality either in favour of or against a deceased; and any one of the heirs may stand as his representative with respect to such decree."<sup>1</sup>

The reasons on which the remarks first referred to are based, are probably twofold; (1) that every part of the estate is liable for the debts of the deceased, and therefore all those who are in possession of any part of the estate must be before the Court; (2) that possession of the estate is necessary for establishing "that the executor *de son tort* was really acting as executor, so that the creditor might reasonably suppose him to be the rightful representative"; for it is only in such a case that the creditor is entitled (under English law) to retain as against the representative of the deceased, payments made to him.<sup>3</sup> It may, at the same time, be pointed out that the object underlying the principle marked (1) above may be safeguarded, in British India, by the form in which the decree is passed,<sup>4</sup> viz., a proportionate part of the debt may alone be ordered to be paid by the heirs who are parties. Again, the heirs who are parties are entitled to apply that the other heirs be brought on the record; they may well be expected to take care of their own interests, by making such an application, if they have anything to gain thereby, and they ought not to be allowed to profit by omitting to do so and withholding the information from the Court; in cases where the other heirs have notice of the proceedings, they have likewise the power to apply to be made parties, should they desire to defend the action.

The remarks of Abdur Rahim, J., cited above are based on the 'Hidaya'; but the statement by Muslim jurists of a rule of "processual law"<sup>2</sup> is not binding on the Courts of British India; and the practice under consideration has reference to circumstances in which the strict procedure has not been followed by the parties, and in which the Courts recognize the expediency of allowing a certain latitude. From the decisions so far given, it does not follow that the Courts would decline to entertain a suit by a creditor of the deceased, if the whole of the estate is not in the possession of the defendants impleaded; for in the Madras and Bombay cases,<sup>3</sup> the heirs sued were actually in possession of the whole of the estate, and in the Allahabad case<sup>4</sup> no part

Reasons why possession of all the estate required.

No decision on the point.

<sup>1</sup> *Abdul Majid v. Krishnamachariar* (1916) 40 Mad. 243, 256; see *Ibid.* 349 which is cited on p. 759, n. 5, above.

<sup>2</sup> *Pathumabai v. Vitil Unimachabai* (1902) 36 Mad. 734, *Devalara v. Bhimaju Dhondur*

(1905) 30 Bom. 388.

<sup>3</sup> *Thomson v. Harding* (1853) 2 El. & Bl. 830.

<sup>4</sup> Cf. *Madho Ram v. Dilbar Mahal* (1870) 2 N. W. 449; and *Purbi Pal Singh v. Hussain Jan* (1882) 4 All. 361.

SECTION 567. of the estate was in their possession. The bearing on this point of 'Madho Ram v. Dilbur Mahal' should also be considered.<sup>1</sup> Secondly, if it is alleged that part of the estate is in the hands of some other persons (an allegation which it is not in the interest of the said parties to make) no plaintiff would object to bringing them on the record. Finally, the Court would find some difficulty in determining whether all the estate is in the possession of the said parties.

Section 567 distinguished from, -

The distinction between ss. 567 and 572 is that s. 567 deals with the case where a creditor sues some only, and not all the heirs of a deceased person, for a debt due to the deceased, and brings a part of the estate to sale in execution of such a decree. This process is (it is evident) defective: the defendants in such a case are owners of only their own shares in the property brought to sale, and the execution purchaser ought in strictness to acquire no right over the share therein of the other heirs who are not on the record. Nevertheless, the decisions are that the execution purchaser may, even in such a case, acquire, under certain circumstances, title to the entirety of the property.<sup>2</sup> On the other hand, s. 572 deals with the powers of individual heirs privately to alienate assets of the deceased though no decree has been passed against them. Abdur Rahim, J., presiding over a Full Bench of the Madras High Court has dissented from the judges who sought to make the rule in s. 572 the same as that under s. 567. "They failed to bear in mind," said he, "that the provisions of the Muhammadan law, that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest, is part of the processual law of that system, and is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rest of the heirs, for the purposes of administration generally. The ground on which a decree against one of the heirs in such circumstances is treated as 'res judicata' is, as stated in the books, that the decree in such cases is, in law, against the deceased and not against the particular heir who is made defendant in the suit."<sup>3</sup>

s. 572.

Decree after contest deemed against deceased.

Desire to place voluntary alienation on same footing as execution of decree.

It may be stated at the start that, on principle, a single heir can represent no more than his own share whether in a suit, or in private alienations. It seems, however, to have been overlooked, that in regard to processual matters, Muhammadan law must 'prima facie' give place to the

<sup>1</sup> See s. 156, *ul.* (3) above.

<sup>2</sup> See s. 567, and the decisions cited in the footnotes thereto. Abdur Rahim, J., seems to approve of the decisions of the Calcutta High Court "in which the rule of Muhammadan law as to one heir representing the other co-heirs

in suits has been adopted." - *Abdul Majid v. Krishnamachariar* (1916) 40 Mad. 243, 257. Cf. *Khotchand v. Durr* (1904) 32 Cal. 296, (p. c.).

<sup>3</sup> *Abdul Majid v. Krishnamachari* (1916) 40 Mad. 243, 256.

adjective law of British India. But assuming that Muhammadan law applies SECTION 567. in this respect, the decision in which Sir Bhashyam Ayyangar took part<sup>1</sup> seems to have been based on the desire that the same rule should apply to voluntary alienations as to sales in execution; or to express the matter with reference to Abdur Rahim, J.'s reasoning, the question seems to have pressed Bhashyam Ayyangar, J., why it should not be considered (where there is a 'bona fide' alienation for a debt of the deceased) that it is the deceased who is making the alienation, rather than the single heir purporting to represent the estate, — just as (where there is a decree for payment of a debt due by the deceased) the law considers that it is the deceased who is the judgment-debtor and not merely the individual heir. In favour of such uniformity may also be cited the observation of Wallis, C.J., that it is probably for the benefit of the creditors as well as of individual heirs that there should not be a rigid rule requiring the whole body of co-heirs to join every alienation — and where there is a debt lawfully due from the estate of the deceased there is a temptation to follow the easier course, if it can be safely followed — of avoiding an intermediate suit. These considerations, however, seem to be met by a decision of the Privy Council,<sup>2</sup> containing the observations cited in the next following paragraph in which stress is laid upon the importance of upholding the title of persons who buy under judicial sales — and it is obvious that the other heirs' interests are much less likely to be prejudiced by such sales than by private alienations. The variance between the rules therefore applicable to Court sales and private alienations may be explained on these grounds.

Sect. 567 (3) is based on a decision of the Privy Council in which they said: "The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is 'de facto' manager of a Hindu family property, or has assets out of which the decree is to be satisfied under his control."<sup>2</sup> Then after holding that in the suits in question the deceased was not represented in law or in fact, and that the sale of his property was therefore without jurisdiction and null and void, and that even the share of the person who was on the

Privy Council:—  
estate represented where (a) absent heirs are minors, (b) debt is justly due, (c) no prejudice to minors and especially where (d) defendant manager or (e) has assets

<sup>1</sup> Pathummai v. Uthil Unnichalai (1903) 26 Mad. 734; see also Hanuati v. Mehdi Hussain

(1897) 1 All. 533.  
— Kharajmal v. Daim (1901) 32 Cal. 296.

SECTION 567. record as defendant in the case before them was not bound by the sales, because he was a minor and not properly represented by any authorised person, they concluded this part of the judgment as follows: "In the opinion of their Lordships it is not a question of form but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale, but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts."<sup>1</sup>

Mere irregularities may be excused.

But Court cannot sell property of persons not represented

In an earlier portion of the same judgment it is said: <sup>1</sup> "Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceedings to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in '*Kishen Chunder Ghose v. Ashooram*' "<sup>2</sup>

Decree in favour of one heir enures for all.

567A. Where one of the heirs of a deceased Mussulman obtains a decree for the recovery of the property of the deceased in possession of a third person, the decree enures not only in favour of the heir who actually is the plaintiff but also for the other heirs, though there is difference of opinion as to whether the decree-holder shall be given possession of more than his share.<sup>3</sup>

This section deals with the converse of what is dealt with in s. 567, above. In the former the heirs are defendants: in s. 567A the heirs are plaintiffs. The present section must, in any case, be read in a sense that does not conflict with the enactments represented by the proviso to s. 563 above; <sup>4</sup> moreover it is far from clear whether the present question is not part of adjective law; if so, Muhammadan law would be ousted by the procedure of British India. Should one of several

<sup>1</sup> *Khanrajmal v. Daim* (1901) 32 Cal. 296, 314, 315 (P.C.).

<sup>2</sup> (1863) 1 Marsh. 647.

<sup>3</sup> This section is taken almost *verbatim* from *Abdul Majid v. Krishnamachariar* (1910) 40 Mad. 243, 256 (P.C.), per *Abdur Rahim, J.* The difference of opinion mentioned in s. 567A,

refers to the fact that the three exponents of Hanafi law, Abu Hanifa, Abu Yusuf and Imam Muhammad, do not all take the same view.

<sup>4</sup> The proviso to s. 563, is based, it will be observed, on the Probate, Succession Certificate, and similar Acts.

heirs sue a trespasser for recovery of property belonging to the deceased, which has devolved upon the plaintiff jointly with others, it would be contrary to all precedent if the draftsman of the defendant's written statement did not object to the non-joinder of parties.

(3) *Rights and Liabilities of the Heirs amongst Themselves.*

**568.** Each heir of a deceased Musulman is liable to his co-heirs for contribution (out of the assets of the deceased come to his hands) towards the satisfaction of a decree for payment of a debt due by the deceased; provided first that the said decree was passed against the said co-heirs in a suit to which the heir (from whom contribution is claimed) was not a party;<sup>1</sup> secondly, that the said decree was not limited in its amount to such a part of the said debt as is proportionate to the rights of inheritance of the said co-heirs respectively in the estate of the said deceased; and thirdly, that no heir is liable to contribute a larger share of the said debt than is proportionate to his own rights of inheritance.<sup>2</sup>

Liability to contribute to co-heirs.

The proposition contained in s. 568 is not laid down in so many terms in any decision, but it is submitted that it follows from the cases.<sup>1</sup>

Distribution of assets.

The process for enforcing a rateable distribution of assets and liabilities is, no doubt, cumbrous, but it results from the heirs not taking the proper course to have the estate of the deceased represented, and then distributed amongst themselves. When each heir has received his or her own due share, it works justly. The Indian Contract Act, s. 146, the Probate and Administration Act, s. 138, and the Transfer of Property Act, s. 82, respectively refer to contributions from co-sureties, co-legatees, and from properties mortgaged for the same debt.

**569.** (1) Where, in a suit against the said parties (referred to in s. 567, above), a decree is passed for the satisfaction of a debt or liability of the deceased, out of the whole of the property of the deceased,—the other heirs

Execution may be set aside as against shares of heirs not parties to suit.

<sup>1</sup> The decree would no doubt itself provide for the rights and liabilities, *inter se*, of those heirs who are parties to the suit.

<sup>2</sup> Cf. *Bussanherum v Kamaluddin* (1885) 11 Cal. 421. See comment.

SECTION 569. may, on sufficient cause<sup>1</sup> being shown, impeach the said decree, in so far as it affects their shares<sup>2</sup> in the said property, and the Court may, to that extent, set aside an auction sale in execution of the said decree, contingently on the other heirs paying or satisfying a part of the said debt or liability, proportionate to their shares in the said property, or on such other terms as may be just and equitable.<sup>3</sup>

Sufficient cause  
for setting aside  
execution,  
cf. s. 567.

(2) In considering whether sufficient cause has been shown why a decree should be so set aside, the Courts will have regard to the circumstances which guide them under s. 567, above, on the question whether the decree should initially be so passed as to bind all the heirs, or only those of the heirs who are parties to the suit;<sup>4</sup> and also to the following amongst other considerations,—

- (a) the importance of upholding the title of persons who buy under a judicial sale; and,—
- (b) the mere fact that some co-heirs are not parties to the suit is not enough to set aside the sale, especially where,—
  - (i) the absent co-heirs are minors;
  - (ii) the debt was justly due from the deceased;
  - (iii) the absent co-heirs are not prejudiced by their absence;
  - (iv) the co-heir who was named as defendant was ‘de facto’ manager, or had under his control assets out of which the decree is to be satisfied;<sup>5</sup>

<sup>1</sup> *e.g.*, that the suit was barred as against some of the heirs. *Bansudram v. Kamaladhin* (1885) 11 Cal. 121.

<sup>2</sup> The word *share* is here used in its ordinary English signification and not in the restricted sense of “quitance share,” referred to in s. 605 (11), below.

<sup>3</sup> See the illustrations to s. 569, particularly (3) and (4), which are based on *Khurajmal v. Daram* (1901) 42 Cal. 296.

<sup>4</sup> As the Allahabad High Court has ruled,

s. 567 (2) (b), that a decree can never bind the absent heirs, that Court grants the relief almost as a matter of course: *Jaffa Begum v. Amir Muhammad Khan* (1885) 7 All. 822; *Rhotanath v. Magbubunnissa* (1903) 26 All. 28.

<sup>5</sup> *Khurajmal v. Daram* (1901) 32 Cal. 296 (P.C.), sub-section (2) of s. 569 is an analysis in the main of the passages from the judgment of the Privy Council, which are set out in the comment to s. 567, above.

(v) the purchaser has been led into the belief when he purchased the interest of the judgment-debtor, that he was purchasing the whole estate.<sup>1</sup>

(c) amongst the circumstances which will make the Court disinclined to uphold the sale, the following have been judicially referred to:

- (i) that the decree has been passed by consent;
- (ii) that the purchaser is the judgment-creditor who has had notice of all the facts.<sup>2</sup>

(1) P mortgages certain property to C and then dies, leaving as his heirs a widow, H, a daughter, HA, and a sister, HB; C sues H and HA, not describing them as the representatives of P in the title, but in the body of the plaint it is stated that they are the heirs of P. C knows that HB is an heir of P, and has reason to believe that she is alive at Medina, but he does not make her a party to the suit. By the consent of H and HA, a decree is obtained by C against them. Under certain sales by the Sheriff, the right, title and interest not only of H and HA (who consented to the decree) but also of HB were professedly purchased by T, and certificates issued by the Court in accordance with those sales. *Held*, that the decree and the execution founded on it did not affect the share of HB in the estate of P, which consequently did not pass to T under the execution sale.<sup>3</sup>

(2) P dies, leaving H, HA and HB as his heirs. H is in possession of the whole estate. Without the consent of HA and HB, H makes to C a payment on account of a debt which P owed to C. But for this payment the debt would have been barred by limitation. C sues H, HA and HB for payment of the sum still due on the said debt. *Held*, (a) that the lower Court having decided that the debt was barred as against HA and HB, and there being no appeal against that decision, H alone was liable;

<sup>1</sup> *Kishen Chandra Ghose v. (Mussumat) Ashoorun* (1863) March 647, 648, (line 7) But it must be remembered that if the absent co-heirs are prejudiced, the purchaser's having been misled by the co-heirs who are parties, cannot affect those whose property is purported to be dealt with in their absence.

<sup>2</sup> *Assamathem Nena Bibee v. Roy Lutchnip Singh* (1878) 4 Cal. 142; S. C. reported as *Mir Ashraf Ali v. Roy Lutchnip ud*, (1878) Cal. L.R. 223; *held* that where

the decree is initially passed by consent against one or more heirs of a deceased debtor, it cannot legally bind the other heirs, and must be set aside in so far as it affects the heirs who were not parties to the consent decree. Cf. *Hendry v. Muty Lall* (1876) 2 Cal. 395; see s. 567, *ut* (3) and (4) and *nn.* thereto.

<sup>3</sup> *Khizarajmal v. Daim* (1904) 32 Cal. 296, (P.C.); *Kishen Chandra Ghose v. (Mussumat) Ashoorun* (1863) March 647, 648.

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*Illustrations.*

(b) that as H had not been sued in a representative capacity, and it was not proved that he had made the payment on behalf of H<sub>A</sub> and H<sub>B</sub>, as well as himself, the suit could not be considered an administration suit, and a decree could not be passed for payment of the whole debt out of the assets in his hands, but only for a part of it proportionate to H's interest in P's estate; (c) that in accordance with both Muhammadan law and justice, equity, and good conscience, H's share in P's estate was not liable to be charged with the whole of the debt, but a proportionate part of it, inasmuch as he could not claim contribution from H<sub>A</sub> and H<sub>B</sub>, as against whom the debt was barred by limitation.<sup>1</sup>

(3) Two<sup>2</sup> brothers, Nabibaksh and Alibaksh, were together entitled to a moiety of certain lands<sup>3</sup> Nabibaksh on behalf of himself and his brother executed a mortgage on 15th May 1874, and a renewal of it on 4th June 1878. In 1879 a mortgage suit was brought against Nabibaksh by the mortgagee<sup>4</sup> On 4th June 1879 Nabibaksh signed a petition that the civil suit be referred to arbitration<sup>5</sup> Shortly afterwards Nabibaksh died, leaving two widows, an infant son, Muhammad Hasan, and an infant daughter. The names of the widows and son were added on the record and the usual summonses served on them to appear. An award was made, and on 20th December 1879 the judge made an order on it. The judge was satisfied that the widows and son were prepared to accept the award of the arbitrator; on 8th February 1881, in execution of the award the moiety of the lands belonging to the two brothers Nabibaksh and Alibaksh was sold—the widows and son having been served with a notice of the sale. Their Lordships of the Privy Council held (a) that Nabibaksh's estate was sufficiently represented for the purposes of the suit, although the name of his infant daughter was omitted from amongst those who were brought on the record as the representative of Nabibaksh, and that therefore her share in the equity of redemption of the moiety of the lands which was purported to be sold in execution of the decree was bound by the sale, and irredeemable; but (b) that Amroo Baksh's share could not be sold in execution of the decree on the following grounds:—"Nabibaksh, however, executed the mortgages of 1878 on behalf of his brother as well as of himself; Alibaksh is still living and is a plaintiff in the present suit and one of the respondents. It must be presumed that Nabibaksh was authorized to sign the mortgages for his brother. At any rate Alibaksh

<sup>1</sup> *Buyssestam v. Kamaluddin* (1885) 11 Cal. 121, see also *Hendry v. Muty Lal* (1876) 2 Cal. 396, above s. 569 *ill.* (1)-(7) & *nn.*

<sup>2</sup> *Khourajmal v. Daim* (1901) 32 Cal. 296, (P.C.)

<sup>3</sup> *Id.* p. 398.

<sup>4</sup> There were other parties also to the mortgage and the suit and the reference to arbitration. But they were on the record as the owners of the other moiety of the lands.



by suing for redemption admits it. And possibly it might have been held that Nabibaksh's authority extended to representing him in Waliram's suit. But by no possibility could it be considered that he was represented [in the arbitration and the proceedings following it] by the widows or infant son of his deceased brother. In fact his interest in the property seems to have been ignored altogether. He is not mentioned as a debtor in the award, and there is no decree against him. The Court therefore had no jurisdiction to sell his share."<sup>1</sup>

(4) One Naurez<sup>2</sup> was entitled to a 1/6 share in certain lands and mortgaged them on 15th May 1874. He died leaving a widow and four children including a son, Amir Baksh. After Naurez's death the mortgage was purported to be renewed, so far as Naurez's original interest was concerned, by Amir Baksh, while he was a minor. On these mortgages, suits were brought against "Naurez deceased by his legal representative Amir Baksh, by his guardian Allah Nawaz,"<sup>3</sup> and against Amir Baksh who was described, as "a minor of 14 years, representative of Naurez, by his uncle Allah Nawaz."<sup>4</sup> The judge "seems to have accepted without question the statement on the record that Amir Bakhsh was legal representative of Naurez and Allah Nawaz was his guardian, and never applied his mind to the matter. Doubtless he would have done so, if the suit had proceeded in the ordinary course but in the former case (Suit of 1879) the proceedings were cut short by the agreement for reference, and in the latter case (Suit of 1878) it was in effect a consent decree." Their Lordships of the Privy Council thought that the estate of Naurez was "not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction and null and void." They also held that the share of Amir Bakhsh himself in his father's estate was not bound.<sup>5</sup> In coming to this decision their Lordships made the observations which are set out towards the end of the comment to s. 567, above.

The Privy Council has recognised the importance of upholding the title of persons who buy under a judicial sale<sup>6</sup> and approved of the wide discretion exercised by the Courts in allowing the estate to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings if it

<sup>1</sup> *Kharajmal v. Daim* (1904) 32 Cal. 206, 313, (P.C.)

<sup>2</sup> *Ib.* p. 315.

<sup>3</sup> *Ib.* p. 310.

<sup>4</sup> *Ib.* p. 309.

<sup>5</sup> *Ib.* p. 315.

<sup>6</sup> *Ib.* p. 307 (3).

SECTION 569. appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But their Lordships have added that these are usually cases where the family named as defendant is 'de facto' manager of a Hindu family property or has the assets out of which the decree is to be satisfied under his control.<sup>1</sup>

After distribution joint liability ceases and each proportionately liable.

**570.** After the estate has been distributed amongst the heirs, their joint liability ceases, and thenceforth each heir is liable to pay to the creditors of the deceased only such a part of the debts as is proportionate to the share that the said heir is entitled to receive out of the estate;<sup>2</sup> such liability being limited to the assets come to his hands<sup>3</sup> for the due application of which he cannot account.<sup>4</sup>

*Illustration*

P dies leaving H, HA, HS as his heirs, who divide the estate amongst themselves in accordance with their rights. A creditor of P sues H and HA, not making HS a party. *Held*, that H and HA are liable to pay parts of the debt proportionate to their shares in the estate and not the whole of it.<sup>5</sup>

Suing heirs who have no assets.

Cf. the Probate and Administration Act, s 138: "When the executor has paid away the assets in legacies and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion." Mahmood, J., has pointed out that, on the authority of the passage in the 'Qazi Khan' quoted in the footnote to s. 561, illustration (3), above, the heirs may be sued even though they have no assets in their hands.<sup>6</sup>

Distribution prior to payment of creditors.

The case represented by the illustration to s. 570 was decided on the 30th of March, 1882, a year after the Probate and Administration Act came into force. Section 105 of that Act ("Debts of every description must be paid before any legacy") does not directly apply to the present point, which affects not legatees but heirs. But the principle of English law is that if an executor (whose place is taken, in his absence, by the heirs of a Mussulman), considering the assets in his hands

<sup>1</sup> *Ib.* 314.

<sup>2</sup> *Perthi Pal v Hussaini Jan* (1882) 4 All. 361; *Bussunderam Marwari v. Kamaluddin Ahmed* (1885) 11 Cal. 41; *Ambashanker v. Sayad Ali* (1891) 19 Bom. 273.

<sup>3</sup> *Muliy Jan v Ahmedally* (1882) 8 Cal. 370, 374; *Bazuyet Hoosein v Dooli Chund* (1878) 4 Cal. 402, 408, s. 1. A. 211, *Amir Dulhus v.*

*Bair Nath Singh* (1894) 21 Cal. 311, 316-317.

<sup>4</sup> (*Mussamut*) *Wahedunnissa v. (Mussamut) Shubrodtan* (1870) 6 Ben. L. R. 54, 59. See *Hamir Singh v. Zaka* (1875) 1 All. 57.

<sup>5</sup> *Perthi Pal Singh v Hussaini Jan* (1882)

4 All. 361.

<sup>6</sup> *Jafri Begam v Amir Md Khan* (1885) 7 All. 822, 841. Cf. *Madho Ram v. Dilbar Mahul* (1870) 2 N. W. 449.

to be sufficient for all purposes, pays the legacies before the debts, and SECTION 570. afterwards finds the debts to be larger than he expected, he is not entitled to plead the payment of the legacies as a defence to a creditor suing for payment of his debt;<sup>1</sup> and our Courts may hold that on the analogy of s. 105, and of the rule of English law, the heirs are bound before distribution, to set aside sufficient assets to satisfy the creditors of the estate, and that where they do not do so, in regard to debts of which they have notice, they will not be allowed to plead distribution of the assets, any more than the English executor is allowed to plead payment of legacies; and in accordance with a ruling of the Calcutta High Court "the liability of an heir is to be measured not by his interest in the estate, but by the assets come to his hands."<sup>2</sup>

Heirs must set aside assets for debts.

#### (4) Alienations by Individual Heirs.

571. Each heir of a deceased Mussulman has, subject to the Transfer of Property Act, s. 52,<sup>3</sup> the right to dispose of his own share (but not more than his share<sup>4</sup>) of the inheritance (whether before or after distribution) in any manner that he may think fit, and to pass a good title to a transferee in good faith for consideration, notwithstanding any debts that may be due from the estate to the creditors of the deceased.<sup>5</sup>

Rights of transferees in good faith for consideration.

(1) P dies in 1861, leaving as his heirs a widow, H, and two sisters HA, and HB. H obtains decrees against HA and HB in 1864, for her 'mahr' and in 1865 for her share in the estate of P. HA and HB remain in possession of their shares in P's estate, and incur debts, for which a decree is passed against them in 1868, and the property is sold in execution to T. H claims that T takes the property subject to her right to be paid the 'mahr' thereout. Held, that H cannot follow the property in T's hands, but her remedy is to claim the 'mahr' from HA

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<sup>1</sup> *Re Loreti, Ambler v. Lindsay*, (1870) 3 Ch. D. 108.

<sup>2</sup> *Mutty Jan v. Ahmed Ally* (1882) 8 Cal. 70; *Amur Duhin v. Baij Nath Singh* (1891) 12 Cal. 311.

<sup>3</sup> The Transfer of Property Act, s. 52, is as follows: "During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceedings, in which any right to immovable property is directly and specifically in question, the property cannot be transferred, or otherwise dealt with, by any

party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose."

<sup>4</sup> See comment to s. 571.

<sup>5</sup> *Bazargi Husein v. Dool Chand* (1878) 4 Cal. 402, 406, 408; 5 I. A. 211, approving *Wahidunnissa v. Shubbertan* (1870) 6 Beng. L.R. 54. See also *Jafri Begum v. Amir Muhammad Khan* (1885) 7 All. 822, 828, 833; *Land Mortgage Bank Ltd. v. Budgebhari* (1879) 7 Cal. L.R. 460, 463; *Abdul Majid v. Krishnamachari* (1916) 40 Mad. 217, 244, 253, 254.

**SECTION 571.** and *H*B to the extent of the assets that they may have received out of *P*'s estate, for which they may not be able properly to account.<sup>1</sup>

*Illustrations.*

(2) *P* dies in 1865, leaving as his heirs three widows, *H*, *HA* and *HB*, and a son, *HC*. While disputes are going on between the widows and son, who respectively claim large parts of the estate for 'mahr,' and under a 'mukarari,' *HC* executes, on the 13th of June 1866, a mortgage bond in favour of *T*, charging a portion of *P*'s estate with the payment of Rs. 4,800. Subsequently, the widows *H*, *HA* and *HB*, obtain decrees against *HC*, to account for the assets of *P* in his hands, and to pay thereout their 'mahr' claims, and the debts of other creditors of *P*, and after satisfying the creditors, to divide the residue amongst the heirs of *P*. In execution of these decrees the property mortgaged by *HC* to *T* is attached. Later, on the 26th of June 1867, *T* attaches the said mortgaged property in execution of a decree on his mortgage, and it is purchased at the auction sale by *TA*. *Held*, (a) that before the suits by *H*, *HA* and *HB* were instituted, *HC* had the right to convey either by absolute sale or by mortgage his own share in *P*'s estate, and the mortgage to *T* passed a good title to him, notwithstanding that debts might be due to *P*'s creditors;<sup>2</sup> (b) that *H*, *HA* and *HB* cannot follow the mortgaged property in the hands of *TA*; <sup>3</sup> (c) that alienations by *HC* pending the suits by *H*, *HA* and *HB* are affected by the doctrine of 'lis pendens,' and are bound by the decree obtained in the said suits.<sup>3</sup>

(3) *P* is indebted to *C*, and dies leaving as his heirs *W*, a widow, *D*, a daughter, and *S*, a sister. *D* purchases *W*'s share in *P*'s property, and mortgages to *T* both that share and her own, amounting to a ten anna share in the estate. *T* subsequently purchases the six anna share in the property to which *S* was entitled, and then brings a suit against *D* on the mortgage, and obtains a decree for the sale of the property. He also obtains a decree for possession of the six anna share transferred to him by *S*. *T* transfers both his decrees to *TA*, who gets into possession of the six anna and ten anna shares, respectively, on 9th February 1875, and 12th September 1875. On the 26th January 1876, *C* (the creditor of *P*) attaches the property in execution of a decree which he had obtained on the 13th of July, 1872, but which had not been completely satisfied.—*Held*, that the property in the hands of *TA* is not charged with the payment of *P*'s debts, and *C* cannot attach it.<sup>4</sup>

<sup>1</sup> *Wahidunnissa v. Shubbalram* (1870) 6 Beng. L. R. 54, 68; 14 W. R. 239. The P. C. "entirely concurred in this view of the law." See s. 571, *ibid.* (2).

<sup>2</sup> *Bazzyet Hussein v. Dooli Chaud* (1878) 4

Cal. 402, 5 I. A. 71.

<sup>3</sup> *Mahomed Wajid v. Taggabun*, *ibid.* Cf. Transfer of Property Act, s. 62, cited in n. to s. 671.

<sup>4</sup> *Land Mortgage Bank v. Bidgalhari Dasi* (1879) 7 C. L. R. 460 (White and Field, J.J.).

(4) P dies indebted to C, and leaving H and HA as his heirs. C sues SECTION 571. H and obtains a decree against her. In execution of the decree P's, *Illustrations* property is purchased by T. Meantime HA sells her share in P's estate to TA. *Held*, that TA acquires the whole of HA's share in the estate, and not subject to the satisfaction thereof of the decree obtained by C against H, to which HA was not a party.<sup>1</sup>

Cf. the Probate and Administration Act, s. 90, only the first subsection of which is reproduced in the corresponding section of the Indian Succession Act, s. 269.

Of course, the estate does not vest in the heirs if there is an executor <sup>When does estate vest in heir?</sup> or administrator,<sup>2</sup> nor in any case until the death of the ancestor. Until then it is a mere 'spes successionis,'<sup>3</sup> incapable of being transferred. As to the priorities between the creditors of the heirs and of the deceased, see the next section.

Sir R. Wilson says in his valuable work (s. 159), that "if while the estate is still undistributed, one of several heirs, being in possession of some specific property forming part thereof, sells or mortgages the same, the 'bona fide' purchaser or mortgagee acquires a good title to the whole of the property so dealt with, not merely to the interest therein of the alienor, both as against the other heirs and as against creditors of the deceased," and he cites 'Land Mortgage Bank v. Bidyadhar' <sup>No heir can transfer more than his own share in the estate or in any property of the deceased.</sup> stating that it follows 'Bazayet Hossain.'<sup>4</sup> But, it is submitted, that the cases referred to have not decided that any heir, without the concurrence of the others, can part with more than his own interest in immovable property, nor is there any other authority for that proposition, and there are decisions directly contradicting it which are referred to below. Dealing first with the cases relied upon by Sir Roland Wilson, it will be observed that in *ill.* (3) to s. 571 the estate was not distributed, but each of the heirs had transferred her own interest in the property, consisting of a two, six and eight-annas share respectively, to the transferee, who had in this manner acquired the whole property. No question arose of any heir purporting to transfer more than her own interest. The only question before the Court was whether (a) the creditor of the deceased could follow the assets into the hands of the transferee, or (b) he could only sue the heirs themselves for payment of the debt out of the assets come to their hands, for which they could not properly account. The latter alternative was accepted by the Court.

<sup>1</sup> *Sitanath Das v. Roy Lutchmiput Singh* (1882) 11 Cal. L. R. 208.

<sup>2</sup> P. & A. Act, and comment to s. 561 above.

<sup>3</sup> Cf. s. 371, *ill.* (1) above.

<sup>4</sup> (1879) 7 G. L. R. 490.

<sup>5</sup> (1878) 4 Cal. 402; 5 I. A. 71.

## SECTION 571.

In the decision given as *ill.* (2) to s. 571, the Privy Council distinctly say : "He (the son) had the right to convey *his own share* of the inheritance, and was able to pass a good title to the alienee notwithstanding any debts which might be due from his deceased father."<sup>1</sup> The judgment lends no support to the statement that one heir can convey any other heir's share in the property.

Co-owners have no right over each other's shares, such as partners have.

This point has recently been carefully considered and set beyond doubt by Abdur Rahim, J.,<sup>2</sup> who points out that under Muhammadan law<sup>3</sup> the co-heirs are said to have 'shirkat-ul-milk' (i.e., ownership of property as tenants in common, or as it has been translated by Hamilton, "partnership by the right of property"); and that this is distinct from 'shirkat-ul-aqd,' or partnership by contract. The latter is the ordinary partnership of English law. In regard to the former (*viz.* co-ownership), it is not lawful for one (co-owner) to perform any act with respect to the other's share, without that other's permission, inasmuch as each co-owner is a stranger to the other's share, but of course it is lawful for each to dispose of his own share either to the other co-owner or (subject to the rights of pre-emption) to one who is not a co-owner.<sup>4</sup>

Previous to the last-mentioned decision the point in question had arisen directly in a case,<sup>4</sup> where the first defendant, a lady, was in possession of the whole estate, and the plaintiff questioned a number of her dealings therewith, one of them being that she had purported to alienate items XI, III, and IV in favour of defendants No. 13 and 14, partly for satisfying the debts of the deceased, and partly for some purpose of which there was no evidence, and the Court set aside the said alienations in so far as they were not made for payment of the debts of the deceased, and so far as they went beyond the extent of the rights of the plaintiff.<sup>5</sup>

Voluntary alienation distinguished from sale in execution of a decree.

The statement in the last-mentioned case that one of several co-heirs can, if all the effects of the deceased are in his hands, meet the demand of a creditor of the deceased by a 'bona-fide' voluntary sale of the assets, just in the same way as the property can be brought to sale in execution of a decree against him,<sup>5</sup> is dissented from by Abdur Rahim, J., presiding over a Full Bench of the Madras High Court, and

<sup>1</sup> *Bazzyet Hossain v. Dool Chund* (1878) 4 Cal. 402, 496.

<sup>2</sup> *Abdul Majeth v. Krishnamachariar* (1916)

41 Mad. 243, 255.

<sup>3</sup> *Citing Hefl.* 217.

<sup>4</sup> *Puthummbai v. V. diti Ummarhabai* (1901)

26 Mad. 734, 736 (par. 5); 737 (par. 2, 6); 739

(par. 2) See s. 567 *ill.* (10), above.

<sup>5</sup> In referring the case to the Full Bench,

Wallis, C. J., had remarked: "If the balance of convenience may be regarded, I am not sure that it is for the benefit of creditors, any more than of co-heirs, to lay down a rigid rule that alienation can be made only by the whole body of co-heirs, or in a suit to which they are parties": *Abdul Majeth v. Krishnamachariar* (1916) 41 Mad. 243, 249.

his lordship points out the distinction between a decree against a single heir and a voluntary alienation by him, which is mentioned in the comment to s. 567, above.<sup>1</sup>

(5) *Dealings with Creditors and Debtors of the Deceased.*

**572.** Until any specific portion of the property of a deceased Mussulman is actually alienated to a transferee in good faith for consideration, the creditors of the deceased have a right to have their claims satisfied out of the said property in priority to the creditors of any of the heirs.<sup>2</sup>

Priority of creditors of deceased over creditors of heirs.

*Explanation.*—A mere money decree against an heir for his personal debt does not amount to such an alienation as will to any extent affect the priority above referred to.<sup>3</sup>

Mere money decree does not affect such priority.

*Polies*, leaving his widow, *W*, and son, *S*, as his heirs. On the 27th of July, 1899, *W* obtains a decree against the estate for her unpaid 'mahr.' The decree is a simple money decree, not charging any portion of the estate with the payment. On the 19th September, 1899, *W* attached certain shares belonging to her husband's estate, in execution of her 'mahr' decree. A creditor of *S*, *C*, also held a simple money decree<sup>4</sup> against *S*, and in execution of his decree, attached, on the 21st of November 1899, the same shares. *Held*, that the estate devolved upon the heirs subject to the liability to pay thereout the debts of the deceased; that a mere judgment against an heir for his personal debt did not amount to such an alienation of the assets as would to any extent defeat the creditors of the deceased, and that *W*'s decree had therefore priority over *C*'s, so that *C* could bring the said shares to sale subject to the rights of *W* under her decree (for 'mahr') but not otherwise.<sup>1</sup>

Illustrations.

**573.** One of several heirs of a deceased Mussulman, though he is in possession of the whole estate of the deceased, may not voluntarily alienate more than his

Alienations by one heir for paying creditor of deceased.

<sup>1</sup> *Abdul Majeeb v. Krishnamachariar* (1916) 41 Mad. 243, 256.

<sup>2</sup> *Rholanath v. Magbul-un-nissa* (1903) 26 All. 28, 35. Cf. the Indian Contract Act, s. 262.

<sup>3</sup> If *D* had been a bona fide mortgagee or purchaser from *C*, the case would have been different: (*Mt.*) *Wahidunnissa v. (Mt.) Shud-*

*bratun* (1870) 6 Beng. L. R. 54; *Rholanath v. Magbul-un-nissa* (1903) 26 All. 35; *Bazayef Hoosain v. Dool Chand* (1878) 4 Cal. 402; 5 L.A. 211; *Kunderly v. Jervis* (1856) 22 Beav. 1.

<sup>4</sup> *Rholanath v. Magbul-un-nissa* (1903) 26 All. 35.

SECTION 573. own share in property belonging to the estate for discharging the debts of the deceased or otherwise.<sup>1</sup>

Two questions are involved in s. 573: (1) Whether any of the heirs can, as against his co-heirs or other representative of the estate, plead payment to a creditor of the deceased as due administration of the assets. (2) Whether the transferee acquires good title to property so transferred.

The Madras High Court had answered both questions in the affirmative,<sup>2</sup> in a judgment that did not discuss the points involved. But the decision was subsequently over-ruled, and it was laid down as stated above.<sup>3</sup> The latter ruling makes ss. 573 and 574 consistent.

The question has already been sufficiently discussed in the comment to ss. 567, 571, and 572, above. But some general considerations affecting s. 573, are referred to below.

Such alienations  
are like acts  
of executor  
'de son tort.'

It is clear that a single heir making payments for the satisfaction of the debts of the deceased, takes upon himself to represent the whole of the estate, without having any right to do so - for each heir can represent only a fraction of the estate proportionate to his share in it. It would therefore seem that the position of such an heir is analogous to that of an executor 'de son tort' in England.<sup>4</sup> Payments so made are there held good against the true representatives of the deceased only where (a) the circumstances are such that the creditor may reasonably take such heir to represent the estate,<sup>5</sup> and amongst the circumstances to be taken into consideration are whether or not such heir "has assets out of which the decree is to be satisfied under his control"<sup>6</sup> and (b) the payment (or other dealing with the estate) is such that the true representative would have been bound to make it.<sup>7</sup> So that the other heirs would not be bound, e.g., if the debt was not due.<sup>8</sup>

Title acquired  
by alienee from  
single heir.

Similar considerations affect the question as to the title that the alienee acquires under the circumstances above referred to. It will

<sup>1</sup> *Abdul Majeeb v. Krishnamachariar* (1916) 40 Mad. 243 (P.B.) over-ruling *Pathammabai v. Vaidi Ummachabai* (1902) 26 Mad. 734, 739. Cf. *Jafri Begum v. Amir* (1885) 7 All. 822. *Contra, Hassan Ali v. Mehdi Hassan* (1877) 1 All. 533.

<sup>2</sup> Both questions arose with reference to defendants 11, 12, 17, involving items I, XVIII, and XI, respectively, in *Pathammabai v. Vaidi Ummachabai* (1902) 26 Mad. 734, 736.

<sup>3</sup> *Abdul Majeeb v. Krishnamachariar* (1916) 40 Mad. 243.

<sup>4</sup> Cf. Indian Succession Act, ss. 267, 268; *Thomas v. Harding* (1854) 2 El. & Bl. 630; *Jafri Begum v. Amir Muhammad Khan* (1885)

7 All. 822, 825 (question 3).

<sup>5</sup> *Khairajmal v. Datta* (1901) 32 Cal. 296 (P.C.) Cf. *Pathammabai v. Ummachabai* (1902) 26 Mad. 734, 738; *Devadas v. Bhimaji Dhondo* (1895) 20 Bom. 335, 345; *Hamir Singh v. Russumat Zukut* (1875) All. 57, 59. So, conversely, not being in possession of the estate, is no defence when the heirs of the deceased are sued by his creditors, see s. 561, *id.* (3), above.

<sup>6</sup> *Graysbrook v. Fox* (1565) Plowd. 275, 282; *Buckley v. Barber* (1851) 6 Exch. Rep. 164, 183 (*per Parke B.*); *Thomson v. Harding* (1853) 2 El. & Bl. 630, 639. See also s. 567 (2), above.

<sup>7</sup> *Khurshetab v. Keso Vunayek* (1887) 12 Bom. 101, 103.



be remembered that where the property is transferred to a third person SECTION 573. 'bona fide' for valuable consideration, the creditors or heirs of the deceased cannot follow it in the hands of the transferee, the mere existence of debts payable by the estate do not affect the title of the transferee, even though he has knowledge of the debts,<sup>1</sup> so that such debts or charges are not in the nature of a trust<sup>2</sup> on the property of the deceased, binding on the transferee. But, as stated above, this does not imply that individual heirs may pass the whole of any particular property. Each heir may transfer only his rights in the property, but such rights are transferable without being charged with payment of a proportionate part of the deceased.

**574.** One of several heirs of a deceased Mussulman cannot give a valid and sufficient discharge to a debtor of the deceased for the whole of the debt, but only for a part thereof proportionate to that heir's share in the estate.<sup>3</sup>

Payment to one heir of debt due to deceased.

(1) P dies, leaving H and HA as his heirs. M a mortgagor of A pays the mortgage-debt to H alone. *Held*, that M is bound to pay over again to HA his share in the mortgage debt.<sup>4</sup>

Illustrations

(2) P dies, leaving a widow, W. D, a debtor of P, pays the debt to W. Subsequently H, a nephew of P, obtains a certificate of heirship (and representation) to P, and sues D. *Held* that payment by D is a valid defence, if D can show that H is the legal heir of P.<sup>5</sup>

A certificate under the Succession Certificate Act or Bombay Regulation VIII. of 1827 is necessary (in the absence of probate or letters of administration) before a Court will pass a decree against a debtor of the estate for payment of the debt. See comment to s. 563, above.

Foreign recognition.

The present section is in accordance with the decision of the Madras High Court in 'Pathumabai's' case. Its effect is that, though a single heir purports to act as the representative of the deceased so that the

Individual heir cannot give valid discharge to debtor.

<sup>1</sup> *Bazayet Hossain v. Dooli Choud* (1878) 4 Cal. 402, 401; (*Musammut Wahidunissa v. Musammut Shubratul* (1870) 6 Beng. L. R. 51; see also *Jafri Begam v. Amir Md. Khan* (1885) 7 All. 822, 828, 833; *Laud Mortgage Bank, Ltd. v. Bulghadhari Dasi* (1880) 7 Cal. L. R. 400, 463.

<sup>2</sup> As to trusts, see Indian Trusts Act, s. 96; Lewin on "Trusts" (10th ed.) 1045. The alienee of a trust estate with knowledge of the trust is bound by the trust, though he has paid the full value of the trust property; *Fakiruddin v. Abdul Hussain* (1910) 13 Bom. L. R. 826.

<sup>3</sup> *Pathumabai v. Vitil Chinnabhai* (1902) 26 Mad. 734, 737 (par. 3 and 4), 739 (par.

3 relating to defendants 18 and 19, and items xv, xvi), cf. Indian Contract Act, s. 45.

<sup>4</sup> *Sitarum v. Shridhar* (1903) 27 Bom. 292 (*Chandavarker and Astor, JJ.*). This was a case between Hindus, but the same principles would apply to Muslims, except that "the Hindu law as a general rule constitutes one of them (i.e. the co-heirs), the senior in age as the *karta* or manager of the inheritance on behalf of the co-heirs." *Ibid.* 295. In this case, had the payment been made to the *karta*, the decision might have been different.

<sup>5</sup> *Purshodam v. Runchhod* (1871) 8 Bom. H. O. R. (A.C.) 152, 155, (F.N.)

**SECTION 574.** debtor may reasonably suppose him to be such, still the heir is not clothed with the authority to give a discharge to the debtor any more than he is to pass a good title to a creditor of the deceased. A distinction was at one time made between ss. 573, and 574 : that every creditor of the estate was entitled to receive the whole of his debt out of the assets and if any heir discharged the duty of paying off the creditor, he only gave to the creditor his due ; but that no single heir was entitled to receive the whole of the debt due to the estate, and the debtor could give to each heir only what was his own due.

Every part of property liable for debt, but whole of any property may be given in satisfaction of any creditor.

The converse of the rule in this section does not hold : In other words, while each heir is proportionately interested in every debt due to the estate, yet it cannot be maintained that (inasmuch as every part of the property of the deceased is liable for the payment thereof of all his debts) each creditor of the deceased is entitled only to a proportionate part of each property of the deceased, and can have only such portion transferred to him so as will leave the rights of other creditors unaffected. To take an example : If P dies, leaving as his heirs two sons, S and SA, a debtor of P cannot pay the whole of the debt to S alone, and S's receipt for any portion of the debt beyond a half of it will be an ineffectual discharge as against SA. But, on the other hand, if P leaves property of the value of Rs. 10,000, and there are two creditors Cand C<sub>a</sub>, each to the extent of Rs. 10,000, then in the absence of fraud S and SA may transfer the whole of the property to Calone, and C would then acquire a valid title to the whole, and not only to half of the property.<sup>1</sup> For Muhammadan law, unlike English law, does not require a rateable payment of debts. It can only be in cases where the assets are not sufficient to discharge all the debts that the point can be of importance. In such cases, of course, the creditors have other remedies.

### § 6.—Protection of Estate.

**575.** Where there is danger of misappropriation, deterioration or waste<sup>2</sup> of the assets left by a deceased Muslim, the Court may deliver possession of the property to some person under the Succession (Property Protection)

Steps for protecting property of the deceased : Appointment of—

1. Curator.
2. Administrator-General.
3. Receiver.

<sup>1</sup> (*Haji Saboo Sulek v. Ally Mahomed Jan Mahomed* (1901) 30 Bom. 270, 6 Bom. L. R. 1115, following *Veeraokharajee v. Papiah* (1902) 26 Mad. 729.

<sup>2</sup> These words are taken from the Administrator-General's Act, s. 18. Cf. preamble to the Succession (Property Protection) Act

XIX. of 1811 (which, previous to Act I. of 1903 used often to be referred to as the "Curator's Act") : "where there is reason to apprehend danger of misappropriation, waste, or neglect and where such appointment will, in the opinion of the authority making the same, be beneficial under all the circumstances of the case."

Act, 1841, or authorize and enjoin the Administrator-General or a receiver to collect and take possession of such property. SECTION 575.

This section is based on the Succession (Property Protection) Act XIX. of 1841, and the Administrator-General's Act, ss. 17 and 18.<sup>1</sup> The law contained in these Acts is the general law of British India, and it is deemed unnecessary to state their provisions in greater detail. The Administrator-General's Act, ss. 17 and 18, apply only when the assets are within the Presidency towns. See the Civil Procedure Code, s. XI, for the appointment of receivers, and compare *Cary v. Hill*,<sup>2</sup> in which Lord Romilly, M.R., said that if the estate has been taken possession of by a person who is not the legal representative, and no other person is constituted the legal representative, the proper course is to file a bill for a receiver to take care of the property until a legal personal representative is appointed.

Lord Romilly said: "You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the Court; if you were able to do so, you would work great injustice. If at the hearing of an administration suit, the Court finds that it has not the legal personal representative of the testator before it, then its arm is paralyzed, and it can do nothing." Then referring to the facts of the case before him, he said: "This plea in substance says that there is no legal personal representative of the testatrix, and indeed it is not alleged or even suggested that any person other than the Defendant has been constituted her legal personal representative. It is true that the bill alleges that the Defendant has possessed himself of some part of the personal estate; but if he had possessed himself of every penny, that would not entitle the Plaintiff to the relief he asks. If a person has taken possession of the estate, you may file a bill for a receiver to take care of the property until a legal personal representative is appointed, and the Court will appoint a receiver for that purpose; but that is a totally different thing from making a decree for general administration."<sup>2</sup>

Necessity of some one to represent the estate.

Wrongful possession.

Receiver.

<sup>1</sup> Dealt with in the comment to s. 563, above.

<sup>2</sup> (1872) L. R. 15 Eq. 79, 82. Muhammadan law empowers the Qazi to appoint a joint

manager when the executor appointed by the deceased is incompetent. See s. 562, above.

## CHAPTER XIII.

### WILLS.

#### § 1.—*Preliminary.*

Terms.	<b>576.</b> In this chapter unless there is anything repugnant in the subject or context—
Will.	(1) "Will" means the legal declaration of the intentions of a Mussulman with respect to his property, which he desires to be carried into effect after his death. <sup>1</sup>
Estate.	(2) "Estate" means all the property <sup>2</sup> that a deceased Mussulman owns at the time of his death, after his debts have been discharged, and his funeral expenses paid thereout. <sup>3</sup>
Will defined.	"Will," it is said in the 'Hidaya,' "means the endowment with the property of anything after death," <sup>4</sup> and the author of the 'Sharaya'-ul-Islam' says: "To bequeath is to confer a right to the substance or usufruct of a thing after death; it requires declaration and acceptance." <sup>5</sup> The Arabic word for will is 'wasiat,' meaning "precept." The earliest wills amongst the Arabs must have been nuncupative, made in many cases, in the midst of battle and surrounded by the tribesmen. <sup>6</sup> The importance given in the Muhammadan law books to the rules dealing with bequests of fractions of the estate, and the fact that the rights given to many of the heirs consist of the same nature, suggest that the will in pre-Islamic times must often have consisted merely of a nomination of a universal successor, an easy step being to nominate more persons than one to form conjointly the universal successor.
'Wasiat.'	
Nomination of universal successor.	
Creditors' rights how protected.	The provision that as regards the operation of a will only that portion of the estate has to be taken into consideration which is left over after the testator's debts have been paid, takes the place of the rules against gifts and 'waqfs' in fraud of creditors contained in ss. 359 and 461, above.

<sup>1</sup> Cf. Probate and Administration Act, s. 3.

thereto.

<sup>2</sup> Of any description whatever, except such as which the interest of the deceased was limited to his life-time.

<sup>4</sup> Hed. 670.

<sup>5</sup> Bail. II. 229.

<sup>3</sup> Cf. s. 558, (4), above, and the footnote

<sup>6</sup> Compare for Roman law, Galus, II. 101, Justinian II. x. 1.

**577.** The will of a Mussulman is, subject to the Pro-SECTION 576.  
bate and Administration Act, governed in British India Law of will.  
by the Muhammadan law.<sup>1</sup>

## § 2.—Testamentary Competence and Capacity.

### (1) Competence of Testator to make a Will.

**578.** (1) Every Muslim who is of sound mind - and Competence  
has attained majority under the Indian Majority Act is to make a will  
competent to make a will.<sup>3</sup> *Quære*, whether a Shiah who majority and  
has attained the age of ten years and is capable of discern- soundness of  
ment may validly make a will.<sup>4</sup> mind.

(2) A bequest made by a person while a minor may be Minor's will  
validated 'ab initio' by subsequent ratification.<sup>5</sup> may be ratified.

(3) A will made by a person when his mind is unsound Lunatic's will  
does not become valid by his subsequently becoming of does not  
sound mind.<sup>6</sup> A will made by a person while of sound become valid by  
mind becomes invalid if the testator subsequently becomes his becoming  
permanently unsound of mind.<sup>7</sup> sound, will  
invalidated  
by testator's  
lunacy.

*Exception.*—According to Shiah law where a person Shiah law :  
wounds himself mortally, or takes poison for committing Will of suicide  
suicide, and then makes a will, it is invalid ; but if he makes invalid.  
his will and then commits suicide, it is valid.<sup>8</sup> The onus  
of proving that a will is invalid under this rule of law is  
on the person impugning it.<sup>9</sup>

The question as to the age at which a Muslim may make a will Age of  
in British India requires a consideration of both the Indian Majority testamentary  
competence.

<sup>1</sup> See s. 1, above, and comment thereto.  
Cf. (*Shah*) *Moosa v. (Shah) Bessa* (1894)  
8 Bom. 241.

<sup>2</sup> Roman law did not permit the dumb to  
make a will; Justin. II. xix. 4; cf. also III.  
xix. 7; Gaius, III. 105.

<sup>3</sup> Bail. I. 617; *Minhaj*, 250 (Bk. 29, s. 1). See  
comment.

<sup>4</sup> Bail. I. 613; II. 229; *Minhaj*, 250.

<sup>5</sup> *Sie*, Bail. I. 617.

<sup>6</sup> Bail. I. 617.

<sup>7</sup> Ameer Ali, "Mahomedan Law," I. 467 :  
According to *Kazi Khan* if a person makes a  
*wasiat*, and subsequently thereto becomes a

permanent lunatic, in such a case the *wasiat*  
will become void. But when the madness has  
not lasted over six months, the bequest will not  
be avoided."

<sup>8</sup> The exception is not expressly mentioned  
in the case of the High Courts. See Table of  
Enactments in Ch. II., above.

<sup>9</sup> Bail. II. 232 (par. 2); *Mazhar Husen v.*  
*Bothe Bibi* (1898) 21 All. 91 (P.C.) : will of suicide  
valid, when made in contemplation of taking  
poison, but before it had actually been taken.  
The onus of proving that the will was written  
after the swallowing of poison rests on the  
party impugning the will : *ib.* 98.

- SECTION 573.** Act and the Muhammadan law—the latter forms the rule of decisions in questions relating to succession “except in so far as such law has by legislative enactment been altered or abolished.”<sup>1</sup> Now the Indian Succession Act, 1865, s. 46, which specifically deals with the question of the age at which a person may make a will, has not been applied to Mussulmans, nor is the said section incorporated in the Probate and Administration Act, or in any other Act to which Muslims are subject, though it is incorporated in the Hindu Wills Act. Five years after the Indian Succession Act, however, the Indian Majority Act was passed, and questions relating only to marriage, divorce, dower, adoption, and religion or religious usages, are excepted from its operation. So that, by implication, majority in the matter of succession (and the law of wills forms a part of the law of succession)<sup>2</sup> is to be governed by that Act: in other words, the provisions of Muhammadan law, as to majority so far as the law of wills is concerned, is “altered or abolished” by the Indian Majority Act which provides that minors shall be deemed to have attained majority on completing 18 or 21 years.<sup>3</sup> But (if the matter is considered in a strictly technical manner) in order that the Majority Act should affect the competence of a Mussulman to make a will, it must be held that either the Majority Act or the Muhammadan law requires the attainment of majority as a condition precedent for testamentary competence, —in other words, that under either the Act, or the Muhammadan law, being a major is a necessary qualification for having the power to make a will. For this purpose it has first to be determined whether the attainment of majority is necessary for competence to make a will under Muhammadan law; and then whether or not majority will be determined in this connection by the Indian Majority Act. The Act does not contain any specific provision of substantive law laying down the effect of being a major or a minor as regards any juristic act,—while according to Shiah law, majority does not seem to be a necessary ingredient of testamentary capacity, inasmuch as that law fixes an age (*viz.*, 10 years) independently of the age of majority for competence to make a will. If this is so, then strictly speaking, the Shiah law of wills must be deemed to be unaffected by the Indian Majority Act, and a Shiah who is ten years old, and has discretion, must be considered competent to make a will. The Courts would, no doubt, strive hard to avoid this
- Succession Act<sup>1</sup> not applied.
- Wills not excepted from Majority Act.
- Two questions :
1. Is attainment of majority an ingredient in testamentary capacity ?
  2. How must majority be determined ?
- Shiah law.

<sup>1</sup> See p. 779, n. 8.

<sup>2</sup> *Mancharji Pestaji v. Narayan Lakshmanji* (1863) 1 Bom. H. C. R. 77, 80, 81.

<sup>3</sup> The two divisions (the law of succession and of minority) are cross divisions: for it is

plain that the law governing a minor who purports to make a will falls within both the divisions. See Holland, “Jurisprudence” 7th ed. (1895) 122, 123 which brings out this point with great clearness by a tabular statement.

conclusion, and would scarcely hesitate to read into the Majority Act a SECTION 578. provision which, though not expressed, seems to be its implied object and purpose, and without which it would almost be rendered nugatory.<sup>1</sup> Under Hanafi law, on the other hand, competence to make a will connotes <sup>Hanafi law.</sup> puberty; and puberty being the age at which, according to Muhammadan law, a person attains majority, it has to be considered with reference to each subject and context, whether the term puberty must by operation of the Indian Majority Act be replaced by the words "attainment of 18 or 21 years (as the case may be)." In coming to a decision on this point as regards wills (should the question ever arise) the Courts will, no doubt, be influenced by the close analogy that testamentary capacity has to contractual capacity. A will purported to be made by a person <sup>will of minor and undue influence.</sup> under 18 years would (apart from the doubts above referred to) be peculiarly liable to attack on the ground of undue influence.

As some doubt has been expressed<sup>2</sup> as to whether the Shafi'i law on <sup>Shafi'i law agrees with Hanafi, not Shiah law.</sup> this point does not agree with Shiah law, the following translations from Shafi'i texts may be useful: (1) "A will is valid if made by one who is capable of duties being imposed on him, and free (although he may be a non-Muslim) so also by one who is under inhibition on account of imbecility, according to the faith (of Shafi'i), but not by an insane man, nor a man who is not in his senses, nor a child; though according to one authority it may be valid if made by a child who has discernment."<sup>3</sup> (2) "The constituent parts (of a will) are: the legatee, the object of bequest, the words (of appointment) and the testator. It is required of him (i.e., the testator) that he be capable of having duties imposed on him, being free, and having freedom of will for action, and it would not be valid without these conditions."<sup>4</sup> No doubt under the Indian Majority Act no minor would be considered to be capable of having duties imposed on him.

**578A.** The rules contained in s. 359A, above, relating <sup>'Pardanashin' ladies.</sup> to transactions by 'pardanashin' women apply with the necessary modifications to wills.

(2) *Testamentary Capacity, how Limited.*

**579.** Under systems of Muhammadan law other <sup>Testamentary capacity:</sup> than the 'Ithna 'Ashari Shiah law<sup>5</sup> a testamentary dispo-

<sup>1</sup> See *Krishnamachariar v. Krishnamachariar* (1913) 38 Mad. 166, 174, 175.

<sup>2</sup> Rod. 673; Wilson, 415.

<sup>3</sup> *Minhaj-ul-Talibin*, Willa, (lines 1-3).

<sup>4</sup> Shaikh-ul-Islam Zakari al Ansari's *Manhaj*; Book on *Wassia* (ll. 1-4.)

<sup>5</sup> As to Shiah *Ithna 'Ashari* law see s. 579c, below.

SECTION 579. sition is (subject to ss. 579A and 579B, below), invalid, if, and in so far as, it is purported thereby—

One-third of estate.

Bequests to heirs invalid.

Not opposed to Islam.

(a) to dispose of more than one-third of the testator's estate,<sup>1</sup> or

(b) to benefit any of his heirs,<sup>2</sup> or

(c) to benefit an object opposed to Islam as a religion.

See the illustrations and comment following s. 579c, below.

Consent of heirs validates (a) and (b).

**579A.** (1) Dispositions infringing clause (a) and/or (b) of s. 579, above, are validated and will be given effect to, if, after the testator's death,<sup>3</sup> the heirs whose rights are affected by such disposition<sup>4</sup> consent thereto, either expressly or impliedly [or by passive acquiescence].<sup>5</sup>

Where some only of the heirs consent.

(2) Where some of the heirs consent and the others do not, the legacy is (in so far as it requires such consent) payable out of the shares of the consenting heirs alone.<sup>6</sup>

Bequest validated by consent of heirs is not a gift requiring possession.

(3) A testamentary disposition validated in accordance with subsection (1), above, operates (except under Shafi'i law) as the act of the testator, and not as a gift by the heirs; and it is not necessary that possession of the subject of the bequest be given to the legatee in order to complete its transfer to him.<sup>7</sup>

<sup>1</sup> Bail. I. 614, 634, etc.; II. 233; *Munhaj*, 260 (Bk. 29, s. 2); see also *Abdul Mayeth v. Krishnamachariar* (1916); 41 Mad. 243, 254.

<sup>2</sup> *Bafatun v. Bilaiti Khanum* (1903) 30 Cal. 663, 686; *Fatma v. Ariff* (1881) 9 Cal. L. R. 66 *i.e.*, the actual heirs at his death, not the presumptive heirs at the time of the bequest: see *id.* (5) to s. 579c, below. Upon the Petition of *Koramat-ul-Nisauk Bibi* (1817) 2 Morl. 120; *Jumeenooddeen Ahmed v. Hossein Ali* (1865) 2 W. R. 18, 40, (will disinheriting all heirs); *Qadir Ali Khan v. Noussa Begum* (1867) 2 Agra 154 (altering rights of heirs); *Mahomed Mudun v. Khodunnessa Alian Khookee Beebe* (1865) 2 W. R. 181 (more than half to daughter); *Muhammed v. Imamuddin* (1865) 2 Bom. H. C. 63 (2nd Ed. 50) (to brother without consent of husband); *Baboojan v. Muhammed Nurool Haq* (1868) 10 W. R. 375; *Oomuloonnessa Beebe v. Areefoonus Beebe* (1865) 4 W. R. 66.

<sup>3</sup> *Bafatun v. Bilaiti Khanum* (1903) 30 Cal. 683; consent during life is not enough in Sunni law; *Nusrat Ali v. Zeinunnissa* (1871) 15 W. R. 146; *Cherachom Vitli Ayisha Kuti Umah v. Vali Pudiakel Brathu Umah* (1865) 2 Mad.

II. C. R. 350. Amet Ali, "Mahomedan law" (3rd ed.) 1 486, states that consent during the last illness of the testator is irrevocable, because the heir is supposed to have then acquired the right. No authority is cited for the proposition.

<sup>4</sup> But a Muslim has no power to appoint by will guardians for marriage of his minor children, Bail. I. 47; II 8.

<sup>5</sup> Macn. 244, 245; *Rameoomar Chunder Roy v. Paqueeroonisa Begum* (1822) 1 Ind. Jur. (O.S.) 119 heiress continued to reside in house bequeathed to her, held this was not consent to will, in absence of some act of actual consent or ratification; but, where the heir affixes his signature to will, without undue influence, it may mean consenting thereto as in *Khadijah Bibee v. Suffer Ali* (1865) 4 W. R. 36; *Sharifa Bibi v. Gulam Mahamed* (1892) 16 Mad. 43. See also *Cherachom Vitli v. Vala* (1865) 2 Mad. H. C. R. 350; *Nusrat Ali v. Zeinunnissa* (1871) 15 W. R. 146; *Daulatram v. Abdul Kayum* (1902) 26 Bom. 497.

<sup>6</sup> Irrespective of the subject of bequest being within or beyond a third of the estate.

<sup>7</sup> Bail. I. 616. See the illustrations and comment following s. 579c, below.



**579B.** In the absence of heirs and as against the right of the State to take by escheat, the testator may bequeath the whole of his property by will.<sup>1</sup> Where a man dies leaving only a wife as his heir and no blood relations, he is entitled to make a will disposing of 5/6 of his estate; and where a woman leaves only a husband as her heir, and no blood relations, she is entitled to make a will disposing of 2/3 of her estate.<sup>2</sup>

SECTION 579B.  
When no heirs.

(1) *T*, a woman, dies leaving her husband *H*, and no other heirs. *T* purports to bequeath half of her property to *L*. The bequest is valid as against *H* only to the extent of 1/3 of the estate, hence a third of the estate is in the first instance, given to *L*, and *H* takes his legal share of 1/2 of the net estate, i.e., 1/2 of 2/3 = 1/3 of the whole. Then out of the residue (i.e., 1/3) that would have escheated to the State, *L* can again take 1/6 to complete the 1/2 that is bequeathed to him. So that ultimately the estate is thus divided: *H* takes 1/3; *L* 1/3 + 1/6 = 1/2; and 1/6 escheats to the State.<sup>3</sup>

Illustrations.

(2) *T* dies leaving him surviving only *W*, his wife, and purporting to bequeath all his property to *L*. *L* takes 5/6, and *W* 1/6. For *L* takes in the first place 1/3 as legatee; then *W* takes 1/4 of 2/3 = 1/6, and then the residual 5/6 does not escheat to the State, but goes to *L*.<sup>4</sup>

See also the illustrations and comment following s. 579 c, below.

When the deceased dies leaving only a husband or wife surviving, the husband or wife is entitled to take only his or her Quranic share in the estate, amounting to 1/2 or 1/4, but is not entitled to take the residue of the estate by return: see ss. 625, 633, 647, below. Moreover, the 1/2 or 1/4

Case where husband or wife is sole heir.

<sup>1</sup> *E.g.*, in *Mohammud Ameenooddeen v. Mohammud Kuberoodeen* (1825) 4 S. D. A. CAL. 40; cf. *Elkin Bhee v. Ashraf Ali* (1864) 1. W. R. 152.

<sup>2</sup> See comment; Bail. I., 634; and see *n. to* *id.* (1) to s. 579B. This refers to the case where the rights of the heirs do not exhaust the estate, for where only a husband or wife survives the deceased the husband or wife takes only a fraction of the estate of the deceased as a Quranic share and is not, as against the testamentary dispositions of the deceased, entitled to claim the residue of the estate. See s. 579, *id.* (7) (8). See also ss. 625, 633, and 647, below.

<sup>3</sup> Bail. I., 634; see also s. 581, *id.* (2) below, and the footnote thereto. But see (*Shek*) *Muhammad v. (Shek) Imamuddin* (1865) 2 Bom. H. C. R. 50, 53: In this case the will was held to be totally invalid, as the testatrix purported to give to her brother her whole property, disregarding her husband's rights. The law seems to be that

where there is an attempt to exclude an heir the will is invalid; but *id.* (2) indicates that purporting to bequeath the whole property to a stranger is not necessarily tantamount to such attempt. (See however s. 50, above.) In the case referred to, no one appeared in the High Court to submit that the will was valid to the extent of one-third. The judgment is meagre: the brother was probably also an heir, which would be another ground for holding the will invalid; for though the judgment holds it invalid as it is a bequest by the testatrix of the whole of her property, "which it was not lawful for her to make," the ground taken by the High Court is hardly enough to avoid the will in toto. In *Bafatun v. Filati Khansum* (1903) 30 Cal. 683, the point was raised but the High Court held that the testatrix (*Bechun Bibi*) left also a nephew as heir besides her husband, and that the will in favour of the nephew was invalid: see 30 Cal. 686.

**SECTION 579B.** Quranic share is determined with reference only to the net estate, i.e., not only have the creditors of the deceased to be first satisfied, but the deceased has the right to make a will disposing of 1/3 of that part of his estate which is left over after creditors have been paid in full: so that the husband or wife is in truth entitled to receive only 1/2 of 2/3, or 1/4 of 2/3, i.e., 1/3 or 1/6 of the net estate after the creditors have been paid.

Exceptions  
under Shiah  
law

**579C.** The Shiah 'Ithna 'Ashari' law<sup>1</sup> agrees with the law as stated in ss. 579, 579A, and 579B, above, with the following alterations—

1. Consent  
during  
lifetime.

(a) the consent referred to in s. 579A, above, is valid, notwithstanding that it is given in the life-time of the testator, and is not ratified after his death;<sup>2</sup>

2. Bequests  
to heirs.

(b) the testator may, without the consent of his heirs, validly bequeath—

3. Bequests  
for  
incumbent  
religious  
duties.

(i) legacies to any of his heirs, payable out of a third of his estate;<sup>3</sup>

4. Bequest in  
'muzaribat.'

(ii) any part of his estate (though it exceeds a third) for the performance of such religious duties as are incumbent on himself;<sup>4</sup>

(iii) the whole or any part of his estate by way of 'muzaribat' or 'qeraz'<sup>5</sup> on the terms of an equal division of profits between the legatee and his heirs,<sup>6</sup>—*sed quare*.<sup>7</sup>

*Illustrations.*

(1) T, a Sunni, makes a will, and leaves a house, which exceeds in value one-third of his estate, to a stranger. If T's heirs consent to the bequest after the death of T, the bequest is valid.<sup>8</sup>

<sup>1</sup> Bail. II. 236.

<sup>2</sup> The Shiah *Ismā'ili* law corresponds to the Sunni law: *Do'ayam-ul-Islam*. See comment, Bail. II. 236.

<sup>3</sup> Bail. II. 244 (par. 2). See *Lahmala Khanum v. Jafri Khanum* (1908) 30 All. 153 and the remarks on that case, which is given as *II*. (3) to s. 581.

<sup>4</sup> Bail. II. 234. For a similar provision in Shāfi law, see *Minhaj*, 246 (Bk. 28, s. 1).

<sup>5</sup> The two words have the same meaning. Richardson gives the following (amongst other) meanings: "Qeraz, repaying, requiting (good or bad), going partnership; trading with another's capital . . . ." "Muzaribat, selling the goods of another for half the profit, . . . partnership." Bail. I. 161 n. 3, defines *muzaribat* as "a contract in which the capital is contributed by one party, and the labour and skill by the other, with a mutual partici-

pation in the profit." The *Tahrir-ul-Ahkam*, a great Shiah authority, says: "Muzaribat or qeraz is a legal transaction, by unanimous consent. It is the delivery of property by one person to another, that he may labour with it, under a provision that the labourer shall be a partner in the gain, without being subjected to any share of the loss . . . a contract of *muzaribat* may be executed by a person on his death-bed, and if he provide more than the ordinary hire for the manager, this provision becomes binding in the event of his death over the whole of his property."

<sup>6</sup> Bail. II. 234 (par. 4); *Tahrir-ul-Ahkam* Book on Qeraz, Ch. 1.

<sup>7</sup> See comment under the heading "Bequest for Muzaribat."

<sup>8</sup> See cases cited in the footnotes to s. 579, above.

(2) T makes a will leaving property, whether exceeding in value SECTION 579C one-third of the estate or not, for a purpose prohibited by Islam. The heirs consent. The will is not validated by the consent of the heirs.<sup>1</sup> *Illustrations*

(3) A Mussulman cannot validly make a will (a) for building Jewish Synagogues,<sup>2</sup> or (b) Christian Churches,<sup>2</sup> or (c) for translating the 'Towreet,' or 'Injeel' (the law or gospels),<sup>2</sup> or (d) aiding a tyrant or oppressor,<sup>2</sup> or (e) directing that so much of his property should be given to L, LA, and LB for reading the Quran, over his grave,<sup>2</sup> or (f) that his grave be plastered, or a vault or arch be placed over it, unless such precautions are required against the ravages of wild animals,<sup>2</sup> or (g) that he should be buried in his mansion, or that poor people should be buried in it, unless he directs that his mansion be converted into a general cemetery,<sup>2</sup> or (h) for shrouds to Muslims, unless it is restricted to poor Muslims.<sup>1</sup>

(4) T directs that one-third of his property should be spent after his death on building a 'masjid.' This is valid.

(5) T, a Sunni Mussulman, bequeaths a legacy to his brother, B, having at the time of the will no other heir; afterwards a son, S, is born to T, who thus becomes the sole heir of T. The bequest to B is valid without the consent of S.<sup>5</sup>

(6) T, a Sunni Mussulman, has a son, S, and two brothers, B, and BA. T leaves a legacy to B, then S dies in T's life-time. The legacy to B is not valid without the consent of BA.<sup>5</sup>

(7) T devises the whole of her estate to a stranger. One of her sons attests it, and the other consents to her making it; the property is then attached in execution, of a decree against T's sons and the legatee sets up the will to remove the attachment; held, that the attachment must be removed from the whole of the property and not merely from a third, as the sons had by their conduct acquiesced in the will after the death of the testatrix,<sup>6</sup> *sed quaere*.

#### 1. RESTRICTION ON TESTAMENTARY POWERS.

The restriction of testamentary capacity to a third of the estate 'Sunna' on has been referred to the following traditions for its ultimate authority—testaments.

"Sa'd ibn Abi Wakkas said: 'I was ill in the year of the conquest will of Muslim of Mecca, and was near dying, and the Prophet came to see me, and I restricted to one-third of estate.'

<sup>1</sup> Cf. *Abdul Karim v. Abdul Qayum Khan* (1906) 28 All. 394.

<sup>2</sup> *Bail. I. 625; II. 230.*

<sup>3</sup> *Bail. I. 624.*

<sup>4</sup> *Bail. I. 625.* It would seem that it is unlawful to restrict a burial place by any qualifications except of a charitable nature.

<sup>5</sup> *Bail. I. 615 (par. 3).* See also the cases cited in the footnotes to s. 579. above, and

*Hafatus v. Balaite Khanum* (1903) 30 Cal. 683, 686, the facts of which case are mentioned in the footnote to *ill.* (1) to s. 579B, above.

<sup>6</sup> *Doulairam v. Abdul Kayum* (1902) 29 Bom. 497. *Sed quaere*—If the sons were indebted at the time when they purported to agree to the will, it is submitted that they could not, by purporting to consent to the will, prejudicially affect their creditors' rights;

## SECTION 579C.

The bequeathable third.

said : " Oh Messenger of God, verily I have much property, and no heir except my daughter, may I then make a will, leaving all my wealth for religious and charitable purposes ? " He said, " No ; " I said, " May I do so with two-thirds of it ? " He said, " No ; " I said, " Shall I with one-half of it ? " he said, " No ; " I said, " May I with a third of it ? " His Highness said, " Make a will disposing of a third in that manner ; for a third is a great deal, particularly of this great wealth which you possess, for verily if you die and leave your heirs rich, it is better than leaving them poor to beg, for verily the money which you expend for God's pleasure, you will be rewarded for, even to the mouthful which you lift up to your wife's mouth."<sup>1</sup> " Sa'd ibn Abi Wakkas said : ' His Highness came to see me when I was sick, and said, " Have you made your will leaving anything to be expended in the road of God, and for charitable purposes ? " I said, " Yes, I intended to do so." He said, " In what proportion of your wealth have you intended so doing ? " I said, " All my wealth is for the road of God." The Prophet of God said, " Then what have you left your children ? " I said, " There is no necessity for my leaving anything to them, for they are rich." His Majesty said, " Make your will leaving one-tenth in the road of God." And I continued repeating my desire to leave more, till at last the Prophet said, " Then make your will leaving one-third for that purpose, and one-third is a great deal." ' ' <sup>2</sup>

Another version of the tradition.

This rule harmonizes with general scheme of succession.

It has been said that the tradition cited above—the two versions evidently refer to the same occasion—may standing by itself have had reference to the particular circumstances. It may, no doubt, be liable to that interpretation, but the law of intestate succession discloses one great principle underlying the reforms in the law introduced by the Prophet, *viz.*, where the pre-existing customary rules of succession are amended, so that persons who were not recognised as heirs by the customary law, acquire rights under Islam (ousting to the extent of the rights so acquired, the customary heirs),—in such cases the rights given by Islam to the newly entitled heir comprise, as a rule, half the interest that is still left to those who used to take under the customary law—or as the Arabic idiom would have it " the property is to be divided in thirds,"—those whose rights were prior in time taking twice as much as those who had just acquired them, *i.e.*, the former took two-thirds, and the latter one-third. May it not be that this same principle was clearly understood in regard to wills ? It finds place in the books of all the schools. Thus the scheme of the law of (intestate) succession

Bequeathable third how fixed.

Will completes the scheme of Succession.

<sup>1</sup> *Mushout-ul-Masabih*, XII. xx. 1.

<sup>2</sup> *Ibid.* XII. xx. 2.

is not complete, unless it is borne in mind that, while definite fractions of **SECTION 579.** the estate are given to the various heirs recognised by the law, there is left over a third of the estate in the entire discretion of the testator to be dealt with in accordance with his particular circumstances, and it is an injunction of the Prophet that every man with a family should make a will. So that, while, on the one hand, no person is permitted (according to the most general view of the law) to disturb the operation of the law amongst those who are already recognised as heirs, on the other hand, with reference to those who are not heirs, the scheme in the mind of the law-giver is not complete unless the testamentary powers are utilized for the purpose of providing those who do not succeed under the general law. Unfortunately the assumption that every man will act with the necessary prudence, is not always justified

Second aspect  
restriction :  
heirs disqualified  
from taking  
legacy.

## 2. BEQUESTS TO HEIRS.

The difference between the 'Ithna 'Ashari' and other systems of Muhammadan law about bequests in favour of heirs deserves special attention.

Bequest in  
favour of  
heir, allowed  
by 'Ithna  
'Ashari' law.

According to the 'Shara'ya-ul-Islam' "a bequest in favour of one's kindred is highly proper whether they be his heirs or not."<sup>1</sup>

On the other hand, such bequests are invalid not only under Sunni law, but also under the other school of Shiah law, viz., the Shiah 'Ismaili' law; and the reason assigned for such invalidity in the 'Da'ayam-ul-Islam'—the most authoritative work amongst the 'Ismailis (unprinted),—is that the law of succession, being laid down in the Quran, it is setting at nought the precepts of Islam to attempt to alter the relative rights of the heirs: see s 579 (c) This is shown by the following official translation of portions of photographed extracts, from the said work made in the case of 'Tyabally v. Abdulali.'<sup>2</sup>

'Ismaili'  
Shi'as do not  
permit such  
bequests.

"Question: No will for an heir?"<sup>3</sup> "I said to (? asked) the Syed (may peace be on him), 'Is it stated that no will shall be executed in favour of an heir?' He said, 'Yes.' I asked, 'Is then a gift allowable in favour of an heir?' He said, 'Yes.' I said (? asked) 'What is the meaning of his (that is the Prophet's) words: "No will shall be executed in favour of an heir"?'—If one says while one is sick "I give my one-third to such and such a one of my sons," will not that be allowable?" then he (may peace be on him) said, 'Does he take the one-third

'Ismaili'  
authority  
'Da'ayam-ul-  
Islam.'

<sup>1</sup> Ball. II. 247 (par. 6.).

<sup>3</sup> The text of this portion appears in the margin

<sup>2</sup> Unreported: suit 555 of 1910 in the Bombay High Court, Original Side.

SECTION 579c. as well as the inheritance? [If so <sup>1</sup>] it is not allowable, unless it is allowed by the heirs? Then he said, 'A gift made during sickness is also not allowable because a gift made during sickness is tantamount to a will. I say verily in the opinion of Syed a will made in favour of an heir is not allowable under any circumstances, whether (it is made) during health or during sickness. . . <sup>2</sup> And it is stated on the authority of him, (peace be on him) that if a bequest to an heir had been allowed, he would have been given, out of the inheritance, more than what is appointed for him by Him, [i.e., God] (be His name honoured and glorified), and whoever makes a bequest to a [particular] heir of his, certainly reduces the right which God has appointed for him [i.e., another heir] and acts contrary to His Book (be His memory glorified) and the act of a person who acts contrary to His Book shall not be allowed.' The view taken by the 'Ithna 'Ashari' authorities is opposed to this reasoning, and is based on the Quran:

Gift in death-  
illness like a  
bequest.

"It is prescribed for you that when one of you is face to face with death, if he leave (any) goods, the legacy is to his parents and to his kinsmen in reason. A duty this upon all those that fear."—Quran II., 175.<sup>3</sup>

The Sura in which this verse occurs was, however, promulgated in the second year of the Hijra (i. e., in 622-623 after Christ), whereas the verse by which parents are declared to be heirs is Sura IV. 12, promulgated after the battle of Ohod in the third year of the Hijra. The later verse replaced by a definite rule of law what was merely a recommendation in the earlier Sura, so that it may well be argued that the recommendation of a legacy in favour of parents was made when they were not heirs, and was the first step towards giving them the right to inherit; and this view is supported by the following tradition "Abu Umamah said

I heard the Prophet of God say in his Khotbah' (in the year of his farewell pilgrimage) 'verily God has given to everyone his right, then there is no will for heirs.'"<sup>4</sup>

The reasons why such different interpretations were put on the same verse of the Quran, by the 'Ithna 'Ashari' Shiah and the other Muslims,

Reasons for  
difference of  
views.

<sup>1</sup> The words "If so" inserted by the Official Translator seem to be quite out of place. One is reminded of Strabo's statement (XV. 1.64, *fin.*) that to expect correct translation from interpreters who know nothing of the subject is "like asking water to flow pure through mud."

<sup>2</sup> The words omitted refer to another point, viz., "He said, about a man who had bequeathed to another man a share out of his one-third, that he (i. e. the legatee) should be given one-sixth thereof, because the shares allotted

to heirs come out of six, and this is the unanimous opinion (of the Jurists) so far as we know" on which there is a note by the Official Translator. "According to the Koran the share of a legal heir is any one of the following six shares, two-thirds, one-half, one-third, one-sixth, or one-eighth" cf. Ball. I. 680 (par. 3).

<sup>3</sup> Sale's translation is still more in favour of the *Ithna 'Ashari* view, but it is less literal.

<sup>4</sup> *Mishkat-ul-Masabih*, XII., xx., 2.

are not easy to find out. Throughout all branches of law, however, SECTION 579C. it will be found that the original customs of the Arabs have a much more stable position in the Hanafi law than in the Shiah law. Possibly one of the causes of this may be that the Shiah law developed somewhat later, and continued developing for a longer period,<sup>1</sup> and in countries where the original laws of the Arabs were neither established, nor sufficiently known nor ascertainable. The rules against disturbing the provisions of the law of Islam in favour of the various heirs, were no doubt necessary when the Arabs had recently been forced to abandon their customs relating to inheritance (especially in regard to the exclusion of females), and where there was a natural tendency to revert to them as far and as often as possible, or to bring about the same result by testamentary dispositions. When, however, those customs had been forgotten, there was less necessity for insisting that the relative rights of the heirs should not be so disturbed.

### 3. CONSENT OF HEIRS: WITHDRAWAL.

The Sunni authorities lay down that if the heirs have once consented, they cannot withdraw their consent;<sup>2</sup> but the author of the 'Shara'ya-ul-Islam' states, as to Shiah law, that if the heirs at first assent, and then declare that their assent was given through a mistake as to the value of the bequest, or as to its excess over the third of the estate, the decree will be given for the amount that they admit; an exception is, however, made where the bequest is of a slave or mansion, the value of which must have been known to the heirs, and the consent once given cannot in such a case be retracted.<sup>3</sup>

As, under Shiah 'Ithna 'Ashari' law, the testator may obtain the consent mentioned above during his life-time, the question may be raised whether, if the presumptive heirs for the time being give their consent, the will becomes valid even against other heirs, whose rights to inherit arise subsequently to the will, as was held in a case governed by Hindu law on the point of alienation by a widow.<sup>4</sup> It would seem that the analogy of that case would not apply in Muhammadan law: see 'Fahmida v. Jafri',<sup>5</sup> which, however, does not appear to be quite accurate in so far as it implies that the Shiah law requires the consent of heirs to be given after the death of the testator. The Sunni law lays down in clear

<sup>1</sup> The *Ithna 'Ashari* Shiahs recognise 12 as *cessive imams* or heads of religion, the *Imams* only 7. See the list of Imams at the end of Ch. I. above. Sha'afi lived later than A. Hanafi, and travelled extensively. His syst-

ems on many points with that of the Shiahs.

<sup>2</sup> Bail. I. 616; Hed. 671.

<sup>3</sup> Bail. II., 236.

<sup>4</sup> *Bijrangi v. Manokarnikar* (1907) 30 All. 1.

<sup>5</sup> (1908) 30 All. 153.

SECTION 579C. terms that the actual heirs after the death of the testator must consent to bequests beyond one-third <sup>1</sup> just as the legacy is invalid only if it is in favour of one who is actually heir after the death of the testator. But the complication of consent previous to the testator's death does not arise, except in 'Ithna 'Ashari' law.

#### 4. BEQUEST FOR 'MUZARIBAT': SHIAH LAW.

Bequest of over  
one-third in  
'muzaribat.'

The 'Jawahir-ul-Kalam' <sup>2</sup> has a long comment (too lengthy to be quoted) on the passage in the 'Shara'ya-ul-Islam' on which s. 579C clause (iii) is based: It appears that (1) the Shiah jurists are agreed that during the minority of the children of the testator, either the whole property, or at least the shares of the minor children, may be bequeathed in 'muzaribat'; (2) where the heirs are not the minor children of the testator, the testator has the power of bequeathing in 'muzaribat' not only a third of his property, but apparently any portion of the property, so long as the benefit to the 'wasi' (viz., the person to whom the property is bequeathed in 'muzaribat') does not exceed one-third of the testator's estate. So far there seems little dissent, but some jurists (including the author of the 'Shara'ya-ul-Islam') <sup>3</sup> seem to hold that the whole property may be so bequeathed regardless of the restriction contained in the last sentences.

#### 5. ANALOGOUS LAW.

Hindu law:

English law:

French Code:

Restrictions on testamentary capacity of some kind or the other, are to be found in most systems of law. Thus in Hindu Law the restriction is based on a division of the property into ancestral and self-acquired. In England the statutes of Henry VIII. dealing with wills<sup>4</sup> enacted that all persons seised in fee simple might . . . by will in writing devise to any other person . . . two-thirds of their lands held in chivalry, and the whole of those held in socage: which on the alteration of tenures by the statute of Charles II, amounted to the whole of their landed property except their copy-hold tenements." The French Civil Code provides that advantages resulting from donations 'inter vivos' or from wills cannot exceed (a) one-half of the property of the person who has made such disposition—if he leaves (i) only one legitimate child at his death, or (ii) one or more ascendants in each of the paternal and maternal lines; or (b) one-third of the estate if he leaves two children; (c) one-fourth if he leaves ascendants in only one line.<sup>5</sup>

<sup>1</sup> Dall. I. 615.

<sup>2</sup> *Jawahir-ul-Kalam*, IV. 656-658.

<sup>3</sup> Dall. II. 234 (par. 4); *Tahrir-ul-Akam*, Book on *Qeraz*, Ch. 1.

<sup>4</sup> 32, Henry VIII, c. 1, and 34 Henry VIII, c. 2.

<sup>5</sup> Henry Cachard, "French Civil Code" (1895), pp. 213, 214, artt. 913, 915.



At Athens the laws of Solon for the first time gave testamentary powers, SECTION 579C. but restricted it to the cases where the testator had no legitimate children<sup>1</sup> Athenian law.

**579D.** Particular classes of Mussulmans may by custom acquire the power of disposing of the whole of their property by will.<sup>2</sup> Custom.

**579E.** *Semble*, the burden of proof is on the legatee to show that the will does not infringe ss. 579-579D, above.<sup>3</sup> Burden of proof on legatee.

### (3) Subject of Bequest.

**580.** (1) A bequest may be validly made of anything that, at the time of the testator's death, is in existence and capable of being transferred.<sup>4</sup> Subject of bequest.

(2) The right to occupy a house during a future period of time,<sup>5</sup> or to take the future produce of immovable or other property for a limited time, or for the life-time of the legatee, may validly be the subject of a bequest.<sup>6</sup> Right of occupancy. Rights limited in point of time, as during life of legatee.

(3) Where the bequest is of a right to take the profits of a house, the legatee, except under Shafi'i law, has no right to live in it.<sup>7</sup> Under Shafi'i law the legatee becomes "as it were the proprietor of the house."<sup>8</sup>

(1) T makes a will in 1880 providing that L should have the right to occupy T's house during the year 1890. If T dies in 1885, the bequest is valid,<sup>9</sup> but if T lives till 1891, it is void; and if the bequest is valued at more than the third, then the period of residence has to be apportioned with the heirs, so that the value of the interest taken by the legatee falls within the third. Illustrations.

(2) T bequeaths to L,—

(a) "The produce of his garden or land or the occupancy of a manor;" —L is entitled to the existing and future produce, whether the legacy purports to be "for ever" or not;<sup>10</sup>

<sup>1</sup> See Grote, *Hist. of Greece*, III. 183, 184.

<sup>2</sup> *E.g.*, *Cutchhi Memons v. Advocate-General v. Jimbabai* (1917) 41 Bom. 181.

<sup>3</sup> *Krishnamachariar v. Krishnamachariar* (1513) 38 Mad. 166, 176; *cf. Sukoomut Bibee v. Warris Ali* (1874) 22 W. R. 400.

<sup>4</sup> *Bail. I.* 614, 652; *Minhaj*, 280 (Bk. 20, s. 1.)

<sup>5</sup> *Bail. II.* 240.

<sup>6</sup> *Bail. I.* 652; *Minhaj*, 285 (Bk. 20, s. 5).

<sup>7</sup> Apparently the reason is that the heirs are entitled to manage the property, and to give the produce to the legatee, who is given no right to occupy the house. Of course the heirs may permit him to occupy it; *cf. Bail. I.* 654. But see s. 50, above.

<sup>8</sup> *Hed.* 693.

<sup>9</sup> *Bail. I.* 652.

<sup>10</sup> *Bail. I.* 655, n.

**SECTION 580.** (b) "the fruit in his garden,"<sup>1</sup>—if there is some fruit in the garden at T's death, L takes the existing, but not the future fruit, unless  
*Illustrations.*

(c) "the wool of his flocks" or "their progeny," or "their milk," "for ever;"—L is only entitled to the wool or progeny or milk existing at his death, and not the future produce,<sup>1</sup>

(d) "the produce of a house to the poor;"—L has the right to receive it, as the bequest is lawful,<sup>2</sup>

(e) his mansion to L, and of the right to occupy it to L;—both bequests are valid and effectual.<sup>2</sup>

(3) T by his will leaves a third of his estate to L. T is afterwards killed by the wrongful act, neglect, or default of X, and T's executors sue X, and recover damages in respect of the death of T. L is entitled to a third of the damages so recovered.<sup>3</sup>

Bequest of  
service, a

Cf. "A bequest of the service of a slave or the occupation of a manor, or the produce of both, or of land and gardens, is lawful: And it is lawful for a limited time."<sup>4</sup> But ordinarily it will be presumed that the full proprietary interest is bequeathed, where either the unlimited right to take the profits is bequeathed, or where the testator purports to impose restrictions as regards use or alienation which he cannot lawfully impose.<sup>5</sup>

#### (4) *Effect of attempt to Exceed Powers.*

##### (a) *Disregard of Rights of Heirs.*

Words  
purporting

**581.** Where a testator purports to exclude some of his children [or, *quaere*, other heirs] from their shares in his estate, the words of exclusion will be treated as null and void, and will not be interpreted as amounting to a legacy of a third of the estate to the heirs who are not excluded.<sup>6</sup>

(1) T says: "I give my son's," or "my daughter's share in my estate to L." If T means thereby to displace his son or daughter, and to make L take his or her place, the bequest is void.<sup>7</sup> But if he means, "I give to L as much as to my son," or "as my daughter,"

<sup>1</sup> II. 234.

<sup>2</sup> I. 652.

<sup>3</sup> *Muhammad Khan v. Muhammad*  
*an* (1898) 25 Cal. 516; 25 I. A. 77;  
*unusu v. Rohemunnisa*, (1872) 17 W.

R. 190; *Muhammed Abdul Majid v. Fatima*  
*Bibi* (1885) 8 All. 39; 12 I. A. 159.

<sup>6</sup> Bail. I. 629, II. 238. See however, Bail.  
I. 634; s. 581, *III.* (2), below; and n. to s. 579,  
*III.* (1), above.

<sup>7</sup> Bail. I. 629.

the legacy is valid, and the son's or daughter's portion will be SECTION 581. ascertained, and an equal portion given to the legatee, provided that *Illustration* that portion does not exceed a third of the estate.<sup>1</sup>

(2) T dies leaving a widow, W, and no other heir. By his will T purports to bequeath the whole of his estate to L. W does not consent to the will; hence as against W the will is valid only as to one-third of the estate; of the other two-thirds W takes her one-fourth share as Quranic sharer i.e., one-sixth of the whole estate. The rest is then available for L who thus ultimately gets five-sixths of the estate.<sup>2</sup>

(3) A Shiah Mussulman died leaving him surviving two daughters the plaintiff and the defendant. He left a will purporting to bequeath the whole of his property (consisting mainly of a house) to the defendant held that the will was wholly invalid, and that the plaintiff was entitled to half of the house.<sup>3</sup>

This section follows from the preceding: If one heir cannot be preferred to the detriment of another, much less can any heir be absolutely excluded. These rules, it will be seen, are the counterpart of the rules against adoption: the ties of blood can neither be disregarded nor can any other tie take their place: either act would "induce a breach of the ties of kindred."<sup>4</sup>

The judgment in illustration (3) to s. 581 does not make it clear <sup>Fahmida Khanum v. Jafar Khanum.</sup> that the objection to the bequest was not that it exceeded one-third of the estate, nor that it was in favour of an heir, but that its purpose was entirely to disinherit the plaintiff (the other heir). Had only 1/3 of the estate been bequeathed, the bequest would, under Shiah Ithna, 'Ashari law, have been entirely valid; had the bequest exceeded 1/3 but not been vitiated by any desire to disinherit one of the heirs, it would have been void as to the excess alone. The judgment also refers to the necessity of obtaining assent after the death of the testator, apparently confusing Shiah Ithna 'Ashari with other systems of law.

#### (b) Disregard of Rule of Bequeathable Third.

##### (1) Effect of Will Purporting to Bequeath more than One-third

### 582. Subject to the Probate and Administration Act <sup>Abatement of legacies exceeding</sup>

<sup>1</sup> I.e., the legatee will share just like a son or daughter, and not in priority to them, as would be the case with other legatees—subject of course to the rule in s. 579, above, about the third of the estate: Bail. I. 630.

<sup>2</sup> Bail. I. 634. In (*Musall.*) *Bakht Begum v. Fajr Khan* (1880) 16 Panj. Rec. 239 (No. 104),

the point was overlooked, and it was held that the legatee should take only a third of the estate.

<sup>3</sup> *Fahmida Khanum v. Jafar Khanum* (1908) 30 All. 153. See comment.

<sup>4</sup> Hed. 671.

SECTION 582. s. 107,<sup>1</sup> where a Mussulman purports to make a testamentary disposition of more than a third of his estate, and the heirs do not consent thereto, the legacies must abate in the manner stated below—

(1) According to Hanafi law—

HANAFI LAW.

(a) the legacies must first abate equally and rateably, subject to clause (d), below ;

Abatement.

(b) next, the rateable portion (so abated) of each legacy, which is for a secular (not for a pious) purpose must be allotted to it ;

Legacies for pious purposes.

(c) thirdly, where any of the legacies are for pious purposes, their rateable portions (so abated) must be consolidated, and, out of the amount so consolidated, priority given to the extent of the full legacy mentioned in the will, in the following order,—

(i) the ‘farāiz’ (or actually prescribed charities) have precedence over other legacies for pious purposes ;

(ii) next come the ‘wajibat,’ i.e., purposes that are not prescribed, but considered necessary ;

(iii) thirdly come the ‘nawafil’ i.e., purposes that are voluntary ;

(iv) within each of the said divisions, unless there is any legacy for an object to which priority is expressly given by the Hanafi lawyers,<sup>1</sup> each has priority in the order in which it is mentioned in the will ;<sup>2</sup>

Any single legacy exceeding the third.

(d) where any legacy is by itself of greater value than a third of the estate, according to Abu Hanifa (from whom Abu Yusuf and Imam Muhammad dissent) the said legacy,

<sup>1</sup> The P. & A. Act, s. 107, is as follows: “If the assets after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportion ; and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself, or to any person for whom he is a trustee.”

<sup>2</sup> There is a good deal of literature on the

subject of the relative merits of pious bequests and charities which may have to be produced in Court, if necessary, in case a dispute arose. The following order appears in the *Fatawa ‘Aleemgiri* and the *Hidayat* :—

(a) *Hajj* (or pilgrimage.) (b) *Zakat*. (c) *Ahns*. (d) *Expiation*. (e) *Sadaq-i-Fitrat*. (f) *Sacrifices*. (g) *Vows*.

<sup>3</sup> *Ball*, I. 626 ; *Hed.* 678 ; *Wilson*, “ Anglo-Muhammadian Law,” s. 271, is (it is submitted) inaccurate.

in competition with the other legacies, must be reduced SECTION 582 in the first instance to a third, and thereafter it will abate as mentioned above: this rule does not apply even according to Abu Hanifa where the subject of bequest is money, or it takes the form of a 'muhabat.'<sup>1</sup>

(2) According to Shiah law—

SHIAH LAW.

(a) those bequests that are prior in date take priority over those that are later in date, unless there is anything in the will to show that such later bequest was intended by the testator as a revocation of the former;<sup>2</sup>

(b) where the bequests consist of legacies of fractions of the estate, and two legatees are successively given a third of the estate, it is a presumption of law<sup>3</sup> that the latter bequest was a revocation of the former;<sup>1</sup>

(c) where the bequest to the said legatees does not consist of an exact third of the estate but of some other fraction, a question of construction arises—

(i) whether there is an assumption on the part of the testator to deal with more than a third of the estate, or

(ii) whether there is such a repugnance between the two bequests as to indicate that the testator did not intend both bequests to take effect, but only one,—

in case (i) above the bequest that is earlier in point of time has priority over the latter bequest;<sup>4</sup> in case (ii) above the later bequest prevails, and the former is presumed to be revoked.<sup>5</sup>

*Explanation.*—It is presumed, until the contrary is shown, that of two bequests contained in the same testamentary document, the bequest that is mentioned later, is later in point of time.<sup>6</sup>

<sup>1</sup> See comment to s. 582. *Muhabat* is a colourable sale or purchase, for a price below or above the real price. For Shafi'i law, in *Minhaj*, 261 (Bk. 29, s. 2).

<sup>2</sup> Bail. II. 212 (ll. 9-21 of par. 2).

<sup>3</sup> It is difficult to say whether the presumption is irrebuttable. There is no such pre-

sumption under Hanafi law: Bail. I. 626.

<sup>4</sup> The testator is presumed to know and to bear in mind the rule of law that he can bequeath only a third of the estate: Bail. II. 235.

<sup>5</sup> Bail. II. 234-235.

<sup>6</sup> Bail. II. 212: see comment.

## SECTION 582.

*Illustrations.*

(1) "A man has made a will (a) that a hundred 'dirhams' shall be paid to the 'faqirs,' (b) that a hundred to his relatives, and (c) that the poor should be fed in expiation of the prayers that he has missed [for which 40 'dirhams' would be required]. Then he dies [leaving 216 'dirhams']; and there are one month's prayers due from him: A third of his estate is not enough to pay for all these bequests. In such a case, Shaikh Muhammad ibn Al-Fazl has said that the third should be divided in this way (with the following priorities): first 100 (should be allotted) for the 'faqirs,' next 100 for the relations, and thirdly (a sum should be allotted) for paying the price of feeding (the poor) at the rate of two maunds of wheat for each prayer [this sum, as stated above, amounts to 40 'dirhams'; so that the total legacies amount to 240 'dirhams'; and the third of the estate is only 72; hence the legacies must abate in the proportion of 72 to 240, i.e., they must be reduced to 30, 30 and 12 respectively]; and then (a) whatever amount comes to the share of the relations [i.e., 30 'dirhams'] should be given to them, and (b) out of whatever portion comes for the 'faqirs' [i.e., '30 'dirhams'] and for feeding the poor [i.e., 12 dirhams making with the 30 for the 'faqirs,' altogether 42,] the food for the poor should first be paid out, and after the food has been paid out in full [i.e., 40 is to be paid out, for the poor] then (c) the 'faqirs' will be paid, i.e., the loss will be borne by the share of the 'faqirs' [who get only 2 'dirhams']. This is in the 'Fatawa Qazi Khan.'"<sup>1</sup>

(2) T, a Sunni, dies leaving estate worth Rs. 15,000, and purporting to leave legacies amounting to Rs. 10,000; viz., to L, a house worth Rs. 4,000; and to LA another house worth Rs. 6,000. *Seemle*, L and LA take half of the houses bequeathed to them respectively, the heirs taking the other halves.<sup>2</sup>

(3) T, a Shiah, dies leaving Rs. 3,000 as his net estate. In his death-illness he purports to make a 'waqf' of Rs. 1,000, a colourable sale of property (valued at Rs. 2,000) to L at the price of Rs. 1,000, and a gift to LA of Rs. 1,000. The heirs do not consent. As each of the legacies must be regarded as of Rs. 1,000, the first according to priority of date will prevail, and the others are invalid.<sup>3</sup>

<sup>1</sup> *Fatawa Alamgiri* IV. 324; (*Wasia*, ch. 5). The words in [ ] are added by me. The legacies being originally 100 for *faqirs*, 100 for relations, and 40 for the prayers, i.e. 240 in all, and the third of the estate being 72, there is an abatement in the proportion of 72 to 240; or 3 to 10, which reduces the legacies to 30, 30, and 12. Then the legacy for secular purposes (so abated) is paid out (i.e. 30 to the relatives), whereas the two (abated) legacies for pious objects, (viz. 30

for the *faqirs*, and 12 for prayers) are consolidated, making together 42, out of which the legacy for the expiation of prayers, (which is an incumbent duty) is satisfied, in full (i.e. 40 are given to it) leaving 2 for the *faqirs*.

<sup>2</sup> There is no express authority as to the mode in which abatement takes place under Sunni law when specific legacies exceeding a third of the estate are given and not consented to.

<sup>3</sup> *Hall*. II. 212; cf. *Hall*. II. 234-235.

(4) T dies leaving a son, S, and a daughter, D. He purports to bequeath **SECTION 582.**  
3/4 of his estate to S, and 1/4 to D. Under Hanafi and Shiah Isma'ili law *Illustrations.*

the bequests are invalid, and D is entitled to take 1/3 of the estate.<sup>1</sup> If T's will is governed by the Shiah Ithna 'Ashari law, the bequest that is earlier in point of time will prevail to the extent of 1/3 of T's estate, and the later bequest will have effect only out of the surplus (if any) left over out of the 1/3; i.e., if the bequest to S is earlier, he takes 1/3 as legatee, and the other 2/3 is inherited by S and D in the proportion of 2 : 1. and if D's is earlier she takes (out of the bequeathable 1/3) as legatee 1/4 of the estate, and the son then takes 1/12 (i.e., 1/3 - 1/4) as legatee, and the residual 2/3 is finally inherited by the two in the proportion of 2 : 1.

(5) In 1900, T, a Shiah, makes a bequest of Rs. 75 to L. In 1901 he makes bequest of Rs. 100 to LA. T dies in 1902, leaving Rs. 300. The bequest to L will be paid in full, and LA can take only Rs. 25.<sup>2</sup>

(6) T, a Shiah, dies, and a will is found amongst his papers in the following terms: "I give to L a legacy of Rs. 75, and to LA a legacy Rs. 100." It will be presumed that the legacy to L was earlier, and it will therefore have priority in the same manner as in *ill. (5)*.<sup>3</sup>

(7) T, a Shiah, dies leaving a will, saying: "I bequeath one-third of my estate to L." There is also a codicil to T's will, in which he says "I bequeath one-third of my estate to LA." LA will take a third of T's estate, and the legacy to L is considered as revoked.<sup>4</sup>

(8) T, a Shiah, dies leaving a will purporting to bequeath 1/4 of his estate to L, then he makes a codicil leaving 1/4 of his estate to LA, and saying that 1/2 of his estate should go to his heirs. The bequest to L has priority, and LA takes 1/12 of the estate (i.e., 1/3 - 1/4).<sup>5</sup>

(9) T, a Shiah, says in his will: "My daughter's son is living with L, a stranger. I give to L, 1/4 of my estate." Then T makes a codicil saying, "L has ceased to maintain my daughter's son, who is now living with LA. I give to LA 1/4 of my estate." The legacy to L is revoked.

Abu Hanifa differs on one point relating to abatement of legacies from his disciples. The 'Fatawa 'Alamgiri' does not indicate according to which view the 'fatwa' was given. But apparently the view of the majority would prevail. Abu Hanifa holds that if any one of the legacies is by itself in excess of 1/3 of the estate, then (unless all the legacies fall within the two exceptions given below, or are consented to by the heirs) such a legacy, is to be cut down to 1/3, and the legatee shares only in that proportion in competition with the other legatees. So

Legacy of more than a third.

<sup>1</sup> *Fatima v. Arif* (1881) 9 Cal. L. R. 66. <sup>4</sup> *Ball* II 211, 235.

<sup>2</sup> *Ball* II, 212; *cf. Ball* II, 231, 235.

SECTION 582. that if T leaves a legacy of  $\frac{1}{2}$  of his estate to L, and  $\frac{1}{4}$  to LA, according to Abu Hanifa the bequeathable third of the estate has to be divided between them in the proportion of  $\frac{1}{3}$  and  $\frac{1}{4}$ , and not of  $\frac{1}{2}$  and  $\frac{1}{4}$ . The two disciples do not accept this view, and according to them L and LA would share in the proportion named by the testator, i. e.,  $\frac{1}{2}$  and  $\frac{1}{4}$ . Abu Hanifa himself is of opinion that the principle of cutting down each individual legacy to a third of the estate does not apply in two cases: (1) where the legacies take the form of 'muhabat,'<sup>1</sup> (2) where the legacies consist of sums of money.

Mode of determining priority of legacy in point of time.

It may be mentioned that,—according to Shiah law, bequests for satisfying religious duties which are incumbent on the testator rank as debts, but all the other debts have priority over them.<sup>2</sup> Where a doubt arises as to which of two repugnant bequests was first mentioned, according to the Shiah authorities, it must be determined by casting lots.<sup>3</sup> In British India this rule of Shiah law can have no force, as the question would be determined in accordance with the Indian Evidence Act. Cf., however, the Oudh Laws Act, s. 9, cited in the comment to s. 557, above.

(ii) Effect where there is Accession to Subject of Bequest.

1. Accession to legacy between death and acceptance.

583. Where there is an accession to the subject of the bequest after the death of the testator but before acceptance by the legatee, such accession will be considered to form part of the subject of the bequest, and in order to be valid without the consent of the heirs, the original bequest, with the accession, must together be less than  $\frac{1}{3}$  of the estate,<sup>4</sup> or must abate in accordance with s. 585. below.

2. Accession after acceptance.

584. Where the legatee accepts the bequest on the death of the testator, and there is an accession to its subject after such acceptance but before actual partition or distribution of the estate,—

(1) according to the author of the 'Kuduri' the accession becomes the property of the legatee, and it need not be less than  $\frac{1}{3}$  of the estate to be valid; but

(2) according to the 'Fat'awa 'Alamgiri' the opinion of the Shaikhs is that the accession forms part of the legacy,

<sup>1</sup> See comment; s. 582 (1) clause 'd'. *Muhabat* is a colourable sale or purchase for a price respectively below or above, the real price.

<sup>2</sup> Bail. II. 234; see s. 560, 579 B, above.

<sup>3</sup> Bail. II. 212.

<sup>4</sup> Bail. I. 637-638.



and must be less than 1/3 of the estate, or must abate SECTION 584. in accordance with s. 585, below.<sup>1</sup>

585. Where there is an accession to the subject of a bequest, and the bequest must abate under s. 583, or s. 584 (2), above,—

Accession where there has to be abatement.

(1) according to the two disciples, the original subject of the bequest and the accession both abate equally and rateably, and the legatee takes only such shares in each as together make up a third of the estate.<sup>2</sup>

(2) According to Abu Hanifa the legatee is entitled to have the whole of the bequest (in so far as it falls within the third of the estate, and is otherwise valid) satisfied out of the subject of the bequest as it was prior to the said accession, and if the legacy is valid beyond the value of the original subject, then to have recourse to the said accession.<sup>2</sup>

Abu Hanifa's view.

(1) T bequeaths a mare to L. After the death of T, but before a partition of the estate, the mare foals; and the values of the mare and its foal are together less than one-third of the estate. L is entitled to both.<sup>1</sup>

Illustrations.

(2) T dies leaving estate worth Rs. 900, and bequeaths a mare of the value of Rs. 300 to L,—

(a) If, after T's death, but before partition, the mare foals and the foal is also valued at Rs. 300, according to Abu Hanifa, L is entitled to the mare, and to a third of the foal. According to the two disciples he is entitled to two-thirds of the mare and two-thirds of the foal.

(b) If the mare foals after L accepts, but before the distribution of the estate, according to the 'Kuduri,' L is entitled to both, but according to the 'Fatawa 'Alamgiri' the better opinion is that L's rights are the same as mentioned in clause (a), above.<sup>3</sup>

### § 3.—The Legatee: Competence: Joint Legatees.

586. (1) Subject to s. 579, above, a bequest may be made by a Muslim in favour of any person capable of holding property,<sup>4</sup> or for the benefit of an institution,<sup>5</sup> or for a religious or charitable object.<sup>6</sup>

Competence to hold property and competence to be legatee.

<sup>1</sup> Ball. I. 658.

<sup>2</sup> Ball. I. 639.

<sup>3</sup> Ball. I. 639.

<sup>4</sup> Ball. II. 220; I. 625.

<sup>5</sup> Ball. I. 621.

<sup>6</sup> Ball. I. 625. It would seem that it is unlawful to restrict a burial place by any qualifications.

## SECTION 586.

Bequest  
to unborn  
persons.

(2) A bequest to a person not in existence at the time when the will is made, is void; provided that a bequest may be made to a child, who, at the time when the bequest is made, is in the womb of its mother; and who is born within six months after it is made.<sup>1</sup>

Legatee must  
be in existence  
at time of  
bequest and  
not of death  
of testator.

The legatee is required by the 'Fatawa 'Alamgiri' and the 'Hidaya' to be in existence at the time of the bequest, and not at the time of the testator's death. The author of the 'Sharaya'-ul-Islam' states similarly that "a bequest in favour of a foetus hereafter to be conceived by a particular woman, or 'to whomsoever may hereafter be found of the children of such a man,' is altogether null and void."<sup>2</sup> The Egyptian Code, on the other hand, speaks of 'après la mort du testateur,' and is relied upon in a judgment<sup>3</sup> where the distinction was not material as the testator had died in 1861, and the plaintiff who claimed as legatee under the will was not born till 1884.

Bequest to  
non-Muslim.

It is laid down in the texts that a bequest may be validly made by a Muslim in favour of a 'zimmi,' i.e. a non-Muslim living under the protection of a Muslim government; whereas a bequest in favour of a hostile non-Muslim is not valid.<sup>4</sup>

Legacy to  
murderer  
void.

**587.** A bequest becomes void if the legatee (who has attained puberty, and is not insane) causes the death of the testator, whether the bequest was made before, or after, the act which causes death.<sup>1</sup> According to Hanafi law (but not according to Shiah law) a bequest is so avoided notwithstanding that the legatee has unintentionally caused the death of the testator.<sup>2</sup> Such a bequest may be validated by the consent of the heirs,<sup>3</sup> and if the legatee is the sole heir the bequest to him is valid,<sup>4</sup>—*sed quare*.<sup>5</sup>

<sup>1</sup> Hed. 674 Bail. I. 617; II. 244, 246, *Abdul Cadur v. Turner* (1884) 9 Bom. 158, 163 per Scott J.; *the Tayore case* i.e. *Jutendromohun Tayore v. Ganendromohun Tayore* (1872) L. R. I.A., SUPP. Vol. 47, 70, to which Scott J. refers, requires the legatee to be in existence at the testator's death. The Indian Succession Act, s. 77 does not apply to Muslims.

<sup>2</sup> See Bail. I. 616, 169-171 and an. Bail. II. 244 (par. 2) shows that the Shiah law is uncertain on several points. Cf. *Skinner v. Orde* (1871) 14 Moo. I. A. 309, 325; see also the Indian Succession Act, s. 77; and s. 504, below.

<sup>3</sup> *Skinner v. Orde* (1871) 14 Moo. I. A. 309.

<sup>4</sup> Bail. I. 615-616. "The slayer is disqualified

from inheriting," *ib.* n. 1.

<sup>5</sup> The *Sharaya'-ul-Islam* does not seem to contain anything on the effect of a legacy to the slayer, but no doubt the law is the same as that of such a person inheriting. See comment. This may have some effect if the terms of the bequest impose conditions; e.g., if he is to take jointly with another, or to take merely the produce, or to have the use of, if he is given merely the right to reside in a house.

<sup>6</sup> This is the opinion of Abu Hanifa and Imam Muhammad; Abu Yusuf dissenting.

<sup>7</sup> Bail. I. 615-616.

<sup>8</sup> See comment; and Bail. I. 615-616, n. 1.

No comment is necessary to show the reason of the provision of the SECTION 587. law that a person who has caused the death of another should not inherit from the latter.<sup>1</sup> The original cause of inheritance amongst the Arabs in Pre-Islamic times was itself closely connected the blood-wite and blood-feud, in other words the right to inherit depended upon the duty to take revenge against those who kill the 'propositus.' The murderer himself could, therefore, in no way be qualified to inherit. On the other hand, the Courts in England had to fall back upon general principles in order to exclude Mrs. Maybrick and Crippen from taking benefits in the estates of the persons they had murdered.<sup>2</sup> In the latter case Sir S. Evans said: "It is clear that the law is that no person can obtain, or enforce any rights resulting to him from his own crime, neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence." Similar decisions have been given in the case of Hindus.<sup>3</sup> Cf. s. 606 (3) and s. 639 (1), below.

Reason for the rule

English law,

**588.** Where a bequest is made in the way of God, or a general charitable intention is disclosed by the testator, it is lawful, and it must be expended on good objects, and for the benefit of the poor.<sup>1</sup>

Bequest for charity.

Hence if a person bequeaths one-third of his property "for good purposes," it may be expended in erecting bridges or mosques or for students of learning.<sup>4</sup> And in the will of a Khoja, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," has been held to be valid,<sup>5</sup> and a scheme directed to be settled for the application of the fund to charitable objects, by analogy of 43 Eliz., c. 4. But where, under colour of a religious bequest, there is really a legacy to the trustee personally, it will rank as such, and if the (nominal) trustee is one of the testators' heirs, it is not valid without the consent of the other heirs.<sup>6</sup>

For "good purposes."

'To be disposed of in charity as my executor shall think fit.'

<sup>1</sup> Ball. L. 695, 615, 676, II. 369.

<sup>2</sup> Cf. *Cleaver v. Mutual Association Fund* [1892] 1 Q. B. 147; *Baker, M. R., Fry, and Lopes, L. J.J.*, held on general principles that though the executors of Maybrick could recover the sum for which he had insured his life, in favour of his widow, yet Mrs. Maybrick having been found guilty of his death could not demand that sum from the executors. *Evans, F.* followed this decision in the *estate of Corn Crippen* [1911] p. 108, 112. The same rule prevails when the crime consists of man-slaughter and not

murder. The goods of *Hall, Hall v. Knight and Baxter* [1914] P. 1, 109 L. T. Rep. 587; See, however, *Re Houghton, Houghton v. Houghton* [1915] 2 Ch. 173.

<sup>3</sup> *Vedammal v. Vandanayaga* (1907) 31 Mad. 100; but see *Gangu v. Chandrabhagabai* (1907) 32 Bom. 275.

<sup>4</sup> Ball. I. 625, II. 26-28.

<sup>5</sup> *Gangabhai v. Thaneer Mulla* (1888) 1 Bom. H. C. B. 70.

<sup>6</sup> *Khafooromani v. Roushan Jehan* (1876) 2 Cal. 184; 3 L. A. 291; 26 W. R. 36.

SECTION 589.  
Consent of legatee  
necessary.

589. (1) The express or implied assent of the legatee after the death of the testator, is necessary to complete his title to the subject of the bequest;<sup>1</sup> and the legatee may prevent its vesting in himself, by disclaiming the legacy, provided that he has not already assented to it at any time after the death of the testator.<sup>2</sup>

Partial assent.

(2) A legatee may according to Shiah law validly accept part of the bequest, and disclaim the remainder.<sup>3</sup>

Death without  
assent.

(3) Where the legatee, having survived the testator, dies without assenting to or disclaiming the legacy, according to Sunni law he is presumed to have impliedly assented to the legacy;<sup>4</sup> according to Shiah law the right to assent or disclaim, devolves on his heirs.<sup>5</sup>

Illustrations.

(1) T is the owner of a certain farm, and, as such, has a right to graze his cattle on L's field. T bequeaths his farm to L. If L accepts the legacy, the easement is extinguished under the Indian Easements Act, s. 46, but if L dies without accepting it, according to Shiah law the easement may remain unextinguished, because the heirs of L may accept the legacy, and may not be the owners of the field.<sup>6</sup> According to Sunni law, L's dying without disclaiming the legacy, is implied acceptance, causing the easement to be extinguished.<sup>7</sup>

(2) T bequeaths to L certain shares in a Company which are not fully paid up; L survives T, but dies without assenting to or disclaiming the legacy. Under Sunni law the heirs of L are bound to pay the calls on the shares out of L's estate, if any, *sed quaere*; under Shiah law they would have the option to disclaim the legacy.<sup>8</sup>

Implied  
acceptance.

Acceptance may be inferred from conduct, as giving effect to a bequest, or purchasing something on account of the heirs, or paying debts, in which case the acceptance takes effect as if made in express terms.<sup>9</sup> In *'Hardoon v. Belilios'*<sup>8</sup> the defendant refused to pay calls on shares on the ground (amongst others) that he had never accepted their transfer to him, and Lord Lindley said in the Privy Council: "No one

<sup>1</sup> Ball. I. 614; II. 220.

<sup>2</sup> Ball. II. 230; cf. Indian Trusts Act, s. 46.

<sup>3</sup> Ball. II. 230; cf. Indian Trusts Act, s. 46.

<sup>4</sup> Ball. I. 614.

<sup>5</sup> Ball. II. 230.

<sup>6</sup> Ball. II. 230, the illustration in which refers to a bequest of a female slave and her

unborn child to her husband.

<sup>7</sup> Ball. I. 614, 662.

<sup>8</sup> Cf. *Hardoon v. Belilios* [1901] A. C. 118, 123; on pp. 126, 172 of the report the facts are discussed which were held to amount to acceptance.

<sup>9</sup> Ball. 614.

can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer."<sup>1</sup> SECTION 589.

Roman Law required "extraneous heirs" to accept a bequest in order to perfect it: with heirs of the same family acceptance was presumed unless the bequest was rejected.<sup>1</sup> English law does not require acceptance by the grantee to vest the property in the donee, though when he obtains knowledge of the transfer, he may repudiate it.<sup>2</sup> Roman and English law.

**590.** Unless a contrary intention is shown in the will, where a bequest has been made to a person who pre-deceases the testator, under Sunni law, it lapses, and becomes part of the residue;<sup>3</sup> under Shiah law it passes to the heirs, of the legatee and if the legatee dies without leaving any heirs, the bequest lapses.<sup>4</sup> Legatee pre-deceasing testator.

**591.** Where the testator leaves a bequest jointly to certain named or otherwise ascertained individuals, unless a contrary intention appears, the bequest must be divided equally amongst all the legatees.<sup>5</sup> Joint legatees share equally.

**591A.** Where a legacy is given to a class of persons described generically, they jointly rank as a single individual in competition with such other individuals or classes as are joint legatees with themselves.<sup>5</sup> Legatees mentioned as a class rank as a single individual.

T leaves a third of his property—(a) to L, and to 'faqirs,'—L takes a sixth and the 'faqirs' a sixth; (b) to his cousins (who are three in number) and to 'faqirs' and to 'miskins' (poor persons)—the three cousins take each one-fifteenth of the estate, the 'faqirs' one-fifteenth, and the 'miskins' one-fifteenth.<sup>5</sup> Illustration.

**592.** According to Hanafi law where a legacy is given to several persons jointly, and one of them dies before the testator, the surviving legatees take the whole legacy unless,<sup>6</sup>— On death of a joint legatee no right of survivorship unless the deceased legatee was disqualified ab initio.

(a) there is any thing in the will to show that each

<sup>1</sup> Gelus II. 153-170.

<sup>2</sup> *Butler & Baker's Case* (1501) 3 Rep. 25; *Thomson v. Leach* (1601) 3 Masl. 296; *Siggers v. Evans* (1855) 5 E. B. 307; *Standing v. Bowring* (1885) 31 Ch. D. 233.

<sup>3</sup> Ball. I. 631; *Oomutlounisina Berbee v. Areefoounisina Berbee* (1805) 4 W. R. 66, though the legacy purported to be to her nephew, *musulun*

*bad musulun, buttun bad buttun*: but it purported to exclude the heirs in favour of the nephew. Cf. Indian Succession Act, s. 92.

<sup>4</sup> Ball. II. 247 (par. 3). Some Shiah authorities agree with the Sunni view.

<sup>5</sup> Ball. I. 630.

<sup>6</sup> Ball. I. 631-636.

SECTION 592. of the legatees is to take only a definite part of the legacy; or unless

(b) at the time when the legacy is given, all the legatees are in being, and competent in law to take the legacy, and are so described by the testator as to be capable of identification, and they fulfil the conditions on which the legacy is given; in which case the surviving legatees take only such a part of the legacy as they would have respectively taken if all the legatees had survived the testator.

See the illustrations and comment following s. 592A, below.

Disqualification of being heir or murderer is not disqualification 'ab initio.'

**592A.** When one of several joint legatees is disqualified on the ground that he is an heir of the testator, or has caused the testator's death, his share lapses, and is not taken by the surviving legatees.<sup>1</sup>

Illustrations.

- (1) T bequeaths a legacy to the child of L, 'en ventre sa mère,'—
  - (a) If within six months after T's death, L gives birth to a dead child, the legacy is void;<sup>2</sup>
  - (b) if L gives birth to two children, one alive, and the other dead, the living child takes the whole legacy;
  - (c) if L gives birth to two children, who are both alive, and then one dies, the living child takes half of the legacy, and the heirs of the one that dies take the other half.<sup>3</sup>
- (2) T bequeaths one-third of his property,—
  - (a) to L and LA (LA being dead at the time of the bequest, whether with or without T's knowledge) or
  - (b) to "L and LA, if LA is alive" (LA being dead) or
  - (c) to L and L's posterity,<sup>4</sup> or
  - (d) to L and L's child (and L's child dies before T) or
  - (e) to L and to such of his children as may be poor (and none of children are poor),—

In all these cases L takes the whole legacy.<sup>5</sup>

(3) T bequeaths a third of his property,—

(a) "to L and LA, if LA survives T," or "if LA is poor" (and LA predeceases T, or becomes rich)

<sup>1</sup> Ball. I. 631-634.

<sup>2</sup> Ball. I. 617.

<sup>3</sup> Ball. I. 618.

<sup>4</sup> In the original, the word for "posterity" is *a/r/b*, literally—"those that are to follow." Cf.

"As to B's [*a/r/b*] posterity, as they are to follow him after his death, they are to be considered as non-existent at present." Ball. I. 632: cf. *nemo est haeres viventis*.

<sup>5</sup> Ball. I. 631. See, however, s. 5 C, above.

- (b) "to L and the children of LA if they become poor" (and the children of LA do not become poor) or

*Illustrations*

- (c) to L and L's heir, -

In all these cases L takes a third of the estate.<sup>1</sup>

(4) T leaves one-third of his property "to L, and to LA," or "between L and LA." The repetition of the word "to" and the use of the word "between" shows that he wished them to take severally, and neither L nor LA can take more than one-sixth.<sup>1</sup>

(5) T leaves one-third of his property "between L's children and LA's children," and one of them has no children, the whole third goes between the children of the other, there being no indication that they are to take severally.<sup>1</sup>

(6) T leaves a legacy of one-third of his property to L and LA. Both L and LA survive the testator, but L dies before accepting the legacy, and then LA accepts it. LA takes the whole third. If L had died before T, LA would have taken only one-sixth.<sup>2</sup>

(7) T leaves one-third of his property "to L and to such children of LA as may become poor." At T's death, if none of the children of LA are poor, L takes the whole one-third; if some are poor, then L and such children take 'per capita.'<sup>3</sup>

- (8) T bequeaths a third of his property,—

(a) "to the sons of L." If L has no sons at the date of the will but before T's death, sons are born to L, they take the legacy. If L had 3 sons, Ls, LSA, LSB at the time when T made his will, and then Ls and LSA die, and LSC and LSD are sons born to L previous to T's death, then LSB, LSC and LSD take the legacy equally, if they survive T;

(b) "to Ls, LSA, LSB, the sons of L," then on Ls and LSA predeceasing T, LSB will take 1/3 of the legacy (i.e., 1/9 of T's estate) and LSC and LSD will not take anything, as they were not mentioned in the will.<sup>4</sup>

(9) T, a Sunni, purports to leave a legacy of Rs. 100 to L, a stranger, and to LA, an heir. L can take Rs. 50, but LA cannot take his Rs. 50 unless the heirs consent.<sup>5</sup>

(10) T bequeaths his mansion to L, and the right to reside in it to LA. Here both bequests take effect as stated. But if T bequeaths first the right to reside to LA, and then the mansion to L, then if they are mentioned connectedly they take what is mentioned for them respectively, but if they are mentioned separately, then L takes not

<sup>1</sup> Bail. 6, 331. See, however, "Jc," above.

<sup>4</sup> Bail. I, 335.

<sup>2</sup> Bail. 6, 332.

<sup>5</sup> Bail. I, 336-337.

<sup>3</sup> Bail. I, 332.

SECTION 502. only the whole of the mansion exclusively, but shares with LA the right to reside in it.<sup>1</sup>

Where at the time that the bequest is made, one of the legatees is not in being, or where one or more of the legatees is or are described generally, and there is no one answering the description and fulfilling all the conditions on which the will purports to give the legacy, and which are required by law to entitle him or them to take it, his part accrues to the survivors.<sup>2</sup>

### § 4.—Form of Will.

593. A Muslim is not obliged to observe any special formality in making his will, and his intentions with respect to his property which he desires to be carried out after his death,<sup>3</sup> in whatever form they are declared, may operate as a will, provided that they are declared with sufficient clearness to be capable of being ascertained.<sup>4</sup> In particular, the will need not be framed or worded in any technical form or language;<sup>5</sup> it need not be in writing;<sup>6</sup> if in writing, it need not be signed by the testator, or attested by witnesses; and, if oral, no specific number or class of witnesses need be present at the time of the declaration.<sup>7</sup>

No formality  
necessary.

Writing not  
necessary  
nor witnesses.

<sup>1</sup> Bail. I. 657-658.

<sup>2</sup> Bail. I. 631-634.

<sup>3</sup> But must be a clear intention to bequeath; and the mere fact that a man says that another one is his son, and *maik* and *waris*, both during his life and after his death, may not, in itself, be enough to show such intention: (*Musamat Natho Begum v. Rahim Shah* (1891) 26 Panj. Rec. 286 (No. 55).

<sup>4</sup> E.g. in (*Prince*) *Suleman Kadr v. Durrab Ali Khan* (1881) 8 Cal. 1, 8 I. A. 117. See *Minhaj*, 262, 263.

<sup>5</sup> (*Said*) *Kasim v. Shaista Bibi* (1875) 7 N.W. 313; *Abdul v. Tajudin* (1904) 6 Bom. L.R. 263, 264, 268; *Mashar Hussain v. Bothe Bibi* (1898) 21 All. 91 (P.C.) (letter as will). See also *Kuwarbai v. Mir Alam Khan* (1883) 7 Bom. 170. *Dun Tarin Debi v. Krishnagopal Bagehi* (1908) 36 Cal. 149 (matrimonial arrangement deed as will, Hindu parties); *Re goods of Morgan* (1866) L. R. 1 P. & D. 214; *Robertson v. Smith* (1870) L. R. 2 P. & D. 43; *Williams on Executors*, 10th ed. 95.

<sup>6</sup> Oral wills recognised in *Kishoor Khan v. Jeevan Khan* (1799) Cal. S.D.A. 25; 1 Morl. 619; (*Nawab*) *Aminul-Dowlat v. (Synd)* *Koshus Ali Khan* (1851) 3 Moo. L. A. 199 (Shiah). *Baboo Beer Pertab Sahoe v. Maharaja Rajinder*

*Pertab Sahoe* (1867) 12 Moo. L. A. 1, 28; "He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege as well as to prove with the utmost precision the words on which he relies with every circumstance of time and place"; *Tamers Begum v. Furhat Hussein* (1870) 2 N.W. 35, (absence of writing where ample time available, may throw doubt on the fact of the words being used as expression of will, but cannot affect validity of will, it proved); *Aulia Begum v. Alauddin* (1906) 28 All. 716, 3 All. L. J. 319 (will not signed by the testatrix, nor by any one on her behalf, but found by District Judge, reversing Subordinate Judge, that the document represented the will of the lady, and she was competent at the time to make it, and High Court upheld it was valid will); *In re will of Haji Mahomed Abba* (1899) 24 Bom. 8 (Probate granted of oral will), followed in *Gandhi Chand v. Manpal Sen* (1903) 25 All. 38. Cf. *Re R. C. Stable, Delringle v. Campbell* (1918) 146 L. T. 43 (nuncupative will of soldier, admitted to probate).

<sup>7</sup> Cf. Indian Succession Act, ss. 50, 53, (which do not apply to Muslims). See comment.



It is stated in the 'Sharaya'-ul-Islam' that a bequest requires declaration and acceptance, and "by declaration is to be understood any word demonstrative of such an intention, as if a person should say, 'give such an one after my death,' or 'this is for such an one after my death,' or 'I have bequeathed it to him.'"<sup>1</sup> And dealing with dispositions of property on death-bed, it is stated that such as are not to take effect till after the testator's death, are treated as legacies, whereas such as are to take effect immediately according to some, take effect as legacies, and according to others, as against the whole estate.<sup>2</sup>

SECTION 593.  
Bequest requires declaration and acceptance.

So if a person says, "If any event should happen to me, then I give a legacy of Rs. 100. to such a person, or Rs. 1,000 to him out of my third,"<sup>3</sup> or if "A sick man makes a bequest, and being unable to speak from weakness gives a nod with his head, and it is known that he comprehends what he is about—if his meaning be understood, and he dies without regaining the power of speech, the bequest is lawful."<sup>4</sup> Thus a deed in the form of a gift, but providing that possession of the property was not to be given to the donee till after the death of the donor, was construed as a will, and effect was given to it as far as possible.<sup>5</sup> Similarly, a testamentary disposition in a 'wajib-ul-arz' may operate as a will.<sup>6</sup> But the principle was held not to apply in a case where the parties intended the disposition to operate during the life-time of the donor, and where it had been contended that possession had been given.<sup>7</sup>

No formality required in a will.

Gift given effect to as will.

Similarly, "when a person has said,<sup>8</sup> 'this my slave is to such an one, and this my mansion is to such an one,' without using the word bequest, and there is no mention of bequests, nor of the words 'after my death,' the expressions constitute a gift, both by analogy and on a favourable construction, and if possession be taken during the life of the donor the gift is valid, but if possession is not taken of it till after his death, the gift is void."<sup>9</sup>

As regards witnesses it is laid down in the Quran, V., 105,—

"Let there be witnesses between you when death draweth nigh to any of you at the time of making the testament, two witnesses, just men from among yourselves, or two others of a

Will need not be attested.

<sup>1</sup> Ball. I. 623.

<sup>2</sup> Ball. II. 229, 256; see *Ali Husain v. Fazal Hussein Khan* (1914) 36 All. 431; and s. 461 v. above.

<sup>3</sup> Ball. I. 623; i.e., all that he can bequeath. Thus "1,000 dirhams from my third," sufficiently indicates a testamentary disposition, whereas "1,000 dirhams from my property," or "from the half," or "fourth of my property," would be a gift: Ball. I. 623 (H. 27-33.)

<sup>4</sup> Ball. I. 641 (par. 2.)

<sup>5</sup> (*Sund*) *Kasim v. Shaieta Bibi* (1875)

<sup>6</sup> N. W. 313.

<sup>7</sup> *Mahomed Alfaz Ali Khan v. Ahmed Hussain* (1876) 25 W.R. 121 (P.C.).

<sup>8</sup> See p. 545, n. 6.

<sup>9</sup> Ball. I. 623; cf. *Edwards v. Jones* (1836) 1 M. & Cr. 226, per Lord Cottenham as to when a transaction must be considered a gift in present, and when a *donatio mortis causa*.

## SECTION 593.

different tribe from yourselves, if ye be journeying in the earth and the calamity of death surprise you."

Quran IV, 105,  
merely recom-  
mendatory.

This verse has evidently been interpreted as containing merely a recommendation, and not a rule of perfect obligation; for no mention is made of witnesses in (*e.g.*, the 'Fatawa 'Alamgiri' or 'Hidaya') when the constituents of a will are discussed; <sup>1</sup> again the books on 'wasaia' or wills in these works are divided into ten and eight chapters, respectively, and only the last of them make any mention of witnesses.<sup>2</sup> The following illustration occurs in the 'Fatawa 'Alamgiri': "And if out of two witnesses one says that the deceased made this one an executor on Thursday, and the other one gives evidence that the testator made him an executor on Friday, then such evidence will be accepted: this is contained in the 'Muhit'"; <sup>3</sup> this shows at any rate that the two witnesses need not be simultaneously present. As to Shiah law there may be room for doubt. For though when the essentials of a will are mentioned, no mention is made of witnesses,<sup>4</sup> yet it is also stated<sup>5</sup> that "wills or bequests are established in law by the testimony of two witnesses who are 'Mooslims' and just persons, or in case of necessity, when two just 'Mooslim' witnesses are not to be had, by that of two 'zimmees' or infidel witnesses."<sup>5</sup> This, it seems, refers merely to the proof of a will, and not to its validity. For it applies to written no less than oral wills; nor does there seem to be any distinction in Muhammadan law between an oral and a written will and it is recognised that no attesting witnesses are required when the will is in writing. Further, in order to understand the effect of this passage it must be borne in mind that, unlike the Indian Evidence Act, s. 134, (which provides that "no particular number of witnesses shall in any case be required for the proof of any fact,") Muhammadan law specifies the number of witnesses required for the proof of different transactions: generally two witnesses for all civil cases.<sup>6</sup> So that the references in the Arabic texts to the evidence required for the proof of wills seem in fact to be re-statements of the general adjective law of proof, and not any part of substantive law,—whereas in the cases of marriage amongst the Hanafis, and divorce amongst the Shiahs, the authorities lay it down specifically that witnesses are necessary for the legal validity of the said transactions, and not merely for proving them.<sup>7</sup>

Written and  
nuncupative  
wills not  
distinguished.

<sup>1</sup> Cf. Ball. I, 613, 614.

<sup>2</sup> Entitled "on giving evidence as to wills," and "of evidence with respect to wills."

<sup>3</sup> *Fatawa 'Alamgiri*, *Wasaia*, ch. X and *med.*

<sup>4</sup> Ball. II, 229, 231.

<sup>5</sup> Ball. II, 242.

<sup>6</sup> Hed 353 "Evidence required in a case of

whoredom is that of four men, . . . in other criminal cases of two men . . . in all other cases . . . of two men, or of one man, and two women."

<sup>7</sup> Wilson, "Anglo-Muhammadan Law," 307 s. 282, citing Quran, V. 106 (for V. 105,) says "if oral, the will must (probably) be made in the

§ 5.—*Interpretation of Wills.*

SECTION 593A.

**593A.** In construing wills the Courts give effect as far Testator's intention. as possible to the intention of the testator.<sup>1</sup>

"In all cases the Court must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life."<sup>1</sup>

See also ss. 588-592, above.

**594.** Subject to the provisions contained in this Will speaks from death of testator. chapter, and unless a contrary intention appears in the will, it is construed to speak as if it had been executed immediately before the death of the testator, and the bequests contained in it take effect accordingly.<sup>2</sup>

**595.** Where the will is made in terms so ambiguous Ambiguous will to be interpreted by heirs who may avoid it. that the law affords no interpretation of it, it must be left to the heirs to explain its meaning as they may think proper.<sup>1</sup>

(1) T says in his will "something, or some trifle, should be given to L," or "I leave some property to L." The heirs may give to L or L's whatever they like.<sup>1</sup> Illustrations.

(2) T says, "I bequeath a 'saham' (a technical name for an heir's portion) to L." Abu Hanifa is of opinion that the expression is uncertain and the heirs may interpret it as they please. But the author of the 'Mabsut' says that L is entitled to the smallest share of the heirs, or to half of the property if there is no heir, and the other half of the property is to escheat.<sup>2</sup>

(3) T bequeaths to L "a garment or a beast." The heirs may give to L any garment, or any beast.<sup>3</sup>

presence of two male adult Moslems as witnesses." Sir Roland seems to suggest that oral wills are to be governed by a different law from written wills, on the ground that the Quran contemplates oral wills alone. But were the Quran so interpreted as to make two witnesses necessary for an oral will, it is submitted that the same rule would apply to written wills, unless there were something in the Quran to show not merely that it contemplates oral wills only, but also that it excludes written wills from the law laid down therein. In the time of the Prophet most transactions were oral; and even in the law of gift and *waqf*, as treated in the texts of a date, far later than the Prophet, documentary dispositions of property are seldom referred to.

So far as the later texts are concerned, this may well be explained (as Sir B. K. Wilson does) by "the strong propensity of legal writers to blindly follow their predecessors, without taking note of new facts."

<sup>1</sup> *Raja Venkata Narayana v. Raja Parthasarathi*, 26 Mad. L. J. 411, 424, (P.C.) (per Lord Moulton).

<sup>2</sup> Cf. Indian Succession Act, s. 77; Wills Act, 1837, *i.e.*, 1 Vict. c. 26 s. 24, *In re Gillies*, *Jagis v. Gillies* [1909] 1 Ch. 345.

<sup>3</sup> Ball, I. 636 (*off.* 6-10); but see II. 17-19; II. 238, 239, 241, (*par.* 3-4). See also s. 5c, above.

<sup>4</sup> Ball, I. 629, II. 239.

<sup>5</sup> Ball I. 629; for Shiah *Imam's* law; cf. the passage from the *Du'ayim-ul-Islam* translated in the comment to s. 579, above.

## SECTION 595.

*Illustrations.*

(4) T bequeaths the best of his three garments to L, the next in quality to LA, and the last to LB. If one of the garments is lost, and it cannot be ascertained to whom the remaining two garments were allotted by T, the heirs have the right to claim that the legacies are void, "since the parties entitled are unknown, and ignorance of this fact prevents the validity of any judgment that may be pronounced in the matter, and the attainment of the testator's object, unless the heirs will deliver up the remaining garments." If they consent to the legacy being given effect to, then L will have two-thirds of the better of the two garments in existence, LA will have one-third of the better, and one-third of the worse, and LB the remaining two-thirds of the worse.<sup>1</sup>

Heirs may  
avoid ambiguous  
will.

The Muhammadan law does not differ materially from the English law, under which the bequest would be absolutely void for uncertainty. For as the heirs have the power of putting whatever interpretation they like on it, and if they choose, to give something to the legatee, they do so out of what would otherwise be their own portion. III. (4) shows that they may avoid the bequest if they like.

Failure of  
prior bequest  
accelerates  
or avoids later  
bequest  
according to  
intention of  
testator

**596.** Where there is a bequest to an heir consisting of an interest in property, limited in point of time, and it is followed by a second bequest of the reversion of the same property to a second legatee, and the former bequest fails because the heirs do not consent to it, the latter bequest does not necessarily become invalid by such failure, but may be accelerated unless an intention is shown that the second legatee should not take till after the death of the former,<sup>2</sup> or unless the intention of the testator would be wholly defeated by such acceleration.<sup>3</sup> *Seemle*, the same rule applies wherever the prior of two successive bequests fails.

*Illustrations.*

(1) T bequeaths property to L for his life, and "from and immediately after his decease" to LA. 'Prima facie' these words are to be understood as denoting the order of succession of the limitations, no intention is shown that LA is to take nothing till after the death of L; in such a case it makes no difference whether the previous estate is removed by death, or revocation. Consequently the estate of LA is accelerated in either case.<sup>4</sup>

<sup>1</sup> Ball. I. 637.

<sup>2</sup> *Lainson v. Lainson* (1854) 5 De G. M. & G. 754, followed by P. C. in Hindu case *Ajadhia Bukhsh v. Musummat Rukmin Kuar* (1888) 11 I. A. 1. See also *In re Whitehorn Whitehorn v. Best* [1906] 2 Ch. 121 (Buckley, J.); and *in re*

*McEachern, Gambles v. McEachern* (Eve J.), Sol. Journ., 21 Jan. 1911, p. 204; [1911] W.N. 28.

<sup>3</sup> *Fatimabibi v. Arif Ismailji Bham* (1881) 9 O. L. R., 66 (Wilson, J.); cf. *Ismail Mahomed v. Hurbat* [1898] Printed Judgments, (Bombay 107 (Farman, C.J. and Candy, J.),

(2) T purports to give the rents of more than a third of his property to his heirs in proportions other than the legal proportions: and after the death of the last child, to charity. If the heirs do not consent to T's will, both the bequests must fail, because it would wholly defeat T's intentions if the heirs are ousted for the benefit of the charity. SECTION 596.  
*Illustrations.*

**597.** Where the bequest contains a description of the articles which form its subject, but does not appropriate for the legacy any particular article of the said description, and the testator does not own any such article at his death, the bequest fails unless there is anything in the terms of the bequest showing that the testator intended to give legacy of the value of articles of the said description, in which case such articles will be purchased out of the estate, and given to the legatee.<sup>2</sup> Subject of  
bequest  
described but  
not denoted

**598.** Where a bequest is made of the whole, or a specified fraction, of the testator's money, or of any other object or commodity that is estimated by weight or measure of capacity,—for the purpose of determining the number or quantity of the said object or commodity, regard will be had to the number or quantity of the objects or commodity of the said description owned by the testator at the time when the bequest was made, and not at the time of his death.<sup>3</sup> Where the subject of the bequest is not money or objects or commodity, of a homogeneous nature, regard will be had (for the purpose of determining the number or quantity bequeathed) to the number or quantity of the objects or commodity of the said description owned by the testator at the time of his death.<sup>4</sup> Bequest of  
money or other  
commodity  
estimated by  
weight or  
measure of  
capacity.

(1) Makes a will when he has 100 goats, each of the value of Rs. 5, and no other property. He bequeaths half of his goats to L,— *Illustrations.*

<sup>1</sup> See p. 810, n. 2.

<sup>2</sup> Cf. Indian Succession Act, ss. 120-127, 140, 141, where a bequest of property specified and distinguished from all other parts of the testator's property, is called a specific legacy and "where the testator bequeaths a certain sum of money or a certain quantity of any other commodity and refers to a particular fund or stock so as to constitute the same the

primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative." The distinction is that in the one case specified property is given, and in the other a legacy is directed to be paid out of specified property.

<sup>3</sup> Bail. I. 681, 636.

<sup>4</sup> Bail. I. 631, 636 See s. 574, above

## SECTION 598.

*Illustrations.*

(a) If T dies a year after making the will, and his net estate at his death consists of 60 goats, and Rs. 1,000 in cash, L takes 50 goats.

(b) If T leaves no other property except 60 goats, then L takes only 20 goats unless the heirs consent.

(c) If, instead of goats, there is a bequest of half of T's clothes, (which are of different kinds and values) and two-thirds of the clothes perish before the death of T, then L takes half of the clothes actually left by the deceased, (provided that there was either other property of at least twice the value of the half of the clothes left by the deceased, or the heirs consent to the bequest in excess of a third).<sup>1</sup>

(2) T makes a bequest of a third of his flocks, and,—

(a) all his flocks perish before his death,—the legacy is void, even though T should have purchased other flocks before his death.

(b) If T has no flocks at the time of the bequest, and subsequently purchases some,—the legacy will be valid as to a third of the flocks belonging to him at his death.<sup>1</sup>

(3) T has no sheep and bequeaths,—

(a) “a sheep from his property”; this means that a sheep or the value of one, has to be given to the legatee out of T's property;<sup>2</sup>

(b) “a sheep to L,” then it is doubtful whether the bequest is specific, and so of no effect, or is to be interpreted as a bequest of the value of the sheep;<sup>2</sup>

(c) “a sheep out of his flocks”; this is a specific bequest, and so of no effect.<sup>2</sup>

(4) T says “I bequeath my roan Turkish horse” or “my blind horse to L.” The bequest is specific, and refers to one that is in the possession of the testator at the time of his death.<sup>3</sup>

(5) T bequeaths to L his Turkish horse, without any qualification; the bequest is not specific, but includes property acquired by T subsequently.<sup>2</sup>

### § 6.—Revocation of Will.

**599.** (1) A testator may revoke his will or any part of it either expressly or by implication.<sup>3</sup>

(2) An act by which the testator extinguishes<sup>4</sup> or disposes of his right in the subject of the bequest implies a revocation of the bequest to that extent; and where the said

Revocation of  
will expressed  
or implied.

Revocation  
implied by  
alienation.

<sup>1</sup> Bail. I. 636.

<sup>2</sup> Bail. I. 635-636. See, however, v. JC,  
above.

<sup>3</sup> Bail. I. 618. *Mitchell v. Mitchell* (Bk. 29, s. 6).

<sup>4</sup> Cf. Indian Succession Act, s. 139.

act consists of a sale or gift of the property, the bequest does not revive by the testator re-purchasing the subject of bequest or revoking the said gift.<sup>1</sup>

SECTION 599.  
Or addition.

(3) An addition to the subject of the bequest operates as a revocation, provided that the addition is of such a nature that the subject of the bequest cannot be delivered without it.<sup>2</sup>

(4) Where the same article is bequeathed successively to two persons, the second bequest does not necessarily operate as a revocation of the first, unless an intention to revoke the first is indicated; and where the legatee in whose favour the second bequest is made, is dead at the time when it is made, the first bequest is not thereby revoked, inasmuch as the second bequest is void.<sup>3</sup>

But not necessarily subsequent bequest.

(5) A denial by the testator of the validity of a bequest that he has made,<sup>4</sup> or of the fact of his having made it,<sup>5</sup> does not operate as a revocation of it.

Denial is not revocation.

(1) T bequeaths a house to L. Subsequently, T says: "The house that I gave to L, is for LA." This is an express revocation, unless LA is dead at the time of the second statement, in which case the first bequest remains unaltered.<sup>6</sup>

Illustrations.

(2) T bequeaths to L (a) a piece of cloth, and then T cuts it up and sews it;<sup>6</sup> or (b) cotton, and afterwards weaves it or spins it into thread, or uses it for stuffing quilting, or lining a garment; or (c) iron, and afterwards makes a vessel, or a sword of it; or (d) fried barley, and afterwards mixes it with butter; or (e) a slave,<sup>7</sup> and afterwards pledges him. All these acts operate as revocations of the bequests.

(3) T bequeaths a piece of silver to L, and then fashions it into a ring. Abu Hanifa's view is that this is not a revocation, and this is stated in the 'Fatawa 'Alamgiri' to be correct,<sup>1</sup> though it is opposed to Abu Yusuf's view, and apparently to that of Imam Muhammad's, and to *ill.* (2) above.

<sup>1</sup> Ball. I. 619.

<sup>2</sup> Ball. I. 618.

<sup>3</sup> As the second legatee is dead when the bequest to him is made.

<sup>4</sup> Ball. I. 620. Cf. s. 5c, above.

<sup>5</sup> Ball. I. 619. There is a difference bet-

ween the views of the two disciples on this point, but the *Hidaya* is clear in its preference for the view expressed above.

<sup>6</sup> Cf. Indian Succession Act, s. 139.

<sup>7</sup> Ball. I. 618-620; cf. *Minhaj*, 267 (Bk. 29 s. 6). Cf. s. 5c, above.

## SECTION 599A.

*Illustrations.*

(4) T bequeaths to L a third of his property, and then makes a gift of a third of his property to R. The bequest to T is not revoked.<sup>1</sup>

(5). T bequeaths a mansion to L, and "largely be-daubs it with mud," or builds within it, or sells it, or makes a gift of it. The bequest is revoked, and is not revived by T repurchasing the mansion, or revoking the gift :<sup>1</sup> but if he puts plaster on the house, or pulls it down, it is not revoked.<sup>2</sup>

(6) T bequeaths land to L. If he sows it with vegetables, it is not revoked, but making a vine-yard or planting trees upon it, would revoke the bequest.<sup>3</sup>

§ 7.—*Death-bed Dispositions of Property.*

**600.** The restrictions contained in this chapter on the powers of disposing by will of more than one-third of the estate, or so as to benefit heirs, apply also to other transactions made by a person while he is in 'marz-ul-maut' (or death-illness) in so far as they are made without consideration.<sup>4</sup>

Death-bed transactions without consideration take effect as bequest.

*Illustrations.*

(1). A GIFT<sup>5</sup> made in 'marz-ul-maut' can take effect only as a legacy, i.e., to the extent of a third of the estate and (except under the Shiah 'Ithna 'Ashari' law) in so far as it is not in favour of the heirs,<sup>5</sup> provided that such a gift is not valid even to the said extent, unless possession has been taken by the donee.<sup>6</sup>

(2). T owns a house worth Rs. 3,000, and has no other property. He purports to make a GIFT of it while in death-illness to L, who gives an 'IWAZ' for the gift, of the subject of which T takes possession. T then T dies. If the 'iwaz' is Rs. 2,000 in value or more, the gift and 'iwaz' are both valid, as in that case L benefits only to the extent of Rs. 1,000, or less, viz., within the third of T's estate. If the 'iwaz' is less than Rs. 2,000 in value, then the heirs of T have a right to claim back a portion of the gift, equal to the difference between Rs. 2,000 and the value

<sup>1</sup> Bail. I. 619.<sup>2</sup> Bail. I. 621.<sup>3</sup> Bail. I. 621.

<sup>4</sup> See *id.*, and ss. 367, 419 (*id.* 3 and 4), 500 (comment), 579, above; Bail. II. 200; *Mishaj*, 262, Bk. 29, s. 3). See also *Ibrahim Goolam Ariff v. Saiboo* (1907) 35 Cal. 1 (P.C.), where gifts in favour of heirs were upheld, as it was found that the donor was not on his death-bed; but it was assumed that otherwise they would have been invalid.

<sup>5</sup> *Muhammad Sayid v. Muhammad Ismail*

(1911) 33 All. 233; *Ibrahim Goolam Ariff v. Saiboo* (1907) 35 Cal. 1 (P.C.); *Wazir Jan v. Allah Ali* (1887) 9 All. 357; *Labbi Bibi v. Bibban Bibi* (1874) 6 N.W. 159; *Muhammad Gulshere Khan v. Maryam Begum* (1881) 3 All. 731; *Fatima Bibi v. Ahmad Bakhsh* (1903) 31 Cal. 319; *Ekin Bibi v. Ashraf Ali* (1884) 1 W. R. 152; *Muhammad Saigrid v. Muhammad Ismail* (1910) 7 All. L.J. 1170; *Nazar Hussain v. Nawaz Hussain* (1911) 8 All. L. J., 1154. Cf. n. to s. 600, above.

<sup>6</sup> Bail. I. 542.



of the 'iwaz,'<sup>1</sup> and the donor has the option of retaining the house, provided that he makes an 'iwaz' of Rs. 2,000, i.e., of two-thirds of the net assets.<sup>2</sup> SECTION 600.  
*Illustrations.*

(3). T, a woman, while in death-illness, makes a GIFT of her 'MAHR' to her husband H, who predeceases her. She has no claim for her 'mahr' as against H's estate, because the release can only be questioned after T's death.<sup>3</sup> If she dies her heirs may question the validity of the release.<sup>4</sup>

(4). Where the deceased makes a 'MAHARAT' (i.e., a colourable sale or purchase) to his own disadvantage while he is in 'marz-ul-maut' in so far, and to the extent to which the pretended seller or purchaser has been favoured by the deceased, the transaction can have effect only as against a third of the estate; but such a sale or purchase has priority over a gift made in 'marz-ul-maut' and over all legacies.<sup>5</sup>

(5). If A in his death-illness ACKNOWLEDGES himself to be indebted to an heir, and there is no other proof of the DEBT, it cannot (except according to Shiah 'Ithna 'Ashari' law) take effect as against the other heirs, unless they consent to it.<sup>7</sup> As according to Shiah 'Ithna 'Ashari' law it is valid to the extent of a third of the estate without the consent of the heirs, but their consent is required for validating it so as to make it payable out of more than the third.<sup>8</sup>

(6). The RELEASE OF A DEBT during death-illness is valid only to the extent of a third of the estate of the deceased.<sup>9</sup>

(7). A 'WAQF' made in death-illness is valid only to the extent of a third of the estate of the deceased, unless the heirs consent.<sup>10</sup>

(8). Where a marriage is made in death-illness, and the 'MAHR' (or dower) is more than the 'mahr-ul-mithl' (usual dower) the excess is void, unless the heirs consent.<sup>11</sup> But the case is different where 'mahr' was due in respect of a marriage contracted before the death-illness:

<sup>1</sup> Ball. I. 535-536.

<sup>2</sup> Ball. I. 542.

<sup>3</sup> Ball. I. 544. It is obvious that the illness cannot be known to be *marz-ul-maut* till after her death.

<sup>4</sup> *Muhammad Mashud Hasan Khan v. Muhammad Ameer Hussain Khan* (1009) 6 All. L. J. 503: the release of the *mahr* was made on 18th July 1906, and the wife died on 23rd July 1906. The Court seems to have overlooked the fact that the release would be valid to the extent of one-third of the estate of the wife.

<sup>5</sup> Hed. 685.

<sup>6</sup> Ball. I. 641; II. 257-259.

<sup>7</sup> Hed. 437.

<sup>8</sup> Hed. 437, 634. It will be remembered that according to strict Muhammadan law the

acknowledgment of a debt in favour of a stranger (though there be no other evidence of it) establishes the debt to the extent of the whole of the estate but that debts which can be proved by other evidence have priority over debts of which there is no proof other than the acknowledgment; s. 500, above.

<sup>9</sup> Ball. II. 209. (Cf. Ball. I. 112 (*id.* 27-28).

<sup>10</sup> Ball. I. 601, II. 212; *Ali Husein v. Fazal Hussain Khan* (1911) 36 All. 431 (case under Shiah law). (Cf. *Khojournoust v. Roushan Jehan* (1879) 2 Cal. 134, 3 I. A. 291; 26 W.R. 36 (legacy to heir under colour of charitable bequest held invalid).

<sup>11</sup> *Radd-ul-Mukhtar, Kitab-ul-Iqar*, 'Ch. on acknowledgments in death-illness, *ibid.*

SECTION 600. property transferred for the purpose of discharging the 'mahr' debt is not transferred without consideration; nor is such a transfer a gift, nor does the rule in s. 600 apply thereto.<sup>1</sup>

(9). T purports to BEQUEATH more than one-third of his estate. H one of T's heirs, being in death-illness, assents to T's said bequest. The assent of H operates as though he had left a legacy, and is valid only if H's share in the excess of T's said bequest over one-third of T's estate is less than a third of H's estate.<sup>2</sup>

(10). T leaves a LEGACY to one of his heirs, L; the other heir of T, H, CONSENTS while in 'marz-ul-maut' TO THE BEQUEST, and then dies, leaving as his heirs L, and HA. Under Shiah law H's consent to T's bequest in favour of L, validates that legacy to the extent of one-third of H's estate. Under the Sunni law it is not valid to any extent unless HA consents to the legacy, because L and HA are both heirs of H.<sup>2</sup>

(11). T dies leaving as his heirs his sons S, SA, SB and SC. T's estate is worth Rs. 6,000 but he purports to leave Rs. 5,000 to L. S CONSENTS to the LEGACY. If S's consent is given in health, the legacy takes effect to the extent not only of the bequeathable third (i. e. Rs. 2,000) but also as against S's share in T's estate (i. e. another Rs. 1,000 making up Rs. 3,000 in all). If S's consent is given by him on his death-bed, it is operative if S leaves estate worth Rs. 2,000 besides his share in T's estate (i. e. if S had testamentary power over Rs. 1,000 which was his share in T's estate); otherwise it will abate proportionately.

(12). T directs his executor E to sell certain portions of the estate, and purports to give to E a commission of three per cent. on the proceeds of the sale of the said properties. Held, that this is a mere LEGACY payable out of one-third of the estate, which passed by the will; it is not a debt.<sup>3</sup>

(13). A Shiah makes in death-illness a GIFT and also enters into a 'MAHABAT' transaction, the first in order of time (the gift) takes effect, and then if there is any balance out of a third of his estate, the 'mahabat' takes effect to that extent.<sup>4</sup>

(14). W is in death-illness, and has grain of the value of 6 'dinars' (which is his whole estate). He purports to sell it (by way of 'MAHABAT') to L for grain of the value of 3 'dinars.' By this the loss to the estate is that of 1/2 of the estate, whereas in death-illness W had power to dispose

<sup>1</sup> *Mustafa v. Hurmat* (1880) 2 All. 354; *Abbas Ali v. Karim Bakh* (1908) 13 Cal. W.N. 160; *Eusag Choudhry v. Abedunnissa* (1914) 42 Cal. 361; see also *Bibi Janbi v. Hazurath Sarb* (1910) 21 Mad. L. J. 958.

<sup>2</sup> Ball. I. 615.

<sup>3</sup> *Aga Mahomed Jaffer Bindanim v. Koolsoom Bibi* (1897) 24 Cal. 9; 24 I. A. 196.

<sup>4</sup> Ball. II. 257.

of only  $\frac{1}{3}$  (or 2 dinars). L must return  $\frac{1}{3}$  of the grain purported to SECTION 600 be sold to him by W and the heirs must return  $\frac{1}{3}$  to L. The gain\* to L will then be of the value of 2 'dinars.'<sup>1</sup>

(15). "When a sick woman has given her DOWER to her husband, the gift is valid if she recovers from her illness; and even though she should die of that illness, yet if it were not death-illness, the answer would be the same; but if it were a death-illness, the gift would not be valid, without sanction of the heirs."<sup>2</sup>

<sup>1</sup> Bail. II, 257-258.

<sup>2</sup> Bail. I, 543 (H. 11 '5).

## CHAPTER XIV.

### INHERITANCE AND SUCCESSION.

#### *PART I—GENERAL PRINCIPLES AND SCHEME OF THE LAW.*

##### *§ 1.—Dual basis of Muhammadan law of Succession.*

1. Amendments by Islam.
2. Pre-Islamic customs.

**601.** The Muhammadan law of succession consists primarily of (1) the rules relating thereto laid down in the Quran or inculcated by the Prophet in his teachings;<sup>1</sup> and (2) the customs and usages prevailing amongst the Arab tribes near Mecca and Medina at the time of the Prophet, in so far as they have not been altered or abrogated by the said rules and teachings.<sup>2</sup>

Muhammadan law admired for logical completeness.

The Muhammadan law of inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious scheme of providing not merely for the selection of a single individual or homogeneous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations.

As to the excellence of the system in a formal sense, Sir William Jones said: "I am strongly disposed to believe that no possible question could occur on the Muhammadan law of succession which might not be rapidly and correctly answered."<sup>3</sup>

Law of inheritance and forms which the family assumes.

"All laws of inheritance," says Sir Henry Maine, "are made up of the debris of the various forms which the family has assumed;"<sup>4</sup>

<sup>1</sup> All amendments introduced by Islam are referred to hereafter as "Quranic," even though they may be the result of a wide interpretation, or extension, of the principles contained or indicated in the Quran. See s. 605, below.

<sup>2</sup> This two-fold basis of Muhammadan law has been frequently alluded to in this work, but in the law of succession it is most important to bear it in mind: see the Introductory Chapter and the chapters on the family relations. The customs and usages have no effect or force in themselves, but have become incorporated in the law of Islam by the tacit approval of the Prophet. Nor are they preserved in Mussulman jurisprudence in the character of pre-Islamic usages; they form however the real substratum

of much of the law. That they have no force in themselves is illustrated by the fact that if any old custom were proved (assuming it were possible to do so) which is not recognized in the authoritative texts of Muhammadan law, the custom would have no binding force.

<sup>3</sup> Jones, Works, VIII., 204. See also *ib.*, 218: "Learn the laws of Inheritance, and teach them to the people, for they are one half of useful knowledge."

<sup>4</sup> "Early Institutions," 219. For the early Arabs the tie of war, or rather of joint plunder or revenge, was more important than that of the family. See Smith's "Kinship and Marriage in Ancient Arabia," (1907) 67; cf. *ib.*, 25-27, 41, 65, 69, 285.

and in Muhammadan law, the importance of the pre-Islamic customary rules of succession consists mainly in that we have to turn to them for discovering the fundamental notions of kinship and proximity underlying the law. Those notions were originally based on the blood-fued: the blood-feud seems, partially at least, to have given place to comradeship in arms, and subsequently to agnatic male relation,—for which Islam substituted blood relation of any kind whatsoever together with the relations that marriage creates between husband and wife. Similarly, the customary law alone can explain the reason why different classes of rights are given to the various relations, and why some who might be supposed to be equally entitled to similar rights are treated on different footings. Thus in the first (and in some respects the most important) group of heirs—the ‘sharers,’<sup>1</sup>—no place is given to sons, though daughters, daughters of sons, and even sisters are included in it. This might seem puzzling and meaningless unless it is borne in mind that the sharers consist of those who (under the circumstances in which they have the right to take their respective shares) were not entitled to succeed under the customary law. As the son was always entitled to succeed under the customary law, he is never a sharer.

The debris of the customary law (to use Sir H. Maine’s expression) will be encountered throughout the law of succession, and will often simplify its seeming complexity. A point or two may be noted here to illustrate this. The title to succession, previous to Islam, was that of comradeship in arms; it was for this reason that women and children who were unable to bear arms were disqualified in regard to inheritance.<sup>2</sup> The law was not amended on this point for the first two or three years during which the Prophet preached, and consequently the ‘muhajirun’ (or those who aided the Prophet in his earliest years) succeeded to each other when any of them fell in battle.<sup>3</sup> Later, this rule was abrogated by the Quran, and it was laid down that nothing could furnish so strong a claim to inheritance as blood relation. This was indeed only a part of the general scheme of the new religion to strengthen the family tie.<sup>4</sup> An instance of the survival of the pre-Islamic customary law is, that in Shiah law, though the whole of the inheritance is taken by agnates

Blood-feud  
the “family”  
tie amongst  
Arabs.

The blood  
money still  
taken even  
amongst the  
Shiaks by the  
“asaha.”

<sup>1</sup> See s. 610, below.

<sup>2</sup> See s. 611, below, and comment thereto; cf. Smith’s ‘Marriage and Kinship’ 56-66, 60-61. Sir R. Wilson seems to have overlooked this point in his Anglo-Muhammadan law (3rd ed.) 278, 501. But indeed in most expositions of Muhammadan law the bearing of this great historical fact (which is stated in s. 601) is

very inadequately conceived.

<sup>3</sup> See the commentaries on the verses of the Quran dealing with the laws of inheritance, and *Mahcut-ul-Masabih* XII, XIX, 1, 2, cf. *passim*, e.g. case of Sa’ad ibn Rabi and his brother and widow and daughters.

<sup>4</sup> For other instances see above, *passim*, e.g. ss. 92, 213, etc.

SECTION 601. and cognates, males and females alike, yet in regard to the 'diyāt' or "price of blood," which has or had to be paid by one who killed another, the old rule prevails, and the 'diyāt' is still to be divided amongst the 'asaba' or male agnates alone, the "mother's relations" having no share in it.<sup>1</sup>

### § 2.—*The Pre-Islamic Customary Rules of Succession in Arabia.*

Pre-Islamic  
customary  
rules of  
succession:  
nearest male  
agnate succeeded—

1. descendants;  
2. ascendants;  
3. collaterals.

Per capita.\*

- 602.** According to the pre-Islamic customary law,—
- (1) the nearest male agnate or agnates succeeded to the entire estate of the deceased ;
  - (2) females and cognates were excluded ;<sup>2</sup>
  - (3) descendants were preferred to ascendants and ascendants to collaterals ;<sup>3</sup>
  - (4) when more male agnates than one were equally distant to the deceased, (being nearer than any other male agnates) they together shared the estate 'per capita.'

### § 3.—*Principles underlying the Quranic Alterations in the law.*

#### (1) *Persons Newly Entitled to Inherit under Islam.*

Husband and  
wife, females  
and cognates  
made competent  
to inherit.  
Ascendants  
placed on footing  
of equality  
as regards  
right to inherit.

- 603.** The amendments in the law of succession made by Islam fall under two heads:—
- (1) the husband or wife, and females as well as cognates are recognised as competent to inherit ;
  - (2) parents and ascendants are given a right to inherit even when there are [male] descendants.

#### (2) *Nature of the Rights given to the Newly Entitled Heirs.*

Sunni inter-  
pretation of  
Quran

- 604.** According to the Hanafi interpretation of the

<sup>1</sup> Bahl. II. 267, (*Mird*), 370.

<sup>2</sup> See s. 611, below; also the commentaries on the verses of the Quran cited below. For the changes in the position of women in Arabia under Islam, cf. e.g. Causin de Perceval *l'Histoire des Arabes*, III. 302, 303, 336-337; *Mishnat-ul-Masbūh*, XII, xix, 1, 2.

<sup>3</sup> See ss. 622, 627, below: The "residuary by themselves or in their own rights" (Bahl. I. 691) are the customary heirs, and the priorities amongst them are (in Hanafi law) regulated mainly by the principles of the customary law Cf. ss. 61, 230, above.

Quran, the provisions in favour of the newly entitled heirs<sup>1</sup> SECTION 604. take the following forms :—

(a) Where the newly entitled heir is a nearer relation of the deceased than the customary heir<sup>2</sup> (i.e., than the nearest male agnate)<sup>3</sup> a share of the estate consisting of a definite fraction thereof, is assigned to the newly entitled heir in priority to the (male agnate or) customary heir.<sup>4</sup> A person entitled to such a fraction of the estate is called a “ (Quranic) sharer.”<sup>5</sup>

Sharers : those who are nearer than nearest male agnate.

(b) Where the newly entitled heir being a female is related to the deceased in the same manner and degree of proximity as the customary heir, but was (under the customary law) disqualified from inheriting owing to her sex —

(Sunni law.)

(i) she ranks equally with the customary heir in taking the residue of the estate left after the prior claims of the “ sharers ” are satisfied, but—

1. Quranic sharers having claims to fractions of estate in priority to customary heir.

(ii) she takes half as large a portion of the said residue as the male agnate or customary heir.<sup>6</sup>

2. Female agnates as co-residuaries (co-heirs) with customary heir.

A female so entitled is referred to as “ a residuary by another,”<sup>7</sup> or (in allusion to the origin or nature of their rights) as ‘Quranic residuaries’ or ‘co-residuaries.’

(c) The provisions above referred to are restricted in their operation (with a few exceptions)<sup>8</sup> to agnates, and are not extended to any collaterals remoter than sisters.

Operation of Quranic innovations in sunni law.

(d) The customary heir's rights to inherit in accordance with right arises under the Quran. The Arabic term for “sharer” is *zu farz*; *zu* means “possessor of,” and *farz* means “ordinance, (contained in the Quran),” referring in this connection to the allotted shares.

<sup>1</sup> See s. 605 (14), below.

<sup>2</sup> See s. 605 (10), below.

<sup>3</sup> Or to put it in another way, “where there is some relation of the deceased is entitled under the law of Islam who was excluded by the customary law but who is in fact more nearly related to the deceased than the nearest male agnate who was the heir by the customary law.”

<sup>4</sup> E.g., if the survivors are a daughter and a son's son, the latter is the customary heir and the daughter is newly entitled. If, therefore, they co-exist the daughter, being nearer than the son's son, each takes half of the estate. If there were two daughters and one son's son, they would each take one-third.

<sup>5</sup> The addition of the epithet *Quranic* is an innovation by the present author, introduced to draw attention to the fact that the

<sup>6</sup> E.g., if a man dies leaving S, a son, and D, a daughter, then S is the customary heir. D though related in the same manner as S, would (under the customary law) have been excluded because of her sex. D is, therefore, by Islam made a co-heir with S, but she gets 1/3 of the estate, and he takes 2/3.

<sup>7</sup> Hall, L. 096. “The residuary by another is every female who becomes, or is made, a residuary by a male who is parallel to her.”

<sup>8</sup> The exceptions refer to (a) certain female ancestors (b) uterine brothers and sisters. See s. 616, 618, below.

SECTION 604. with the customary law is generally<sup>1</sup> not abrogated, but the quantum taken by him is in many cases diminished, owing first to the prior claims of the (Quranic) sharers, and secondly to the fact that he has to divide with the Quranic residuaries, the residue of the estate left over after the (Quranic) shares have been allotted.

How far  
safeguarded.

(e) Subject to s. 603 (2) above, no person who was entitled to inherit under the customary law has any new rights conferred on him by the Islamic amendments of the law.<sup>2</sup>

(f) As a rule no right of inheritance is conferred on any person remoter than the customary heir.<sup>3</sup>

See the comment following s. 604A, below.

604A. According to the Shiah interpretation of the Quran—

(Shiah law)  
Males and  
females,  
agnates and  
cognates,  
placed on  
same basis as  
to right to  
inherit.

(a) The distinction made in the customary law, between agnates and cognates, and males and females, is abrogated (in regard to the priority in the right to inherit) : so that the nearest relations whether male or female, and whether agnate or cognate, inherit.

(b) Within certain limits descendants become entitled to inherit with ascendants ; and ascendants with collaterals.

\* Per stirpes.

(c) The distribution is not 'per capita,' but 'per stirpes.'

#### 1. SUNNI AND SHIAH INTERPRETATIONS OF THE QURAN COMPARED.

The Quran did not (according to the interpretation of either the Sunnis or the Shiahs) sweep away the existing laws of succession, but

Characteristic  
features of  
and distinction  
between Sunni  
and Shiah  
interpretation.

<sup>1</sup> The only case of displacement or exclusion, *ex nio mine*, of the customary heir by a newly entitled heir seems to be the case in which a sister excludes a remoter customary heir where a sister and a female descendant co-exist. In other cases, the rights of the customary heir are encroached upon, but not openly disregarded or abrogated. This applies only to the Hanafi exposition of the law.

<sup>2</sup> Thus sons have no new rights. A striking illustration is furnished also by the case of the uterine and consanguine half brothers. The former being cognates, were unknown to the customary law, but the latter being agnates, ranked immediately after the full brothers. Hence the uterine brothers (and sisters) are

made Quranic sharers, and when they co-exist with full brothers, they succeed with them, but the consanguine brothers and sisters are excluded by the full brothers: the newly entitled uterine brothers succeed alike with the full, and the consanguine brothers: but the consanguine brothers are excluded by the full brothers. See ss. 618, 622 (4) (c) below and table of Sharers and Residuaries in this Chapter.

<sup>3</sup> The only exceptions seem to be (1) that ancestors and descendants may succeed together, (2) that certain female ancestors (termed true grandmothers) may, in circumstances which can only rarely occur, succeed to 1/8 of the estate though there may be a male agnate in a nearer line.



made a great number of amendments based on a few common principles. SECTION 604A. These amendments have been differently interpreted by the Sunnis and the Shiah. The Sunni sect, as has been explained before, consists of four main schools. In this chapter, unless the context otherwise indicates the expression 'Sunni law' is used to denote the Hanafi school of Sunni law and similarly with cognate expressions. The leading distinction in their interpretations (taking the Harafis as representing the Sunnis, and the Ithna 'Asharis as the Shiah) may be stated as follows :—

I.—The Sunnis allow the principles of the pre-Islamic customs to stand, and they add or alter those rules in the specific manner mentioned in the Quran, and by the Prophet.

II.—The Shiah deduce certain principles which they consider to underlie the amendments mentioned in the Quran, and fusing these principles with the principles of the pre-existing customary law, raise up a completely altered set of rules.

## 2. GENERAL PRINCIPLES OF THE SUNNI INTERPRETATION.

The principle underlying the arrangement about the quantum of the rights taken by the various heirs under the Sunni interpretation of the law seems to be as follows : The customary heir is not absolutely displaced—the Quranic innovations are not interpreted by the Sunni doctors so as to take away his rights, but rather to provide for those (viz. females and cognates in the main) whose claims were disregarded by the customary law. Thus the basic principle of the customary law, (that agnates should be preferred to cognates) is not altered by the Quran according to its Sunni interpretation. Hence, agnates continue to have priority over cognates; whilst, among agnates themselves, if there is a female related to the deceased through fewer links than the customary heir<sup>1</sup> (i) her claims are superior so far as proximity is concerned, but (ii) the customary heir has old-established rights, and is 'prior tempore' and thus to that extent 'potior jure'—so that the estate is divided equally between the nearer female and the customary heir.<sup>2</sup> Where, on the other hand, the newly entitled heir is in the same line as the customary heir, (i) both being equal in proximity and (ii) the latter being superior on the score of antiquity, he takes twice as much as the former.<sup>3</sup>

<sup>1</sup> If she is removed by a greater number of links or degrees, she is, of course, remoter than the customary heir, and no injustice is done to her where she is excluded by one who is nearer than herself.

<sup>2</sup> Hence, the daughter takes half, leaving half

to the remoter customary heir (such as son's son) who is *prior tempore*.

<sup>3</sup> Hence, when the daughter and son co-exist, or the brother and sister, the females, being newly entitled, take half as much as the males.

SECTION 604A. The newly entitled heirs necessarily consisted only of the classes ignored by the customary law, *i.e.*, females and cognates, and all new rights necessarily encroached on the rights of the male agnates: So that the spirit of the innovations may be expressed in the formula, "Unto her that hath not, and unto the relations of her, shall be given; and from him that hath, shall be taken a little (or may be the whole) of what he seemeth<sup>1</sup> to retain."<sup>2</sup>

### 3. GENERAL PRINCIPLES OF THE SHIAH INTERPRETATION.

The Shiah interpretation of the Quran deduces principles from the specific amendments.

It follows from what has been said, that from the historical point of view the basis of the Shiah law of inheritance as of the Sunni law is the customary law of the Arabs, as it prevailed near Mecca and Medina before the spread of Islam. Both systems alter the customary law in accordance with the Quran. But, whereas the Sunnis interpret the Quran strictly, keep the substratum of the customary law intact, and superimpose thereon the provisions of the Quran, the Shiahs interpret the Quran in a wider sense, as altering the old principles themselves, and as giving rise to a new set of principles. Each case mentioned in the Quran is taken by the Sunnis as a specific amendment of that particular incident of the customary law; by the Shiahs it is interpreted as an illustration from which a total change of the principle involved may be deduced, an instance, in other words, which has to be generalised and applied wherever the same or similar circumstances occur.<sup>3</sup>

This difference between the interpretations of the innovation introduced by the Prophet will become more evident when the general results of the Sunni and Shiah law are compared, and the variation of each system traced as a development of the customary law on the main questions with which the Quran deals. A more detailed comparison of the two systems is therefore reserved till the end of the chapter.<sup>4</sup>

<sup>1</sup> In one instance he doth not even *seem* to retain: cf. s. 621 (4) (b), and *explanation*.

<sup>2</sup> Cf. Matt. XXV, 29; Luke VIII, 18, "Whosoever hath not from him shall be given; and whosoever hath not from him shall be taken even that which he seemeth to have."

<sup>3</sup> A significant illustration of the statement made above is supplied by the fact that in the Sunni law the term '*asaba*' still finds place. This was the pre-Islamic name for such blood relations as custom recognised—the agnates. In the Shiah law that word is absolutely discarded and we may say discredited (cf. Bail, II, 400,

line 11 of par. 2), and its place is taken by the phrase *zu qarabat*, literally one possessed of proximity or relation. The change of the word has not merely a verbal significance. But it is an important indication of the similarities and the distinctions of the two systems of law; the rights taken by the '*asaba*' and *zu qarabat* are so similar that the most usual rendering of both terms in English is "residuary" (see Bail, II, 377).

<sup>4</sup> See the last portion of the comment to s. 618, below.

## 4. QUANTUM OF INTEREST TAKEN BY THE VARIOUS HEIRS.

## SECTION 604A.

I. In accordance with the Sunni interpretation of the law the estate is distributed amongst the various persons entitled to inherit, in conformity with the following general principles:—

- (a) The nearest male agnate (or customary heir)<sup>1</sup> is not disinherited,<sup>2</sup> but his rights are liable to be affected by the rights below referred to.
- (b) Where a newly entitled heir is related to the deceased in exactly the same mode as the customary heir,<sup>3</sup> the newly entitled heir takes by way of inheritance half as much as the customary heir. As the newly entitled heirs are generally females, in most instances the males take twice as much as females.<sup>4</sup>
- (c) Where the newly entitled heir is nearer than the customary heir, the estate is divided equally between them.<sup>5</sup>
- (d) Where newly entitled heirs of the same class differ amongst each other in their sexes they take equally the males do not take more than females.<sup>6</sup>

Thus under Sunni law one daughter takes half of the estate, and two daughters take two-thirds, on the principle of dividing the estate equally with the customary heir, when the latter is remoter than the daughter. It need hardly be pointed out that the operation of the principle is greatly disturbed or altered by the existence of other heirs. But the present section is concerned merely with the general principles underlying the original allotment of shares: it does not deal with the ultimate result of all the rules, but only explains how the rules were framed in their existing form. To take other instances,—where there are both descendants and ascendants, the latter would have been excluded under the customary law, hence the rights given to them must be as newly entitled heirs; and we find that a third of the estate is taken by the ancestors conjointly leaving (nominally) the rest to the descendants,

<sup>1</sup> As the rights of the customary heir or nearest agnate now consist in taking the residue, after those whom the Quran gives shares have taken their shares, he is called the "residuary."

<sup>2</sup> Except in one case. See s. 621 (4) (b), and explanation.

<sup>3</sup> I.e., the Quranic co-residuary with the customary heir, referred to by Baillie as "residuary by another." Baill. I. 692.

<sup>4</sup> This principle, of Sunni law, however, is not that a male as such should take twice the share of a female, but that the newly entitled heir should get half as much as the old

established heir. All the old established heirs are males: the newly entitled heirs are generally females, but not always so; thus the uterine brother and all cognates are newly entitled heirs, so is the father or grandfather when he co-exists with male descendants.

<sup>5</sup> See p. 558 n.

<sup>6</sup> E.g., the uterine brother and sister are both of the same class, and they each take  $\frac{1}{2}$  of the estate—so also the father and mother, when they co-exist with descendants are both newly entitled, and they also take  $\frac{1}{2}$  each.

Principles of distribution.  
I. SUNNI LAW.

1. Male agnates
2. Female agnate when co-residuary with customary heir takes half as much as male.
3. New heir who is nearer than customary heir takes equally with him. New heirs take equally amongst themselves: males and females alike.

Illustrations:

1. Daughter takes half leaving half to customary heir (if latter remoter than herself).
2. The parents take together a third; leaving two-thirds to descendants.
3. The father and mother divide the parents' third in equal shares.

SECTION 604A *i.e.*, the newly entitled heirs take half as much as the old established. It will be noticed that the ascendants in this case are placed on a footing of equality (so far as proximity is concerned) with the descendants, for,—  
 “Ye know not whether your parents be nearer to you or your children.”—(Quran IV., 12).

Had they been considered to be nearer, they would have taken shares similar to that of the daughter, in competition with remoter customary heirs. Then again the parents divide the one-third allotted to them as above, equally; for the father and mother are both newly entitled, and neither can claim superiority over the other either on the basis of (i) old established rights or (ii) greater proximity: the male sex giving no advantage to the father.

It has sometimes been considered that it is one of the fundamental principles of the Hanafi law of inheritance that the male takes twice as much as the female. But if that were the principle no explanation would be forthcoming why the uterine brother and sister, and the parents (in the circumstances alluded to) take equal shares. The real principle, as explained above, is that the newly entitled heir<sup>a</sup> ‘*ceteris paribus*’ takes half as much as the old established heir.

II. SHIAH LAW.  
 Stipital  
 distribution  
 amongst  
 nearest  
 relations.

II. According to the Shiah interpretation of the law, there is no distinction in regard to priority between the agnates and cognates, and the estate devolves (subject to the rights of the husband or wife) upon the nearest blood relations, who divide it amongst themselves ‘*per stirpes*,’ allotting to females half the share allotted to males in each grade.

#### THE QURAN ON INHERITANCE AND SUCCESSION.

Abrogated  
 provision in  
 favour of  
 ‘*muhajirun*’  
 succeeding.

The following are the most important of the verses of the Quran dealing with the law of succession, so arranged that the general principles come first, followed by the specific provisions. The abrogated verses are important for seeing the development of the law: they are, therefore, retained, but the repealing verses are set out immediately after.

Verily, they who have believed and fled and fought strenuously with their wealth and persons in the cause of God,<sup>1</sup> and they who have given refuge to the Prophet, and help<sup>2</sup>—these shall be the next of

<sup>1</sup> These are referred to as the *muhajirun* (lit. those who fled—the word *hijra* which gives the name to the Muslim era, is from the same root). They were the first converts to Islam, forming a band of devoted followers of the Prophet in his early days of persecution. They

were cut off from their relations, and the same rule of succession was laid down for their succeeding to each other, as the customary law (by which companionship in arms gave the title to succession): *Cf.* the next verse.

<sup>2</sup> Known as *ansars*, or helpers.

kin the one to the other.<sup>1</sup> And they who have believed, but **SECTION 604A.** have not fled their homes, shall have no rights of kindred with you until they too fly (from their homes). Yet if they seek aid from you on account of the faith, your part it is to give them aid, except against a people between whom and yourselves there is an alliance. And God beholdeth your actions.<sup>2</sup>

The infidels are next of kin some of them to the others.<sup>3</sup> Unless ye do the same there will be discord in the land, and great corruption. Those who believe, and have fled (from their houses), and fought strenuously in the path of God, and given the Prophet an asylum and help, these are the faithful; mercy is their due and generous provision.

And they who have believed, and fled afterwards, and have fought at your side, these are also of you, but those who are united by ties of blood are the nearest of kin<sup>4</sup> to each other, by the book of God. Verily God knoweth all things.<sup>5</sup>—Quran VIII., 73-76.

Nearer to the faithful is the Prophet than they are to their own selves, and his wives are their mothers.<sup>6</sup> According to the Book of God they who are related by blood are nearer the one to the other than the believers and those who fled,<sup>7</sup> but whatever kindness ye show to your kindred shall be noted down in the Book.—Quran XXXIII., 6.

Such of you as die and leave wives, should bequeath their wives maintenance for a year<sup>8</sup> without causing them to be expelled

Blood relationship to replace comradeship in war.

Blood relationship gives title to succession.

(Abrogated verse): A year's maintenance to widows.

<sup>1</sup> Note first that they are made heirs, one to another, at a time when they were cut off from the tie of blood-relation; and secondly that this creation of a relation between comrades-in-arms was abrogated when the persons in question became re-united to their blood relations.

<sup>2</sup> Verses 73, 75, and 76 seem to refer to the same matter. They were probably not contemporaneously given, and the later verses supplement or explain the former.

<sup>3</sup> It will be noticed that there is no mention of succession here,—it being assumed that succession follows this "kinship," (viz. of comradeship-in-arms) as it followed the "kinship" of blood-friends: See Smith, "Kinship and Marriage in Ancient Arabia," 165-171. The institutions of the *mawla* or the successor by contract (s. 634, below) and of the acknowledged kinsman (s. 635, below), however, must have made the implication clear to the Arabs.

<sup>4</sup> Cf. Quran VIII. 36: "Verily those who misbelieve, spend their riches to turn men aside from the way of God."

<sup>5</sup> This last verse abrogates the earlier verses by which the *anawar* and *muhajirun* were held

next of kin to each other. Cf. also the next cited verse, *et seq.*, Quran, XXXIII. 6.

<sup>6</sup> "It is said that this passage was revealed on some of Muhammad's followers telling him when he summoned them to attend him in the expedition of Tabuk, that they would ask leave of their fathers and mothers."—Sale, citing Beldawi. See the footnote to Quran VIII. 74 in the present comment and the tradition (about payment of debts by Prophet) cited at the end of the comment.

<sup>7</sup> The *muhajirun*.

<sup>8</sup> This was the earlier provision made in favour of widows: subsequently it was abrogated (cf. Quran IV. 14) by more definite and more extensive rights. Verse II. 241 is included in the list of 20 verses mentioned by Jalaluddin *Im* Abdur Rahman ibn Abi Bakr Asasuydi (d. 911, A.H., or 1515, A.C.) in the *Iqan*, a commentary on the Quran, as universally acknowledged to be abrogated. This fact was not brought to the notice of the Privy Council in *Aga Mahomed Jaffer Hindaniam v. Koolsoom Beesbe* (1897) 25 Cal. 9, 18, 19.

## SECTION 604A.

(Abrogated verse): Legacy to parents and kindred recommended.

Women also to inherit.

Kinship.

FEMALES ought also to inherit.

Orphans and poor:

DAUGHTERS.

from their home; but if they quit them [of their own accord] then no blame shall attach to you for any thing that they may do of themselves in a fair way; but God is mighty, wise! And for the divorced, let there be a fair maintenance. This is a duty on those that fear (God).—Quran II., 241, 242.

It is prescribed to you, when one of you is face to face with death, if he leave goods, that he bequeath to his parents<sup>1</sup> and kindred in reason.<sup>2</sup> This is a duty on those who fear God.—Quran II., 176.

Covet not the grace by which God hath preferred some of you to others: for men there is a portion of what they earn, and for women a portion of what they earn. Of God, therefore, ask his gifts; verily, God knows all.

To every one have we appointed kindred,<sup>3</sup> as heirs of what parents and relatives, and those with whom ye have joined right hands in contract,<sup>4</sup> leave. Give, therefore, to each their portion. Verily, God witnesseth all things.—Quran IV., 36, 37.

Men ought to have a part of what their parents and kindred leave; and women<sup>5</sup> a part of what their parents and kindred leave: whether it be little or much, let them have a determinate portion.

And when they who are kin are present at the division, and the orphans<sup>6</sup> and the poor, maintain them out of it, and speak to them with kindly speech.—Quran IV., 9, 10.

With regard to your children, God commandeth you,—(to give) the male the like of the portion of two females; and if there be females<sup>7</sup> more than two, then they shall have two-thirds of

<sup>1</sup> This verse was promulgated before IV. 12, by which parents were made competent to succeed even with descendants, the state of the law when verse II. 76 was revealed, being that parents were excluded by descendants from inheriting, and it is recommended that a legacy be left to the parents. Thus explained, it is not opposed to the view of the jurists other than those of the *Ithna 'Ashari* school, viz., that a legacy cannot be left to any heir.

<sup>2</sup> Not restricting it to the *'asaba*, or male agnates, who alone were recognised by the pre-Islamic customary law of Arabia.

<sup>3</sup> *Fâz*, new principles of reckoning kinship are promulgated by Islam.

<sup>4</sup> Cf. s. 634, below. "A precept conformable to an old custom of the Arabs that when persons mutually entered into a strict friendship or confederacy, the surviving friend should have a sixth part of the deceased's estate. But this

was afterwards abrogated according to Zamakhshari at least as to infidels. The passage may likewise be understood of a private contract whereby the survivor is to inherit in a certain part of the substance of him that dies first": Sale, citing Beidawi.

<sup>5</sup> "This law was given to abolish a custom of the pagan Arab, who suffered not women or children to have any part of their husband's or father's inheritance, on pretence that they only should inherit who were able to go to war," Sale, citing Beidawi! (complaints were first made to the Prophet against this custom by Um Kulthum; *Tafsir-i-Raufi*, cited by Wherry, see also *Miṣṣahat-ul-Masabih*, XII, xix, 1, 2.

<sup>6</sup> Referring perhaps to descendants of pre-deceased sons, and other relations who are excluded: e.g., a grandson is excluded by a son.

<sup>7</sup> I. e., only daughters without sons.

that which (the deceased) leaves : and if there be an only one, SECTION 604A.

she shall have a half ; and as to the parents each of them PARENTS.

shall have a sixth part of what he leaves, if he<sup>1</sup> has a

child,<sup>2</sup> but if he<sup>1</sup> have no child,<sup>2</sup> and his parents inherit, then let

his mother have a third : and if he have brethren, let his mother

have a sixth, after paying the bequests he shall have bequeathed,

and his debts. As to your fathers or your children, ye know

not which of them is nearer to you in the benefit they bring.

Parents and  
children  
equally  
near.

This is an ordinance of God ; verily. God is knowing, wise !

Half of what your wives leave shall be yours, if they have no issue .

WIVES.  
HUSBANDS.

but if they have issue, then a fourth of what they leave shall

be yours, after paying the bequests they shall bequeath,

and debts.

And your wives shall have a fourth part of what ye leave, if ye

have no issue, but if ye have issue, then they shall have an

eighth part of what ye leave, after paying the bequests ye shall

bequeath, and debts.

If a man or a woman be succeeded by a collateral relation<sup>3</sup> and

SISTERS and  
BROTHERS.

the deceased have a brother or a sister, each of these two shall

have a sixth ; but if there are more than this, then let them

share in a third, after payment of the bequests he bequeaths

and of his debts —

Without loss to anyone. This is an ordinance from God,—and

SISTERS.

God is knowing, gracious ! —Quran IV., 12-16.

They will consult thee. Say : God instructeth you as to colla-

teral kindred : <sup>3</sup> If a man die childless, but have a sister,<sup>4</sup> half

of what he leaves shall be hers, and [i.e., just as] if she die

childless, he shall be her heir. But if there be two sisters, let

them both have two-thirds of what he leaves, and if there be

brethren both males and females the male shall have

like the portion of two females. God makes this mani-

<sup>1</sup> i.e., the "propositus."

<sup>2</sup> In the original, *walad*, which Palmer renders "son," the word seems to be the equivalent of offspring, and before the time of the Quranic changes in the law of succession, only male offspring being recognised, *walad*, was no doubt used as synonymous with son :—that is still the first meaning given to the word in Richardson's Dictionary.

<sup>3</sup> *Kalala* in the original : this word means "a kinsman who is neither parent nor child," see Palmer's Quran. Sale and Rodwell render

it by "distant kinsman," which is somewhat misleading, especially as that expression has acquired a technical meaning in the Sunni law of inheritance. See s. 605 (13A) and s. 626, below.

<sup>4</sup> This provision is restricted in favour of the sisters according to the Sunni interpretation. The Shi'ahs take it as indicating that all females may be sharers ; and in conjunction with the previous verses, it is interpreted as placing (as regards competence to inherit) females and cognates on a footing of equality with male agnates.

## SECTION 604A.

fest to you that 'ye err not : God knoweth all things.—  
Quran IV., 175.

Debts of  
deceased paid  
by the Prophet.

The following tradition explains the first sentence of Quran, XXXIII., verse 6 : " Abu Hurairah said : ' The Apostle of God said : " It is fit for me to be more benevolent to Muslemans than they to each other, therefore, any Musleman dying in debt, and not leaving property to discharge it, — it rests with me, and he who leaves property, it is for his heirs," (and in one tradition it is thus, ' He who hath left debt and children, let them come to me, I am their patron, I will discharge his debt, and befriend his children,' " Later it is related from 'Aisha, " Verily a freed man of the Prophet's died, and left some property, but left no child or relations to inherit ; and the Prophet said ' give his effects to a man of his village.' " )<sup>1</sup>

The other traditions in the same work about inheritance, though they throw light on the pre-Islamic rules of succession, do not add anything to the principles of the Muhammadan law, and are therefore not cited.

§ 4.—*Explanation of terms.*

Interpretation.

605. In this chapter, unless there is anything repugnant in the subject or context, the following words and expressions with their grammatical variations, and cognate expressions, have the meanings indicated below,—

The deceased.

(1) " The deceased " <sup>2</sup> means the person whose relatives are to be determined for the purpose of distributing his estate in accordance with the law of intestate succession.

Kinship.

(2) " Kinship " is the connexion or relation of persons descended from the same stock, or common ancestor.<sup>3</sup>

Lineal  
relationship.

(3) " Lineal relation " is that which subsists between two persons one of whom is descended in a direct line from the other.<sup>4</sup> Every generation constitutes a degree, either ascending or descending.<sup>5</sup>

<sup>1</sup> *Mishkat-ul-Masabih*, XII, xix, 1, 2.

<sup>2</sup> Or " propositus."

<sup>3</sup> Cf. Ball, I. 684 ; Indian Succession Act, s. 20.

<sup>4</sup> Indian Succession Act, s. 21 : " As between a man and his father, grandfather, and great grandfather, and so upwards, in the direct ascending line ; or between a man, his son, grand-

son, great grandson, and so downwards, in the direct descending line."

<sup>5</sup> *Ib.*, " A man's father is related to him in the first degree, and so likewise is his son ; his grandfather and grandson in the second degree ; his great grandfather and great grandson in the third."



(4) "Collateral"<sup>1</sup> means a person having a common ancestor with the deceased (either on the side of the father or mother, and through males, or females); but who is neither a descendant nor an ancestor of the deceased. SECTION 605.  
Collateral.

(5) "Agnate" means a person whose relation to the deceased can be traced without the intervention of female links.<sup>2</sup> Agnate.

(6) "Cognate" means a person related to the deceased through one or more female links (whether or not there are also male links intervening).<sup>3</sup> Cognate.

(7) "Consanguine half brothers and sisters" (or shortly "consanguine brothers and sisters") means the children of the same father, but a different mother; the descendants of consanguine half brothers and sisters of the deceased,<sup>4</sup> or an ancestor of the deceased are referred to as his consanguine relations. Consanguine  
relations.

(8) "Uterine half brothers and sisters" (or shortly "uterine brothers and sisters") means the children of the same mother, but a different father; the descendants of uterine half brothers and sisters of the deceased,<sup>5</sup> or an ancestor of the deceased are referred to as his uterine relations. Uterine rela-  
tions.

(9) "The estate" means all the heritable property, of whatever description, owned by the deceased at the time of his death, after his funeral expenses have been defrayed, his debts discharged, and the legacies validly bequeathed by him paid out.<sup>6</sup> Estate.

(10) "The customary law" or "the pre-Islamic law" means the rules of intestate succession prevailing in Arabia Customary  
law.

<sup>1</sup> E.g., a brother, sister, nephew, niece, uncle, grand uncle and cousin, are collaterals.

<sup>2</sup> E.g., a son's son's daughter, son's son, son's son's daughter, father, and father's mother are agnates.

<sup>3</sup> E.g., a daughter's son and daughter's daughter, son's daughter's son, daughter's son's son, mother's father, mother's mother's father, and aunt's son, are cognates.

<sup>4</sup> Thus if CB and CBA are consanguine brothers, and Cs is their consanguine sister,

then (a) CB is (i) the consanguine paternal uncle of the children of CBA, and (ii) the consanguine maternal uncle of the children of Cc and (b) the sons and daughters of CB and CBA are respectively consanguine paternal cousins of each other. The consanguine relations are agnates. See first table on p. 608.

<sup>5</sup> Cf. the last footnote, *mutatis mutandis*. The uterine relations are cognates.

<sup>6</sup> Bail. I. 683 (part 2), 684.

## SECTION 605.

Customary  
heir or nearest  
male agnate.

immediately before the promulgation of Islam, in so far as those rules can be ascertained.<sup>1</sup> "Customary heir" (or 'asaba') means the person entitled to succeed in accordance with the customary law, *i.e.*, the nearest male agnate.<sup>2</sup>

(Quranic)  
sharers.

(11) "Sharer," or "Quranic sharer,"<sup>3</sup> means a person who takes a definite fraction of the estate, under the provisions contained in the Quran.<sup>4</sup>

(12) "Residue" means that portion of the estate (if any) which is left over after the (Quranic) sharers have received the shares to which they are respectively entitled and a "residuary" means a person entitled to take the "residue."<sup>5</sup>

(Quranic  
residuary,

(13) A "Quranic residuary" or "co-residuary" is a female agnate who (under the customary law was

<sup>1</sup> It is assumed in this chapter that the Muhammadan law of succession consists of the pre-Islamic customary law, as varied by the Quran, or the precepts of the Prophet. Hence if a rule cannot be traced to Islam, its origin is attributed to pre-Islamic custom. Cf. Smith, "Kinship and Marriage in Ancient Arabia," *passim*, e.g. 71.

<sup>2</sup> Ball. I. 601, where they are also referred to as "residuaries by themselves, or in their own right." *Asaba* or *Asabal* originally means nerve or ligament, then relationship; only agnates being recognised as relations, the two terms were apparently used synonymously, and in Muhammadan law *asaba* is for practical purposes synonymous with agnates. The earliest tie was not blood relationship, but blood-feud. Cf. "*Asaba*, a word which primarily means those who go to battle together, *i.e.*, have a common blood-feud. Similarly, in the old law of Medina women were excluded from inheritance on the ground that none can be heirs who do not take part in battle, derive booty and protect property" (Beidh. Sur. IV. 8. *Kunzi*, 678, *ib.* 679), "Smith's Kinship and Marriage in Ancient Arabia," 65, 66. "The key to all divisions and aggregations of Arab groups lies in the action and reaction of two principles: that the only effective bond is a bond of blood, and that the purpose of society is to unite men for offence and defence," *ibid.* 60. See also *ibid.* 2, 25-27, 66, 67, 71.

<sup>3</sup> In Arabic *shib-ul-furq*, or *zawilfurq*, *i.e.*,

master of share, see n. to s. 604A above. The terms *sharer* and *residuary* refer primarily to the nature of the rights of the heirs, *viz.*, whether they take a share or the residue. A treatment of the law of succession based on this distinction is apt to obscure the scheme underlying the principles of succession. What portion any person is entitled to take is no doubt an important question, but it is a result of the general scheme of the law, and should be placed in due subordination to the general scheme.

<sup>4</sup> Sharers are enumerated in the comment to s. 610, below. "Sharers are all those for whom shares have been appointed or ordained in the sacred text (Quran) the traditions, or with general assent."—Ball I. 686. They owe their rights not to the customary law, but to Islam. The term does not include any customary heir, *i.e.*, the nearest male agnate can never be a sharer. No male agnates (whether near or remote), except the father and grandfather, are sharers. These become sharers in circumstances in which they would not have been customary heirs, *viz.*, when they are not the nearest agnates, *viz.*, when descendants exist.

<sup>5</sup> Cf. "there are three different kinds of heirs—*sharers*, *agnates* and *uterine relations*. The two last have been termed from their position in the inheritance, *residuaries*, and *distant kindred*, by Sir William Jones in his translation of the *Sirajiyah*,"—Ball. I. 685 (par. 2 and n. 2) Cf. Ball. I. 601. Under Sunni law the nearest male agnate (who was the customary

disqualified by her sex from inheriting, but who) under SECTION 605 Muhammadan law inherits a part of the residue of the estate.<sup>1</sup>

(13A) By "distant kindred" or 'zavil arham' <sup>Distant kindred or 'zavil arham.'</sup> <sup>2</sup> are meant those blood relations who are not competent to be either 'sharers' or "residuaries."

(14) By "newly entitled heir" is meant a person who <sup>Newly entitled heir.</sup> (under the circumstances in question) would not have been entitled to inherit any part of the estate in accordance with the customary law, but who is given rights of inheritance in Muhammadan law.<sup>3</sup>

(15) By "claimants" are meant all such relations of a <sup>claimants.</sup> deceased person as are or might be supposed to be either themselves entitled to inherit any part of his estate, or whose existence affects the rights of those who are entitled to inherit.

(16) Where a term of relationship is used without any qualifying words, it must be understood as referring to a person bearing that relation to the deceased.<sup>4</sup> <sup>Relationship always traced from the deceased.</sup>

(17) By 'aul' or "increase" is meant the process <sup>"Aul" or increase.</sup> of abating the shares claimable by (Quranic) sharers.<sup>5</sup>

heir) is, as a rule, not ousted from his pre-Islamic right to inherit; but he takes the estate subject to the rights of the sharers, and divides the residue with female agnates: See ss. 601, 610, *et seq.* The residuaries, therefore, belong to one of two classes of heirs: (a) those who would have been customary heirs according to the pre-Islamic customary law; (b) those who are made heirs by the law of Islam,—succeeding (i) either as co-residuaries with the customary heir, or (ii) in lieu of him, as sole Quranic residuaries. The sister is the only female that can inherit as sole Quranic residuary, see s. 604 (c), above, and the next footnote.

<sup>1</sup> Referred to in Ball. I. 691, 692, as "residuary by another,"—as the Quranic residuaries (generally) inherit with the customary heirs. Where the sister takes the residue even though there is no brother with her, and consequently when she cannot be called co-residuary with the brother—see below s. 621 (4),—she is referred to in Ball. I. 691, 693 as "residuary with another," because the sister becomes residuary in such circumstances only in case the daughter

also exists: cf. s. 604 (a), (ii). But that expression is very misleading.

<sup>2</sup> *I.e.*, possessors of relationship. The expression is more fully explained in s. 626, below.

<sup>3</sup> Thus Quranic sharers and Quranic residuaries are newly entitled. The former include, *e.g.*, not only the daughter (who was not competent to inherit under the customary law) but also the father when he co-exists with (male agnatic) descendants. The father was excluded under the pre-Islamic customs if any descendants existed, but in Islam he is made a Quranic sharer under the said circumstances,—he is, therefore, a newly entitled heir in his capacity as sharer.

<sup>4</sup> Thus "the son" means "the son of the deceased."

<sup>5</sup> Such abatement is necessary when the sum total of the shares exceeds unity; and the process is carried out, by reducing the shares allotted to each heir to a common denominator, and then increasing the common denominator to the sum total of the numerators. See the proviso to s. 610 (1), below.

## SECTION 605.

In the illustrations in this chapter a common system of referring to the various relations by initial letters has been adopted, italics indicating females.<sup>1</sup>

## PART II.—SUNNI LAW OF INHERITANCE.

## § 1.—Competence to Inherit.

(1) *Exclusion from Inheritance.*

1. Child before birth.

606. (1) A child in the womb of its mother is competent to inherit, provided that it is born alive;<sup>2</sup> but where a woman is treated with violence and in consequence thereof gives premature birth to a still-born child, it is reckoned as having been born alive.<sup>3</sup>

2. Illegitimate father and paternal relations. Illegitimate mother and her relations not excluded

(2) An illegitimate child and its father are not related in law, nor competent to inherit from each other,<sup>4</sup> but in Sunni law the mother and its illegitimate offspring are competent so to do.<sup>5</sup> The same rules apply to relations through the illegitimate father and mother, respectively.<sup>6</sup>

3. Exclusion from inheritance of one who has killed the deceased.

(3) No portion of the estate of a Sunni Mussulman can be inherited by one who has unlawfully killed the deceased, whether intentionally or unintentionally.<sup>7</sup>

4. Non-Muslim.

(4) According to Sunni law a person who is not a Muslim cannot inherit from a Muslim, but in British India rights of property cannot be forfeited, nor rights of inheritance impaired or affected by reason of any person

<sup>1</sup> See *supra* to s. 616 (1), s. 617 (1), et *passim*, below.

<sup>2</sup> *Bail. I.* 702, where some instances are given which have reference to the establishment of paternity.

<sup>3</sup> *Bail. I.* 703.

<sup>4</sup> *Bodhum v. Jan Khan* (1870) 12 W. R. 265.

<sup>5</sup> *Bail. I.* 698; *Mistak-ul-Masabiq*, XII, xix.

<sup>6</sup> *Cl. s.* 214, above. Where, however, the child is brought up as a Christian, the Muhammadan law does not apply and the illegitimate mother is not entitled to succeed: *Nancy alias Zukoorus v. Burgess* (1864) 1 W. R. 272.

<sup>6</sup> For Shiah law, cf. s. 639, below.

<sup>7</sup> *Bail. I.* 697: *e.g.*, "by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer is riding." But if A digs a well, and B falls into it, or A places a stone on the road, and B stumbles against it, A does not lose his right. Then it is explained that whenever the *diyat* or blood money is due from the killer, he loses his right to inherit—the pre-Islamic origin of the rule is thus disclosed. Cf. ss 601, 602, above.

renouncing or having been excluded from the communion of any religion or being deprived of caste.<sup>1</sup>

(5) Rights of inheritance arise only after the death of the person whose estate is in question; and no person is the heir of a living Mussulman.<sup>2</sup>

(6) Where a person acknowledges another to bear a relation to him or her other than that of a parent or child or husband or wife,<sup>3</sup> such acknowledgment is of no effect as against those who deny the relation so acknowledged (provided that their own relation to the deceased is established); but it is of full effect (unless subsequently retracted) against the person who has made the said acknowledgment.<sup>4</sup> There is no such rule in the Shafi'i school of Sunni law.<sup>5</sup> *Quaere*, whether this rule of law is one merely of evidence, and as such of no effect in British India.<sup>6</sup>

The question as to which system of law must be applied to the property of a deceased person has been dealt with in the comment to s. 9, above.<sup>7</sup> With regard to s. 606 (3), and the principle underlying it, s. 587, above, and the comment to it, may be referred to. The principle has found recognition in England. See also s. 639 (1), below.

<sup>1</sup> *Quaere*, whether Act XXI. of 1850 (s. 1, above) affects others than apostates. Slavery and difference of country prevent rights of inheritance under strict Muhammadan law: Ball. I. 698, 700; cf. s. 50, above.

<sup>2</sup> Cf. Ball. I. 583 (ll. 7-8), 574 (par. 3), and s. 285 (II), and III (I) to s. 371, above; *Hasan Ali v. Nasir* (1889) 11 All. 456, following a dictum of the P.O. in *Abdul Walid Khan v. Nurun Nisa* (1885) 11 Cal. 597; 12 I. A. 91; see also Macn. Proc., Inh., case xi., referring to Dig. No. 74, i.e., (*Musammant*) *Khanum Jan v. Musammant Jan Beebe* (1827) 4 S. D. A. (Beng. Rep.) 210.

\* Acknowledgments relating to parentage and marriage have special rules applying to them: see ss. 81, 222, above.

<sup>4</sup> Ball. I. 406: thus if A acknowledges B to be his (A's) brother, and A dies leaving other heirs to himself, who deny that A and B are brothers,—then B does not inherit with the other heirs, nor from A's father F (if F denies his parentage of B). But B would have been entitled (I) to maintenance from A during A's lifetime (see s. 333, above); and (II) if A leaves no

heirs [whose right can be proved by satisfactory evidence, other than A's mere acknowledgment] then B would be entitled to inherit "because the acknowledgment comprehends two things—descent, and a right to the acknowledgment's property after his death, and though the first cannot be heard as it affects another party, the second is not liable to the same objection, because it is only against himself, and a man has the power of disposing of the whole of his property when he has no creditor nor heir" (ib., see s. 579, above); (III) and if F is dead, and A acknowledges B to be his (A's) brother, B would be entitled to share with A, as A's brother, in the estate of F (though F's parentage of B would not be established): Ball. I. 406, citing *Inayah* III. 512.

<sup>5</sup> *Minda*, 92.

<sup>6</sup> I.e., the mere acknowledgment has no effect as proof of relationship against others than the acknowledger: but it is conclusive against him.

<sup>7</sup> See also *Hayat-un-Nissa v. Muhammad Ali Khan* (1890) 12 All. 290; 17 I. A. 73, *Nancy alias Zuhoorun v. Burgess* (1864) 1 W. R. 272.

**SECTION 606.**

Release of right  
to inherit.

The point in s. 606 (5), above, has been before alluded to, mainly with reference to the renunciation of presumptive rights of inheritance.<sup>1</sup> In Madras, however, it was held that where a man had renounced all his claims to the estate of his mother, by a registered document, executed in consideration of Rs. 150 paid to him, he could not afterwards claim to inherit from her.<sup>2</sup>

Slavery, difference  
of country  
or nationality.

Under strict Muhammadan law slavery and difference of country or nationality also disqualify from inheritance.<sup>3</sup> The rules relating to slavery can have no effect in British India<sup>4</sup> and questions affected by the nationality must be governed in the courts of British India by principles of international law, which differ as regards movables and immovables.<sup>5</sup>

Insanity.  
Unchastity.

Insanity is no ground for exclusion from inheritance;<sup>6</sup> nor want of chastity in a daughter.<sup>7</sup>

Right of co-  
sharers.

A co-sharer under Muhammadan law has a right to a specific share in each item of property left by the deceased, and can sue to recover that share from any person in possession of that property.<sup>8</sup>

### (2) *Unborn Person's Rights of Inheritance.*

Reserving  
share of  
unborn heir.

**607.** Where any heir of a deceased person is unborn, but competent to inherit under s. 606 (1), above, the estate can only be divided amongst the other heirs subject to such a portion thereof being reserved, as will ensure that the said unborn person or persons should be able to receive his or their full shares, when born.<sup>9</sup>

Portion of, and  
period for  
which, estate to  
be left  
undivided.

The portion of the estate to be left undivided depends on the circumstances of the case, and the possible rights of the unborn persons. The period for which it must be left undivided is the longest possible period of gestation. On these points it is unnecessary to refer to the older texts of Muhammadan law.

### (3) *Missing Person's Rights of Inheritance.*

Presumption  
of death, until  
when property  
not to be dis-  
tributed

**608.** A person who is missing, is presumed in British

<sup>1</sup> See s. 371, above.

<sup>2</sup> *Kunhi Mamod v Kunhi Moidin* (1896) 19 Mad. 176. This decision seems to be opposed to principle and would probably not be followed; see *Sumsoodin v. Abdul Husain* (1906) 31 Bom. 165, s. 371 *ill.* (1), above; though the *Mufti* attached to the Zilla Court of Shahabad pronounced in favour of the validity of such renunciation: *Macn. Prec.* Inh. case xi, p. 90 n.

<sup>3</sup> *Ball. L.* 698, 700.

<sup>4</sup> See s. 5 n., above.

<sup>5</sup> *Cf. Dicey, "Conflict of Laws,"* 2nd ed. (1908) 604, 664, 678.

<sup>6</sup> *Macn. Prec. Inh. case x; Mahar Ali v. Amani* (1899) 2 Beng. L. R. (A.C.) 306, S. C. *Khyratun v. Amanee*, 11 W.R. 212; *Muhamad Kals Khan v. Saifulla Khan* (1884) 22 Punj. Rec. 194 (No. 91).

<sup>7</sup> *Noronarain Roy v. Neemaschoond Neogy* (1886) 6 W. R. 303.

<sup>8</sup> *Chandu v. Kunkhamed* (1891) 14 Mad. 324.

<sup>9</sup> *Ball. L.* 702-703; *Mishaji*, 254 (Bk. 28, s. 9).

India to be alive until it is proved in accordance with the SECTION 608. Indian Evidence Act, ss. 107 and 108, that he is dead.<sup>1</sup>

609. So long as a missing person is presumed to be alive, his property cannot be divided amongst his presumptive heirs; and the portion of the estate of a deceased person which a missing person is entitled to inherit must be kept apart for him until he comes and claims it, or until such time as he is presumed to be dead.<sup>2</sup>

Reservation of share of missing person.

It is stated in the 'Fatawa 'Alungiri' that a person who is missing must be accounted dead so far as the property of others is concerned, but alive as regards his own property<sup>3</sup> until such a time has elapsed that it is inconceivable that he should be still alive or until his contemporaries are dead.

Missing person loses his right to inherit, but his own property not to be distributed.

## § 2.—Different Classes of Heirs and Rights of Inheritance.

### Scheme of Sunni law of Inheritance.

610. According to Sunni law the estate of a deceased person is inherited as follows,<sup>4</sup>—

(Sunni law).  
Stages of distribution of estate.  
I. (1) Shares  
"Aul" or Increase.

(1) The (Quranic) sharers are allotted the shares or fractions of the estate to which they become entitled; provided that where the sharers are such that the fractions of the estate

<sup>1</sup> *Imdad Ali v. Ghulam Jilani* (1892) 27 Punj. Rec. 156 (No. 42); the rule of Muhammadan law which refuses to raise a presumption of death until 90 years from the date of the birth of the person, is abrogated by the Indian Evidence Act.

<sup>2</sup> *Moolia Cassin v. Moolia Abdul Rahim* (1905) 33 Cal. 173; 23 I. A. 177; but see also *Mashar Ali v. Budh Singh* (1884) 7 All. 297; All. W. N. 333; *Girdhari Lal v. Lado Begum* [1882] All. W. N. 106; (*Musat.*) *Doulat Kharon v. Khaja Ali Jan* (1867) 2 N. W. 59; *Yusuf Ali Beg v. Ayub Beg* (1913) 11 All. L. J. 335.

<sup>3</sup> *Bail. I. 703*; *Imam Ali Khan v. Abdool Ali Khan* (1867) 2 N. W. 28.

<sup>4</sup> *Bail. I. 703*. In *Hosseini Khanum v. T'ijun Lal* (1870) 14 W. R. 293, the view was alluded

to that at least 90 years must (under Muhammadan law) elapse before a missing person's property can be dealt with by his presumptive heirs;—but the plaintiff was a stranger, and the question could not be decided in that case. See also (*Musat.*) *Man Bibi v. (Musat.) Sahab-zadi* (1831) 5 Sel. Rep. 108; *Dureesh v. Shekhan* (1820) 2 Borr. 20; Vol. No. Mori. 218; (*Musat.*) *Rukhi Bibi v. (Musat.) Rahat Bibi* (1875) 7 N. W. 191; *Kuter Khan v. (Musammat) Jades* (1873.) 5 N. W. 62; suit by sisters of person missing for 25 years, to obtain possession (as managers and trustees of 2/3 of his property) from nephews of the missing person, dismissed—*see quare*.

<sup>5</sup> *Bail. I. 685*; *Gujadhar Pershad v. Sheikh Abdoollah* (1869) 11 W. R. 220.

SECTION 610. to which they are respectively entitled, when added together, exceed unity,<sup>1</sup> and their shares cannot for the said reason be paid out to each of them in full,—the share of each abates rateably by a process which is referred to as ‘aul’ or “increase.”<sup>2</sup>

(2) residue to—

(a) customary and Quranic heirs, or

(b) sharers

“Return.”

11 “Distant kindred” take whole failing sharers and residuaries.

(2) The residue of the estate which is left over, after the said shares have been so allotted, is divided amongst the residuaries, i.e., the nearest male agnates<sup>3</sup> and the female agnates in the same line as the nearest male agnates, subject to s. 604, clause (c) above ;

(3) In the absence of residuaries, the (Quranic) sharers (other than husband or wife) take the residue. The right of the sharers so to take the residue is referred to as the right to the “return.”

(4) In the absence of the said sharers and residuaries the estate is divisible amongst the other blood relations of the deceased, whether cognates or female agnates, who are collectively referred to as the “distant kindred.”<sup>4</sup>

#### 1. ONLY TWO ALTERNATIVE MODES OF DISTRIBUTION.

(Sunni law).  
Scheme of  
distribution,

1. If there is any sharer or residuary—

1. the sharers take their shares, and thereafter—
2. the residue is taken by—
  - (a) the residuaries, if any ; or failing them,—
  - (b) the sharers.

II. If there are no sharers or residuaries the whole estate is taken by the other blood relations (distant kindred).

<sup>1</sup> E.g., if a husband and two sisters exist, they are entitled to 1/2 and 2/3 respectively: they cannot all get their full shares. Cf. s. 6, below.

<sup>2</sup> Baill. I. 718, see s. 605 (17), above. This process of abatement is called in Arabic ‘aul’ or “increase” because the common denominator has to be increased to make a rateable reduction. E.g., if a lady dies leaving two daughters, both parents, and husband, the shares are 2/3, 1/6, 1/6, and 1/4 respectively, making a total of 15/12. The common denominator has to be increased to 15 in each case, and they take 8/15, 2/15, 2/15, and 3/15 respectively, instead

of 8/12, etc. See comment after s. 620, and s. 623, *id.* (14)—(18).

<sup>3</sup> In only one case is the title of the nearest male agnate taken away—when he is remoter than a brother, and the sister is living: see s. 621.

<sup>4</sup> A very inappropriate translation of the Arabic term: A daughter’s son is classed amongst the “distant kindred,” but an agnate male cousin ten degrees removed is a residuary. See s. 626, below. Cf. “our son’s sons are our sons, but the sons of our daughters are sons of foreigners.”—*Hanafi* 260, 3,—Smith, “Kinship and Marriage,” 184. See s. 605 (13a), above, and s. 626, below.



2. THE SHARERS ENUMERATED AND CONSIDERED

SECTION 610.

1. Husband. 2. Wife. 3. Daughter. 4. Daughter of son howlow-soever.<sup>1</sup> 5. Father. 6. Paternal grandfather, (referred to as true grandfather). 7. Mother. 8. True grandmother.<sup>2</sup> 9. Full sister. 10. Consanguine half sister. 11. Uterine sister. 12. Uterine brother.

It will be noticed that, of these, only the father and true grandfather found any recognition in the customary law of inheritance. The Quran remedied the entire omission of the husband and wife and of females and uterine relations<sup>3</sup> by specially providing for them. As for the male ancestors, they were under certain circumstances (*viz.*, the absence of the descendants) heirs in accordance with the customary law. The changes introduced by Islam in regard to the ancestors will be more fully explained later, but the basis of the changes was that : (1) Female ancestors should also have a portion of the estate ; (2) even in competition with descendants, the ancestors (female as well as male) should have a share in the estate.<sup>3</sup>

Sharers are those who could not succeed under the customary law being either incompetent to do so, or being excluded by prior right of the others.

3. SCHEME ON WHICH SHARERS SELECTED

The list of sharers seems at first sight to be heterogeneous, and there seems to be no principle by which their number and identity can be kept in memory. If, however, the principle of selection mentioned below is borne in mind, they can be enumerated without any strain on the memory.

Scheme of the list of Quranic sharers

The reader may, for this purpose, draw in his mind a circle including within its circumference the group of persons recognised in pre-Islamic times as being of kin, and having title to succeed. This group, it will be remembered, consists only of male agnates. On this being done, he will find that all those who are immediately beyond the circle contiguous to the imaginary circumference—are included amongst the sharers and no others.

Principle on which right to Quranic share given.

Thus immediately outside the imaginary circle of male agnates, are the husband and wife. These are the first two sharers. Secondly, in the direction of the descendants the imaginary circle includes only the son and the son's son howlowsoever. In the same line with these, and yet outside the imaginary circle, will be found the next group of sharers: the daughter and the daughter of the son's son howlowsoever

Husband and wife.

Daughter, son's daughter.

<sup>1</sup> *I.e.*, agnatic male descendants.

<sup>2</sup> *Sahh*, in Arabic. The true grandfather is the agnatic male ascendant. The true grandmother is not so easily described: see 616, below.

<sup>3</sup> Though, according to the Sunni interpretation of the law, only the uterine brother and sister can succeed as long as there is any male agnate, all the remoter uterine relations being postponed to male agnates.

**SECTION 610.** (though not the daughter's daughter, who, being a cognate, is removed one degree further from the sons and son's sons). Thirdly, we proceed in the direction of the ascendants, and we find included amongst the sharers the mother and a restricted class of grand-mothers (*viz.* the paternal grandmother) touching the limits of the circle: they are the nearest to the agnatic ascendants who were recognised as customary heirs. Fourthly, amongst the collaterals the full and the consanguine sister and the uterine brother as well as the sister are all standing shoulder to shoulder with the full and the consanguine brothers who alone were included within the sacred precincts of the imaginary circle. Finally, we find that (a) the father and paternal grandfather and (b) the true grandmothers other than the paternal grandmother have obtained recognition as sharers. (a) The father and grandfather are made sharers in cases, where, by admitting new comers into the circle, these male ancestors are crowded out of their original places within the circle; (b) the true grandmothers other than the paternal grandmothers find recognition as sharers, because (as more fully explained in the comment to s. 616, below) the whole set of true grandmothers stood alike disconsolate huddled together, and the custodians standing at the gates of the circle did not find it in their hearts to push away one old woman out of this set, while receiving the others, the less so as the burden had to fall on the share allotted to the old women themselves, and did not affect the interests of the others within the circle. As for the women themselves, they were all old, and none of them so strong-minded or so powerful in safeguarding their own newly acquired interests as to resist the benevolence which added another claimant to the  $\frac{1}{6}$  allotted to grand-mothers.

Mother, paternal grandmother.

Full and consanguine sisters; uterine sisters and brothers.

Father, grandfather

True grandmothers.

#### 4. CLASSIFICATION SHOWING PRINCIPLES OF QURANIC RIGHTS.

Principle on which a right—  
I. to Quranic share given.

I. The Quranic sharers thus consist of those relations who (according to the customary law) were excluded in favour of the customary heir, but whose claims on the score of proximity are not inferior to his. They may be grouped under the following heads:

- (1) husband or wife,
- (2) female agnatic descendants (provided they are nearer than the customary heir),
- (3) such ancestors as are not customary heirs, *viz.*,

- (a) male agnatic ancestors, when the customary heir (or the nearest agnate) is a descendant,<sup>1</sup>
- (b) female ancestors,<sup>2</sup>
- (4) collaterals: these are, however, restricted (so far as the right to a Quranic share<sup>3</sup> is concerned) to, -
- (a) the following agnates, *viz.*, the full and consanguine sisters under circumstances referred to in the comment to s. 623, below, and
- (b) the following cognates, *viz.*, uterine sisters and brothers.

The effect of the conditions on which the sharers are entitled to shares is that no person remoter than the residuary (the customary heir) succeeds as a sharer.<sup>4</sup> There is only one exception to this: the anomalous case of some female ascendants.<sup>5</sup>

II. The Quranic or newly introduced residuaries are those females who are related to the deceased in exactly the same way as the customary heir, but who were excluded owing to their sex. Under the Hanafi exposition of the law, however, descendants and sisters are the only females to take as residuaries. The rights of the female ancestors to become residuaries is either obscured or merged in other rights. And collaterals remoter than the sisters are entirely cut off from rights of this class—the principle of which is, however, clear when we consider the case of the son and daughter surviving: the son would have been the sole heir, excluding the daughter under the customary law: he is allowed to remain heir, but the daughter is added as (Quranic) residuary, and the two take the estate jointly though in unequal proportions.

III. Finally, those relations by blood who do not fall within the descriptions above referred to, (*viz.*, of sharers and residuaries) are called 'zavil arham' (plural of 'zu-rahm') literally meaning "masters of relationship" ("the distant kindred" of English authors) and these succeed in the absence of the former. These consist mainly of cognates and female agnates remoter than sisters.

- SECTION 610
1. Husband or wife.
  2. Daughter or son's daughter
  3. Male ancestors when there are descendants.
  4. Female ancestors, Sisters and uterine brothers.
  5. Shares taken only when nearer than customary heir.

II. Quranic right (of females) to be residuaries.

III. Quranic rights of 'zu-rahm or distant kindred.

<sup>1</sup> Only in that case was it necessary for them to be given rights by Islam: in the absence of male descendants, the ascendants were the customary heirs. Such simultaneous succession is a new principle introduced in the law: for, previous to Islam, it seems that only one class of heirs succeeded at a time, *viz.*, the nearest or next of kin. The Quranic basis for this principle is the verse, "Ye know not whether your children are nearer to you or your parents," Quran IV. 12, cited in the comment to s. 604, above.

<sup>2</sup> These had no rights at all under the custom-

ary law of succession.

<sup>3</sup> The rest of the female collaterals come in with the cognates, being classed as "distant kindred": see s. 626, below.

<sup>4</sup> *E.g.*, the daughter becomes sharer only if the customary heir is a son's son, or some remoter agnate; the sister only when the customary heir is neither a descendant nor an ascendant.

<sup>5</sup> The exception only holds in regard to such female ascendants as are cognates. See s. 616, below.

## TABLE OF SHARERS IN SUNNI LAW

(1) Where there are two or more sharers of the same class (i.e., falling within one of the 12 descriptions given below) they take the share collectively, each taking an equal portion (notwithstanding that in cases 7 and 8 they differ in sex). (2) The shares mentioned below are liable to abatement by 'aul' or increase (see s. 610 (1)). (3) The sharers other than husband or wife take the whole estate if there are no "residuaries" (see ss. 610, 625, 633).

SHARER.	Conditions for becoming sharer.	SHARES.		Circumstances (if any) varying share.	SHARE so varied.
		Where one.	Where two or more.		
I. Relations by affinity.					
1 Wife,	Shares in every case share allotted:—	Two or more wives divide equally the		{ the wife takes. the husband the wife. the husband	1/8
2 Husband,	If there is any agnatic descendant				1/4
	If there is no agnatic descendant.				1/4
II. Blood relations.					
(1) Female agnatic descendants and collaterals.					
3 Daughter,	Shares only 'if there is no son'. <sup>1</sup>	1/2	2/3	When there is a single daughter (or female agnate in a higher line), son's daughter (or other female agnate) takes:—	1/6
4 Son's daughter, (or other female agnatic descendant),	Shares only in absence of son's son's son, (and other male agnates in the same or higher line), <sup>1</sup> and of daughters (or other female agnates in a higher line). <sup>2</sup>	1/2	2/3		
5 Full sister,	Shares only 'in absence of male agnatic descendants, ascendants, full brothers,' <sup>3</sup> and female agnatic descendants. <sup>2</sup>	1/2	2/3	[When there is a female agnatic descendant, the sister (full, and failing her, consanguine) becomes residuary].	
6 Consanguine sister,	Shares only 'in absence of male agnatic descendants and ascendants, full and consanguine brothers' and female agnatic descendants, and full sisters'. <sup>4</sup>	1/2	2/3		
7 Uterine sister,	Shares only 'in absence of male agnatic descendants, and ascendants' <sup>1</sup> and female agnatic descendants. <sup>2</sup>	1/2	2/3	See above. If the consanguine sisters (one or more) co-exist with a single full sister, (there being no nearer male agnate nor female agnatic descendant,) the former takes	1/6
8 Uterine brother,	Shares only 'in absence of male agnatic descendants, and ascendants' <sup>1</sup> and female agnatic descendants. <sup>2</sup>	1/6	1/3		
(2) Ascendants.					
(a) Female Ascendants					
9 Mother,	Shares in every case:			1. When there are agnatic descendants, she takes 2. When no agnatic descendants, but father co-existing with two or more brothers or sisters, she takes..... 3. When co-existing with father, but neither agnatic descendants, nor two or more brothers and sisters, she takes 1/3 of residue after husband or wife (if any) has taken his or her share..... 4. With neither father nor agnatic descendants, nor two or more sisters and brothers, she takes 1/3 of the whole estate.	1/6
10 True grand-mother,	The nearest is a sharer, provided the mother <sup>2</sup> and all the links between herself and the deceased are dead. <sup>1</sup> Two or more divide the 1/6 equally.				1/3
					1/3
					1/6
(b) Male Agnatic Ascendants.					
11 Father,	Shares in every case. <sup>4</sup>	1/6		[When there are two or more brothers or sisters, some authorities make the grandfather co-residuary with them.]	
12 True grand-father,	Shares in every case, provided all the links between himself and the deceased are dead. <sup>4</sup>	1/6			

<sup>1</sup> The words enclosed in ' ' may be thus paraphrased: "when the claimant is nearer than the nearest male agnate."

<sup>2</sup> The conditions following those referred to in s. 1, generally provide for priorities amongst those whose claims are similar as regards the nature of their kinship to the deceased, viz., where more claimants than one are nearer to the deceased than the customary heir, and some claimants are nearer than others.

<sup>3</sup> Where the claims of several are similar, but the

claims of those having priority do not exhaust the whole share allotted to them all as a class.

<sup>4</sup> Where there are no male agnatic descendants, the father (and failing him the grandfather) is the residuary, and his rights as sharer are merged in his rights to take the residue, which is never less than 1/6—except where there are any daughters or female agnatic descendants, in which case his right as sharer gives him a claim to rank with the other sharers.

§ 3.—*The Sharers : The First Class of Heirs  
in Sunni law.*

SECTION 611.

(1) *Relations by affinity: Husband or Wife.*

611. (1) The husband<sup>1</sup> takes 1/4 of the estate of his deceased wife, if she leaves any agnatic descendant surviving her, and 1/2 if she dies without leaving any such descendant.

Husband  
wife  $\frac{1}{4}$ ; if no  
descendants,  
Descendants  
reduce shares  
by half.

(2) The wife<sup>1</sup> takes 1/8 of the estate of her deceased husband, if he leaves any agnatic descendant surviving him, and 1/4 if he dies without leaving any such descendant. If there are more wives than one, they divide the 1/8 or 1/4 equally amongst themselves.<sup>2</sup>

[The husband and wife do not take any portion of the estate beyond their Quranic shares if there survives any blood relation howsoever remote, male or female, agnate or cognate : see ss. 625 and 633 below ; the husband is entitled to take the residue in priority to the State : see s. 647.]<sup>3</sup>

Their other rights

It is convenient to deal with the husband and wife first, because their rights are of a simple nature, and they always succeed—and only as sharers. On principle, however, it would be more proper to consider their rights after the rights of all the blood relations (as Quranic sharers) had been dealt with.

The husband and wife are the only heirs by affinity recognised in the law :<sup>4</sup> they took no recognised interest in each other's estate under the pre-Islamic customary law. The widow was liable to be considered a part of the estate, and to devolve like other heritable objects on the heirs.<sup>5</sup> The Quran prohibited this, and enjoined at first that she should be allowed to live in the house of the deceased, as of right, for a year<sup>6</sup>. Later, this

Widow's  
position  
before Islam.

<sup>1</sup> *I.e.*, the regularly married husband and wife: not if the marriage is irregular, nor if the connection has been by way of *mut'a*: Ball. I. 684 (par. 3) citing (n. 2) *Durr-ul-Mukhtar*, 852, "From which it appears that with regard to the effect of an invalid (*i.e.* irregular) marriage, there is no difference of opinion between Abou Huneefa and his two disciples." As to irregular marriages, see s. 83, above; cf. *Mulka Jehan Sahiba v. Mahomed Ushkurree Khan* (1873) I.A. (SUPP. VOL.), 192; 28 W.R. 26. As to *mut'a* see s. 25, above, and third head of the comment to s. 216, above.

<sup>2</sup> Ball. I. 689; *Sirajus*, 17, 18; *Minhaj*, 247; (*Sheikh*) *Muscecolah v. (Musammul Beebe)*

*Shrifus* (1864) 1 W. R. 122.

<sup>3</sup> The paragraph in [ ] is added for convenience of ready reference with regard to the rights of the husband and wife. Their rights in other respects are treated in their due order under ss. 625 and 633, below.

<sup>4</sup> Cf. *Ekin Bebe v. Ashraf Ali* (1864) 1 W.R. 152. So a STEP-SON (*i.e.*, the son of a husband by another wife, or of a wife by another husband) is not an heir: *Musammul Begam v. Jalal Din* (1917) 52 Punj. Rec. 182 (No. 50).

<sup>5</sup> See the quotation from Prof. Smith's "Kinship and Marriage" in the comment.

<sup>6</sup> Quran, II. 241, cited in comment to s. 604, above.

**SECTION 611.** injunction was replaced by a law that the widow should get a definite portion of the estate as legacy or "share."<sup>1</sup>

Right to  
"share"  
development  
of recommenda-  
tion to legacy.

There is a parallel to this development of the law, in the case of the parents, in regard to whom it was at first recommended (without being a rule of positive law) that a legacy should be left to them. Later this recommendation of a legacy was altered into a rule that they should take a definite share of the estate. If the expression "Quranic legacy" could be allowed, it would well indicate the nature and origin of the "Quranic share."

A species of  
"Quranic  
legacy."

Chastity.

It will be observed that chastity is not a condition precedent to the widow inheriting. The Muslim husband has powers of divorcing his wife, and any further safeguard is therefore unnecessary.<sup>2</sup>

#### POSITION OF WOMEN IN ARABIA PREVIOUS TO ISLAM.

Position of  
widow in  
pre-Islamic  
times.

"At Medina," says Professor Smith, "as we are told by the commentators on Sura 4, women could not inherit [before Islam]. So far as the widow of the deceased is concerned, this is almost self-evident, she could not inherit because she was herself—not indeed absolutely, but 'quâ' wife—part of her husband's estate, whose freedom and hand were at the disposal of the heir, if he chose to claim them, while if he did not do so, she was thrown back on her own people. But further, there is an explicit statement, confirmed by the words of the Sura (verse 126) that the men of Medina protested against the new rule, introduced by the Prophet, which gave a share of inheritance to a sister or a daughter. We have seen above, that this was based on the broad principle that none should inherit save warriors, and that this principle was applied in the most absolute way, is made plain by the story of Cais ibn al-Khatim who when he went forth to avenge his father's death provided for his mother, by handing over to one of his kinsmen a palm garden near Medina, which was to be his if Cais fell in his enterprise, subject to the condition that he would 'nourish this old woman from it all his life.' Where the mother of a man of substance could only be provided for in this round-about way the incapacity of women not only to inherit but to hold property—at least lands—must have been absolute ('Aghani' 2. 160.)"<sup>3</sup> The fact above alluded to (that she could herself be inherited) is thus explained by Professor Smith: "The Coran (IV. 23) forbids men 'to inherit women against their will,' and verse 26 forbids them to have their step-mothers in marriage, 'except what has passed'; i.e., marriages

(Of women as  
to rights of  
inheritance  
and to hold  
land.

Widows were  
themselves the  
subject of  
inheritance.

<sup>1</sup> Quran, IV. 15, 16, cited in the comment to s. 604. See also ss. 299 and 641, and the comment on them.

<sup>2</sup> *Muhammad Baksh v. Hagar Khan* (1887)

<sup>3</sup> *Punj. Rec.* 98 (No. 37).

<sup>4</sup> Smith's "Kinship and Marriage" 117. See also *ib.*, 294, citing *Kamul*, pp. 679, 678, 15.

of this kind had been allowed before, and existing unions of this kind SECTION 611. are not cancelled, but the thing is not to be done any more. Both passages, according to the commentators, refer to the same practice, and their explanation is certainly authentic, for they support it by numerous historical examples. From the mass of traditional accounts of the matter, I select, as full and clear, one of those preserved in Tabari's great commentary (MS. of the Viceroyal Library in Cairo). In the jahiliya when a man's father or brother or son died, and left a widow, the dead man's heir, if he came at once and threw his garment over her, had the right to marry her under the dowry ('*mahr*') of [i.e., already paid by] her [deceased] lord ('*sahib*') or to give her in marriage, and take her dowry. But if she anticipated him and went off to her own people, then the disposal of her hand belonged to herself. The symbolical act here spoken of is the same as that we find in the book of Ruth (III. 9) where the young widow asks her husband's kinsman Boaz 'to spread his skirt over his handmaid,' and so claim her as his wife."<sup>1</sup>

## (2) Relations by blood as (Quranic) Sharers.

### (a) Descendants: Female Agnates.

(1) Daughters Female agnate Descendants in the first line.

612. Where the deceased dies leaving one or more daughters, but no son or sons,<sup>2</sup>—

Daughter when sharer.

(1) if there is a single daughter she takes 1/2 of the estate as Quranic sharer;<sup>3</sup>

One daughter takes  $\frac{1}{2}$

(2) if there are two or more daughters they take collectively 2/3 of the estate dividing it equally amongst themselves.<sup>4</sup>

Two or more take  $\frac{2}{3}$

<sup>1</sup> *Ib.* 104, 105.

<sup>2</sup> *Ball. I.* 687, 690. In order that the daughter may be a sharer, there must be no sons surviving the deceased. If there is any son, then he, as the nearest male agnate, is the customary heir, and the daughter is not nearer than him but is in the same line: she therefore cannot, in that case, get a prior claim to the estate (as Quranic sharer), but can only rank as a co-residuary with him: see s. 621 (2) (a).

<sup>3</sup> *Quran IV. 12*, cited in the comment to s. 604, above; *Ball. I.* 687, 690; *Minhaj* 247. Being nearer than the nearest male agnate, her claims are superior to his on the ground of proximity; but this is counterbalanced by his rights being more ancient (based as they are on pre-Islamic custom), and hers newly established—giving him priority in point of time. Hence the daughter

takes a moiety of the estate, leaving the other moiety to the male agnate or customary heir. Cf. for Mosiac law, Numbers, XXVII. which shows that the daughter inherited in the absence of the son, but not with him.

<sup>4</sup> See last note. Two daughters take 1/3 each, leaving 1/3 to the customary heir. According to the Sunni interpretation of the law, this principle of division is not followed where more daughters than two exist, so that 3 or 4 daughters take no more than 2/3. The explanation, no doubt, being that the encroachments on the customary heir's rights had to be restricted within certain limits: the prevalence of female infanticide in pre-Islamic times perhaps rendered it unusual for a man to have more than two daughters, in those times.

**SECTION 612.**

Other rights  
of the  
daughter.

[The daughter inherits as a sharer if there is no son. If a son and daughter co-exist, they both become residuaries, and the daughter does not then take any Quranic share. Similarly the son's daughter becomes a sharer if there is no son and no son's son; but if the son's daughter co-exists with a son's son, then she becomes co-residuary with him; provided that they are not both excluded by the existence of a son: see s. 621 (2), below. The daughter or son's daughter is also entitled to take the residue by "return" proportionately with the other sharers, should there be no male agnates: see s. 625, below). The daughter's son and daughter's daughter and other descendants of the daughter are cognates, and as such are excluded from all participation in the estate if there exists any sharer other than a husband or wife, or there exists any male agnate however remote: see s. 626, below.]<sup>1</sup>

The rights of daughters are summarised under s. 623, below; cf. table of sharers and residuaries.

Conditions  
on which  
daughters and  
other sharers  
become entitled  
to take a share.

The daughters constitute the first<sup>2</sup> of those sharers who are blood relations, and it will be observed that they do not become sharers in every case, but under the condition that there are no sons of the deceased. Conditions of a similar nature are annexed to the rights of all the sharers. These may now be adverted to:

PRINCIPLES  
UNDERLYING  
CONDITIONS FOR  
INHERITING  
AS SHARER.

1. The nearest male agnate (or customary heir) is given no right to take a Quranic share: he is already heir, and there is no necessity for giving him any rights. Exception to rule 1:—The father or true grandfather is customary heir when there are no male agnatic descendants; still he takes a Quranic share for reasons explained in the comment to s. 614, below.

2. As a rule, no person is entitled to be a sharer who is remoter to the deceased than the nearest male agnate (or customary heir);<sup>3</sup> proximity being reckoned in accordance with s. 622, below.

Modifications of and exceptions to rule 2:—

(i) Ascendants cannot in Islam be considered to be necessarily remoter than descendants (Quran, II. 12);<sup>4</sup>

<sup>1</sup> The paragraph in [ ] is added for the greater convenience of those who consult this work as a book of reference, the paragraph should be omitted by the reader when the whole chapter is being perused in its proper sequence. The rights referred to in the paragraph are mentioned in their proper sequence in ss. 621 (2), 625, 626, below.

<sup>2</sup> Being descendants, and in the first line, they would according to the principles of kin-

ship recognised in Muhammadan law, be the first to be considered.

<sup>3</sup> As regards descendants it would be more accurate to say that no person can succeed as sharer unless she is  *nearer*  than the customary heir; for those in the same degree of proximity become co-residuaries, and not sharers; cf. s. 621 (2) (a).

<sup>4</sup> This verse of the Quran is cited in comment to s. 604, above.



(ii) nor all cognates necessarily remoter than all agnates;<sup>1</sup> SECTION 612.

(iii) a true grandmother may succeed though she is remoter<sup>2</sup> than the nearest male agnate.

Since no person remoter than the nearest male agnate is to be a sharer, and since cognates are considered remoter than all agnates, <sup>Most of the sharers are agnates</sup> (with the exception of the anomalous cases of the grandmother and uterine brother and sister) it follows that the sharers must generally<sup>3</sup> be agnates—and female agnates, because males would in most cases be excluded under rule 1 or 2, above.

Now as to the daughter, rule 1 does not affect her, as she is not a male daughter, agnate, nor can rule 2 apply, as she is in the first line of descent, i.e., the nearest possible relation. But rule 2 applies to daughters of sons—who get neither a Quranic share (nor take any other kind of right of inheritance in the estate) if any nearer male agnatic descendant survives.

(<sup>11</sup>) *Daughter of Son or lower Female Agnatic Descendant.*

618. Where the deceased leaves neither a daughter<sup>3</sup> nor a son<sup>4</sup> surviving him,— <sup>Son's daughter when sharer.</sup>

(1) The daughters of his predeceased sons<sup>5</sup> become Quranic sharers, and become entitled to 1/2 of the estate if there is one such grand-daughter of the deceased, and 2/3 if there are two or more; provided that there is no son's son co-existing with them.<sup>6</sup>

(2) Where the deceased leaves a daughter and a son's daughter surviving him, but no son, nor son's son, [the <sup>Where daughters of a son co-exist with a single daughter (the</sup>

<sup>1</sup> Though, under the Sunnī law, the cognates are allowed to share with agnates, or to compete with them only in two cases: (a) the uterine brother and sister shares with the full or consanguine sister; (b) amongst true grandmothers—cognates and agnates compete against, and if necessary, share with, each other. These exceptional cases are explained below under ss. 616, 618.

<sup>2</sup> I.e., removed by greater number of links.

<sup>3</sup> Ball. I. 687, 690; *Minhaj*, 247. If there is any daughter, the daughter would become the sharer.

<sup>4</sup> If there is a son, he is nearer than a son's daughter, and the latter becomes disqualified, on the ground of being remoter than the customary heir; see rule 2 in the comment to s. 612, above.

<sup>5</sup> Not the daughter of a daughter, i.e., residuary only agnate female descendants are entitled to be sharers: the term "daughters" or than both).

"female descendants" being referred like all terms of kinship to agnate relation; e.g., son's daughter; son's son's daughter; son's son's son's daughter, etc. descended always through male links. The cognates come much lower in the Sunnī system of inheritance, in which (cf. ss. 604, 610, above) the customary law is preserved in so far as the priority of agnates is concerned,—though the sharers expressly mentioned in the Quran, i.e., the nearer female agnates (including the sister), come in at an early stage; see also comment to s. 612, above.

<sup>6</sup> If there is any son's son, the son's daughters become co-residuaries with him; s. 621, below; Macn., *Proc. Inh.*, XVI, XXXII, pp. 94, 110

**SECTION 613.** daughter takes  $\frac{1}{2}$  of the estate and] the son's daughter takes  $\frac{1}{6}$  of the estate as (Quranic) sharer.<sup>1</sup> The said  $\frac{1}{6}$  is divided equally amongst the daughters of sons if there are two or more such daughters of sons<sup>2</sup> surviving, together with a single daughter.

Female  
agnates lower  
than son's  
daughter.

(3) In the absence of the daughter and the son's daughter, the nearest agnatic female descendants take the said share of  $\frac{1}{2}$  or  $\frac{2}{3}$  in the manner above referred to (provided that there is no agnatic male descendant in the same line as themselves, or a higher line), and, if there is only one in the first grade, those in the next grade take  $\frac{1}{6}$ .

Daughters and female agnatic descendants inherit sometimes as sharers and sometimes as residuaries. A full statement of their rights in both these capacities will be found under s. 623, see also the table following s. 610 and the larger table entitled "Table of Sharers and Residuaries."

The  $\frac{1}{6}$  may be called the remnant of the daughters' shares—it is arrived at as follows: 2 daughters would have taken  $\frac{2}{3}$  i.e., the share of two or more female descendants when they are nearer than the customary heir, consists of  $\frac{2}{3}$  of the estate. This  $\frac{2}{3}$  is divided between the daughter and granddaughter, but so that the daughter (being the nearest) gets her full  $\frac{1}{2}$ , leaving  $\frac{1}{6}$  for the granddaughter.

(b) *Ascendants as Quranic Sharers.*

(c) *Male agnates Father and True or Paternal Grandfather.*

1. FATHER  
takes  $\frac{1}{2}$  as  
sharer if  
there are  
descendants.

**614.** Where there is any agnatic descendant surviving,  $\frac{1}{6}$  of the estate is allotted as a Quranic share to (a) the father,<sup>3</sup> and (b) in the absence of the father, to the nearest agnatic<sup>4</sup> (or paternal) grandfather, (called the "true" grandfather).<sup>5</sup>

<sup>1</sup> Ball. I. 687; *Minhaj*, 248. This gives effect to s. 612, above,—the daughter's rights cannot, on principle, be affected by a person remoter than herself—though they may be indirectly affected by the doctrine of "increase"; see ss. 610, 620.

<sup>2</sup> It makes no difference whether they are all the daughters of one son, or of different sons.

<sup>3</sup> Ball. I. 686, 696. See comment, and Macn., *Proc. Inh. LXIII*, p. 132.

<sup>4</sup> Only agnates being entitled to this share.

Here the customary notions about kinship are not altered, because the agnatic ancestor was already recognised, and there was no crying need for reform.

<sup>5</sup> *Sahih* in Arabic. The expression refers to such grandfathers as were recognised as being of kin, without question, i.e., from pre-Islamic times, when only the agnatic relation was recognised.

<sup>6</sup> Ball. I. 686, 690; *Minhaj*, 247.

*Explanation.*—A male ancestor who is not an agnate SECTION 614.  
(i. e., between whom and the deceased a female intervenes) "False grand-  
father."  
is called a "false grandfather,"<sup>1</sup> and he cannot inherit as  
a sharer.<sup>2</sup>

[The father was the pre-Islamic customary heir, entitled to take the whole estate in the absence of a son or son's son, or other male agnatic descendant; but not entitled to take any part of the estate if any male agnatic descendant survived. The father now takes 1/6 of the estate as sharer, but his rights as residuary are not taken away: see ss. 621, 622 (2);—though the quantum of the estate taken by him is diminished by the fact that there are other persons (viz., daughter or son's daughter, mother or true grandfather and husband or wife) entitled to take Quranic shares, when they co-exist with him. The true grandfather was also recognised by the pre-Islamic law as being competent to inherit, and his rights in Islam are similar to those of the father. The false grandfather however does not become entitled to any part of the estate except as one of the "distant kindred," viz. when there are no Quranic sharers (except the husband or wife) and no male agnates: ss. 626, 627. The share of the father or (in his absence) of the true grandfather, may abate under s. 610 (1).]<sup>3</sup>

#### FATHER AND GRANDFATHER INHERIT IN ONE OF THREE WAYS.

(1) If there is no agnatic descendant, then the father is himself the customary heir, i. e., residuary, and he does not require any Quranic share,—except in the case when (2) the newly created rights are so extensive as to leave no residue for him, or less than the 1/6 to which the Quran entitles him even when he co-exists with male descendants: the newly created rights cannot be so extensive except when there are female descendants, (3) if there is a male agnatic descendant, the father would be excluded by the customary law, whereas according to the Quran, IV. 12 descendants are not to be considered as any nearer than ascendants: hence ascendants are given a share.

If no agnatic descendant, father is customary heir. No share required unless there are female descendants. Whenever there is any male agnatic descendant, share necessary.

The grandfather takes similar interests in the estate as the father with the necessary changes, viz., (1) The grandfather does not (like the father) reduce the mother's share from 1/3 of the estate to 1/3 of the residue. The reason of this is obvious. The mother is in the same line as the father

Father's and grandfather's rights compared.

<sup>1</sup> *Ib.* The Arabic expression has no such disagreeable connotation as "false" has.

<sup>2</sup> Nor as a residuary.

<sup>3</sup> The paragraph in [ ] is added for the

greater convenience of those who consult this work as a book of reference; the paragraph should be omitted by the reader when the Chapter is being perused in its proper sequence.

SECTION 614. and her rights are analogous to those of a co-residuary with the father, but she is nearer than the grandfather, and takes her share, in priority to him. (2) For obvious reasons the grandfather does not, like the father, exclude the true grandmother. (3) The father is clearly nearer than the brothers and sisters; but in the case of the grandfather there is room for doubt and different opinions are expressed on the point.<sup>1</sup> See ss. 615, 616, 620 and 624, below.

Arab family  
before Islam.

See table of true grandparents, in s. 616, below.—Cf. “At the time of the Prophet there was inside the Arab tribal system a family system in which the centre of the family was a paterfamilias—not a Roman father with despotic authority over his wife and children ‘in manu,’ but still a male head who by contract or capture had the right to have all his wives’ children as his own sons.”<sup>2</sup>

(i) Female Ancestors as *Qurānī* Sharers.

Mother  
takes 1/6 or 1/3  
of whole—

615. (1) The mother of the deceased is entitled (a) to 1/6 of the estate as sharer if there is any agnatic descendant surviving;<sup>3</sup> (b) if there is no such descendant she is entitled to 1/3 of the estate, except as provided in this section.

or 1/3 of residue.

(2) Where with the mother there are surviving the father<sup>4</sup> and also the husband or wife (as the case may be) and there are no other heirs,<sup>5</sup> then subject to sub-section (3) below, the mother takes 1/3 not of the whole estate, but of the residue after the husband or wife has taken his or her Qurānic share, (the father taking the remaining 2/3 of the residue).

Two brothers  
or sisters  
reduce her  
share.

(3) Where there are two or more brothers or sisters (full, consanguine, or uterine) co-existing with the mother, she takes only 1/6 of the estate, notwithstanding that there may be no agnatic descendants.<sup>6</sup>

Mother's  
other rights.

[The mother may take by return under s. 625, if there are no residuaries, but otherwise she does not take a large portion of

<sup>1</sup> See s. 615 (2) below.

<sup>2</sup> Smith, “Marriage and Kinship,” 203.

<sup>3</sup> Thus the mother gets the same Qurānic share as the father, viz., 1/6: the male is not preferred to the female, inasmuch as both are equal in proximity, and the father when he inherits as sharer, is no less newly entitled than the mother is. Cf. comment to s. 604, (fourth head) I. (d), and (e) thereto.

<sup>4</sup> Not the grandfather, though it is men-

tioned in the *Sirajia* that Abu Yusuf placed the grandfather in the same position as the father in this regard.

<sup>5</sup> I.e., there are no agnatic descendants—who are the only other heirs that can inherit with the father. If there are agnatic descendants then sub-s. (1), clause (a) applies.

<sup>6</sup> Ball. I. 688, 690, 695, *Sirajia* (with the *Shar'ia*) Jones's transl., par. 10, 15; *Minhaj*, 247; Macn. Proc. Inh., cases 23, 24, 41, 54.

the estate than the  $\frac{1}{6}$  or  $\frac{1}{3}$  mentioned in this section. Her share SECTION 615. may abate under s. 610 (1).<sup>1</sup>

The mother, being a female, did not inherit under the customary law. She can, therefore, inherit only either as a sharer, or as Quranic residuary. It is generally stated that her rights are those of a sharer only, and that she is never a residuary. But it will be observed that under subs. (2) of the present section, she is, to all intents and purposes, a Quranic co-residuary with the father, for, when the claimants are: mother, father and the husband or wife (there being no descendants).—the father is the customary heir (being the nearest male agnate), the husband or wife first takes his or her share, and then out of the residue the mother takes  $\frac{1}{3}$  leaving to the father  $\frac{2}{3}$ ,—in other words she shares the residue with the father in the proportion of a double share to a male, just as the estate would have been inherited had there been a daughter and son, (or other agnatic descendants in the same line), instead of father and mother. Still, it would not be quite accurate to say that the mother's rights are those of a Quranic residuary, inasmuch as the rule contained in s. 615 (3) affects the mother's rights in a manner that has no parallel in the rules relating to the rights of the other Quranic residuaries.

It may appear at first sight that in the case of the mother's  $\frac{1}{3}$  share<sup>2</sup> the analogy of the rule fixing the shares of the other female agnates (when they are nearer than the 'asaba' or nearest male agnate) is not followed, for a daughter or sister (in the said circumstances) takes  $\frac{1}{2}$  of the estate, and a mother (in a similar event) takes  $\frac{1}{3}$ . But it must be borne in mind that the mother's  $\frac{1}{3}$  is always taken by a single individual, whereas the daughters or sisters may be two, and, in that case, they each take  $\frac{1}{3}$ ; and if more than two, the share of each is smaller. It is evident that the rules relating to ascendants could not be exactly parallel to those relating to collaterals, for the rights of the ascendants overlap those of the descendants. They have besides less occasion to be developed fully as they come into operation more seldom.

The rule by which the mother's share is reduced to  $\frac{1}{6}$  when the (i) mother co-exists with the (ii) father and (iii) brothers or sisters, is anomalous, and must be considered, as a special case; where, however, it is the (i) grandfather (and not the father) who co-exists with the (ii) mother and (iii) brothers or sisters, some authorities<sup>3</sup> hold that the grandfather does not exclude the brothers and sisters, but that they

The mother's right to take  $\frac{1}{3}$  compared—  
(i) to that of a (Quranic) residuary.

(ii) to that of other Quranic sharers.

Reason why brothers and sisters reduce mother's share.

<sup>1</sup> The paragraph in [ ] is added for the greater convenience of those who consult this work as a book of reference; the paragraph should be omitted by the reader when the chapter

is being perused in its proper sequence.

<sup>2</sup> I. s., where there are no descendants nor the father.

<sup>3</sup> Ball. I. 687.

**SECTION 615.** all inherit as sharers or residuaries : and the mother's share may, in that case, have been necessarily reduced ; and it may have been considered that if the mother's share is reduced to 1/6 when she co-exists with the grandfather (and brothers and sisters), much more should her share be so reduced when she co-exists with the father (and brothers and sisters). The principles are liable to be blurred here owing to the differences of opinion referring to the rights of the brothers and sisters ; and in all cases of doubt the position of the newly entitled heirs would naturally gravitate towards their original position under the customary law—i.e., there is a tendency to reduce the shares of the newly-entitled heirs.<sup>1</sup>

True grand-  
mothers come  
into place of  
mother.

**616.** (1) In the absence of the mother, and subject to sub-section (4) below, 1/6 of the estate is allotted as a (Quranic) share to the nearest from amongst the grandmothers answering to any of the following three descriptions :<sup>2</sup>

- (a) agnate grandmothers<sup>2</sup> of the deceased,
- (b) grandmothers of the deceased related entirely through female links,<sup>3</sup>
- (c) grandmothers of the father or of the true grandfather of the deceased, related<sup>4</sup> entirely through female links.<sup>5</sup>

The three  
groups of female  
ancestors who  
are entitled.

<sup>1</sup> In referring hereinafter to the ancestors, F="father" or "father's"; M="mother" or "mother's". Thus FMMF=father's mother's father. See table in s 616, below.

<sup>2</sup> Or paternal grandmothers, e.g., FM or FFM or FFFM—agnatic relationship being the only kind recognised by the customary law. See s. 602, above.

<sup>3</sup> E.g., MM or MMM. These are the counterpart of the first group. The one being (a) pure agnates, the other (b) pure cognates. So far as this chapter has proceeded, this is the first time when the customary notion of kinship and proximity is departed from, even in regard to rights so obviously new as those of the Quranic sharers. The rights of the females ancestors under the Quran are so novel and various that it is not surprising that guidance for interpreting the Quran was not consciously sought from the old pre-Islamic rules. The unconscious influence, however, of ideas taken from those rules is distinctly traceable. The *Sarajia* refers, e. g., to the case, when a paternal grandmother said to the Khalif 'Umar: "My claim to the deceased's property is superior to that of the mother's mother, because if she dies her grandson does not inherit (from her): whereas if I die my grandson would inherit." "But he said,

"Take this sixth, and if both of you are living still the same (must be divided) between you, and if there is but one of you two, the sixth is for her." Though the old lady did not carry her point with the great state-man, yet her argument illustrates the ineradicable nature of the pre-Islamic notions of kinship, and also explains the recognition of the third group of true grandmothers (cf ss. 602, 613, 614).

<sup>4</sup> I.e., related to the said father or grandfather. <sup>5</sup> E.g., FMM or FFM or FFFMM : the relation here begins with male links (agnates), in the first instance, and then continues through female links.—The process cannot be reversed so that MFM, or MMFFM is not a true grandmother but a "false" one. Class (c) illustrates the strength of the old mode of reckoning kinship: the male agnatic ancestors (FF, FFF) are considered to take the place of the deceased so entirely, that all the intermediate links are considered capable of being eliminated: Thus F, or FF is considered so exactly to take the place of the propositus, that FMM or FFFMM rank as regards competence with MM, i.e., the maternal grandmother of a paternal ancestor of the deceased is ranked (as regards competence) with the maternal grandmother of the deceased himself.

(2) The three groups of female ancestors above enumerated are collectively referred to as "true<sup>1</sup> grandmothers"; and may be described as grandmothers between whom and the deceased no false grandfather intervenes;<sup>2</sup> grandmothers other than "true" are referred to as "false grandmothers."<sup>3</sup>

(3) The true grandmother who is related to the deceased through the fewest links is considered to be the nearest, and excludes one who is remoter than herself.

(4) A true grandmother who is related to the deceased through one or more male ancestors<sup>4</sup> is excluded if any of the said ancestors<sup>5</sup> survives the deceased.

(5) Those grandmothers are also excluded who are remoter than one who is excluded under sub-section (4) above.<sup>6</sup>

(6) Where, in any case, more grandmothers than one are in the same degree of proximity to the deceased, and are all entitled to be sharers, they take the 1/6 share

<sup>1</sup> *Sahib* in Arabic, see footnote to s. 614, above.

<sup>2</sup> As explained in the preceding footnotes, the intervention of true grandfather is not taken into account, because in accordance with the customary notions of kinship the true grandfather stands in the place of the *propetius*, but the false grandfather does not do so.

<sup>3</sup> *Bail. I.* 888, 690. It will be observed that whereas the devolution of the father's 1/6 share is restricted to the one line of agnatic grandfathers, that of the mother may be taken by a female ascendant in one of three lines—so that far more female ancestors have the chance of succeeding as Quranic sharers than male ancestors. As the female ancestors were absolutely excluded under the old law, the rights under the new law of all female ancestors can develop more easily than the rights of male ancestors, some of whom (*i.e.*, the agnates) were recognised in the old law, and whose prestige gives them an advantage over the others, preventing those others from acquiring any rights when they come into competition with the agnates. A similar result occurs amongst the brothers and sisters. The uterine brother and sister, who were absolutely excluded by the customary law, succeed with the full brothers and sisters, as well as with the consanguine brothers and sisters; whereas the consanguine do not succeed where there are any of the full blood in their own line. See ss. 618, 622 (4) (c).

<sup>4</sup> *E.g.*, FM, or FFM.

<sup>5</sup> *E.g.*, FM is excluded by the existence of F, and FFM by the existence of F, or F.

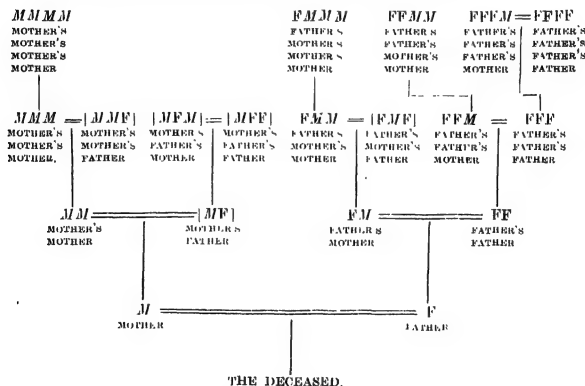
<sup>6</sup> This rule may also be stated as follows—  
"No female ancestor can take any share of the estate if any link (whether male or female) between herself and the deceased is surviving." The link, if consisting of a female, will represent a nearer true grandmother—if a male, it will represent a male agnate for possible customary heir). *E.g.*, if FM and MMM co-exist with F, then MMM is excluded by FM, because the latter is nearer, but FM is herself excluded by F. The reason of this is that F is the customary heir, and no relation remoter than him as a rule inherits (*cf.* comment to s. 610, above). The explanation of why F does not exclude MM unless FM is also living, seems to be that though the existing rules about kinship provided a means for comparing the relative proximity of F and FM, there seemed no means for comparing the relative proximity of a male agnate and a female cognate,—the rules for comparing agnates with cognates amongst the grandmothers being full of too novel a description to find place in the general law or to be applied except *pro hac vice*; while at the same time the customary law which preferred all agnates to cognates could furnish no criterion when the comparison had to be made as amongst ancestors, in whose case it was evident that a cognate might be considered nearer than an agnate.

**SECTION 616** collectively; according to Abu Yusuf (and apparently also Abu Hanifa)<sup>1</sup> the said grandmothers divide their said Equal collective share equally, notwithstanding that one of them may bear the relation of true grandmother to the deceased in more ways than one;<sup>2</sup> but according to Imam Muhammad a grandmother bearing the relation of true grandmother to the deceased in more ways than one, is entitled to claim a proportionate part of the said Quranic share in respect of each such relationship.<sup>2</sup>

Except according to Imam Muhammad,

TABLE ILLUSTRATING "TRUE" GRANDPARENTS

N.B. { The letters referring to the "false" grandparents are enclosed in [ ]  
In the highest generation only the "true" grandparents are given.



<sup>1</sup> Bull. I. 688, where Abu Yusuf's opinion is alone referred to, with the remark: "There is one report to the same effect from Alou Huneifa."

<sup>2</sup> This may happen in a case like the following: If a lady, X, has a son and a daughter, FF and MM, who have respectively a son and daughter M and F, who (being consans) are married to each other, and give birth to the propoitus, then X will be  $MMM$  and also

$FFM$  of the propoitus, i.e., she will be true grandmother in two ways. If then there is another true grandmother,  $FMM$ , surviving who is related to the deceased in only one such way, then according to Imam Muhammad, X who is both  $MMM$ , and  $FFM$ , will take  $2/3$  of the  $1/6$ ; and  $FMM$  will take  $1/3$  of the  $1/6$  but according to Abu Yusuf they will take equally. See Runser's *Sunja*, 22, for Imam Muhammad's view.



[The true grandmother may take by return under s. 625 if there are no residuaries; but otherwise she does not take a larger portion of the estate than that mentioned in s. 616. Her share may abate under s. 610 (1).]<sup>1</sup>

Under sub-sections (4) and (5) above, a paternal grandmother may be excluded by the existence of a male ancestor through whom she is related to the deceased; and a maternal grandmother may then be excluded by the existence of the said paternal grandmother, so that neither can succeed, notwithstanding that if the said paternal grandmother had not been surviving, and if the maternal grandmother had alone survived with the male ancestor, the said maternal grandmother would not have been excluded.<sup>2</sup>

The exclusion of a grandmother by a male ancestor (who does not himself take the grandmother's 1/6 share) is apt to be considered as an anomaly. It is however in strict accordance with the principle that no one inherits who is remoter than the customary heir (*i.e.*, the nearest male agnate). The only male ancestor through whom a true grandmother can be related to the deceased is a true grandfather, who, being a male agnate, is either himself the customary heir (as the nearest male agnate), or there is some male agnate nearer than him. In either case a true grandmother related through him is remoter than the customary heir, and it is no part of the Qur'anic alterations in the law to provide for relations remoter than the customary heir subject to the principle that "Ye know not whether your parents be nearer or your children."<sup>3</sup> It will thus be seen that it is no more an anomaly that the true grandmother is excluded by a true grandfather, *i.e.*, a nearer male agnatic ascendant, than that the son excludes the daughter of a son, or the sister, *s.e.* ss. 604 and 604A above, and comment thereto.

### (c) Collaterals as Qur'anic Sharers.

#### (i) Aunts; Full and Consanguine Sisters

617. (1) Subject to sub-section (2) and to s. 624,

<sup>1</sup> The paragraph in [ ] is added for the greater convenience of those who consult this work as a book of reference; the paragraph should be omitted by the reader when the chapter is being perused in its proper sequence.

<sup>2</sup> *E.g.*, if F, FM and MMM are surviving, MMM is excluded by FM, for the latter is the nearer of the two, and FM is herself excluded by F, because she is related through him. If however there had been only F and

MMM, the latter could not have been excluded by F. The reason, as stated above, is that the relative proximity of F and FM could be compared according to the existing criteria, and also of FM and MMM, but not of MMM and F. (1) "A person excluded may, as all the learned agree, exclude others." Sir W. Jones's *Siraj*, par. 16.

<sup>3</sup> Quran, IV. 12; cited in comment to s. 601, above.

True grandmother's other rights at.

How true grandmother may be excluded by a male.

The reason why a paternal grandmother excluded by a male relation through whom she traces her relationship to the deceased.

Sister as sharer when no male agnatic descendant or ascendant

SECTION 617. below, where there is neither a male agnatic descendant<sup>1</sup> nor such ascendant<sup>2</sup> surviving<sup>3</sup> the full and/or consanguine sisters share as follows :—

Full sister. (a) 1/2 of the estate is allotted to the full sister as a share if there is only one full sister surviving; if there are two or more full sisters they are allotted 2/3 of the estate as their collective share;<sup>4</sup>

Consanguine sister. (b) where there is no full sister, the said share of 1/2 or 2/3 respectively is similarly allotted to the consanguine sister or sisters;

Single full sister. (c) where there is a single full sister, (she takes 1/2, and) 1/6 of the estate is allotted to the consanguine sister or sisters, to be divided equally amongst themselves.<sup>5</sup>

Sisters when not sharers (but residuaries.)

(2) The full or consanguine sister is not allotted a Quranic share when she co-exists with any

(a) full or consanguine brother respectively,<sup>6</sup> or any (b) female agnatic descendant.<sup>7</sup>

Other rights of sisters.

[The full or consanguine sister is an agnate and takes a Quranic share, unless the customary heir is nearer than herself, i.e., unless there is a nearer male agnate surviving the deceased. Her share may abate under s. 610 (1). She also becomes a co-residuary with the brother when

<sup>1</sup> I.e., son or son's son how low-soever, referred to below as S. or SS, etc.

<sup>2</sup> I.e., father or father's father how low-soever, referred to below as F. or FF, etc.

<sup>3</sup> I.e., neither S, SS, SSS, etc. nor F, FF, FFF, etc. must be surviving. It is only when none of these are surviving that a collateral (e.g., a brother) would be the nearest male agnate or customary heir, and only in that case that a collateral (e.g., a sister) could be given any right to inherit, consistently with the general principle that no relation remoter than the customary heir (*usula* or nearest male agnate) inherits. See ss 601, 603 A. above. In accordance therefore with the generally accepted Hanafi theory that the true grandfather is nearer than the brother, no collateral can succeed if any true grandfather is living.

<sup>4</sup> *Bail.* I. 688, 690, *Mishaj*, 247.

<sup>5</sup> *Bail.* I. 689, (I.I.) *Ma'an*, *Prec.*, *Inh.*, cases 33, 46, 72 (1), 81 (2); cf. the case of daughter and son's daughter . s. 613. When there are two or more full sisters, the consanguine sisters do not get any share, and they can only be residuaries—which they are, provided the con-

sanguine brother is the nearest male agnate. But if the nearest male agnate is remoter than the consanguine sister, the latter does not become co-residuary; *Bail.* I. 680.

<sup>6</sup> I.e., when the full sister and the full brother co-exist, the full sister becomes not Quranic sharer, but co-residuary with the brother (who is the customary heir). Cf. the case of the daughter and son co-existing; when the full sister and consanguine brother co-exist, the full sister is nearer than the consanguine brother, hence she becomes (in that case) a sharer, and the consanguine sister becomes co-residuary with the consanguine brother. In case the full sister co-exists with a female agnate descendant, the full sister becomes residuary, excluding the consanguine brother.

<sup>7</sup> *Bail.* I. 688; *Mishaj*, 247. When she co-exists with a female agnate descendant, she becomes (Quranic) residuary, ousting a male agnate remoter than herself as was the case in *Meherjan v. Shahidi* (1890) 1 Bom. L. R. 549, noted as illustration (3) to s. 623, below; see s. 621 (1) (b), below.

the latter is the nearest male agnate and as such entitled to be residuary : see s. 621 (2) below.<sup>1</sup> SECTION 617.

The rights of the sisters are fully stated under s. 623, below, *q.v.* and cf. Quran, IV. 15, 16, 175, cited after s. 604, above.

(ii) *Cognates : Uterine Sisters and Brothers as Sharers*

**618.** Where there is no (male or female) agnatic descendant, nor a male agnatic ascendant surviving, 1/6 of the estate is allotted to the uterine sister or brother as a Quranic share, if there is only one such brother or sister; if there are two or more they are collectively allotted 1/3 of the estate as a Quranic share and divide it amongst themselves, males and females sharing in equal proportion.<sup>2</sup> Uterine sisters and brothers as sharers.

[The uterine sister and brother are cognates, they were therefore not recognised by the customary law; and they succeed only as sharers and not as residuaries; but they may take by return under s. 625. Their shares may abate under s. 610 (1). Their children can share only as "distant kindred": s. 626.]<sup>1</sup> Other rights of uterine brother and sister.

See the footnotes to the last section.

The uterine sister and brother share in equal proportions because they are both newly entitled: the uterine brother is not an agnate: the brother's rights are not older than the sister's, and he cannot therefore claim a larger share, as a male agnate can when he has a female agnate placed on a footing of equality with him (as co-residuary) Reason why uterine brother and sister share equally.

#### RIGHTS OF UTERINE BROTHERS AND SISTERS.

1. Neither the uterine brother nor sister takes any portion of the estate if the customary heir is an ascendant or descendant, or if there are any agnatic descendants: this is in accordance with the general principle that no person remoter than the customary heir is allotted a Quranic share. Rights of uterine brothers and sisters.

<sup>1</sup> The paragraph in [ ] is added for the greater convenience of those who consult this work as a book of reference; the paragraph should be omitted by the reader when the chapter is being perused in its proper sequence.

<sup>2</sup> Bail. I. 689, 690. Macn. & Inh. Prec., case 73. The uterine relations cannot succeed unless they are nearer than the customary heir, or nearest male agnate, *i.e.*, there must be no male agnate amongst either the descendants

or ascendants. They are also excluded by female agnatic descendants apparently because then the share allotted to females nearer than the customary heir is taken up by the female descendants, and none is left for the uterine sister and brother. So where there was a daughter and a uterine sister, the latter was held to be excluded: *Mathooranath Mo-zoomdar v. Eswaff Ali Khan* (1870) 11 W. R. 356.

## SECTION 618.

2. If the customary heir is a collateral, then (provided that there are no female descendants) the uterine brothers and sisters become Quranic sharers, and

(a) if there is only one of them, he or she takes one-sixth of the estate ;

(b) if there are two or more, they divide one-third of the estate amongst themselves equally irrespective of their sex.<sup>1</sup>

Reason why  
they share  
equally.

The uterine brothers and sisters were never eligible for succession under the customary law.<sup>2</sup> Both being introduced for the first time by the Quran, they divide the Quranic shares allotted to them equally in accordance with the principle that the difference (if any) between the quantum of the estate taken by males and females has reference not to their sex, but to the fact that the males had old-established rights, and the females were newly introduced.<sup>3</sup>

(iii) *No Collateral remoter than Sister is a Sharer.*

Sister remotest  
sharer

**619.** No female collateral<sup>4</sup> remoter than a sister or brother inherits under Hanafi law as a sharer.<sup>5</sup>

Niece does not  
inherit as  
sharer or  
residuary.

Such females can inherit only as "distant kindred" and only in the absence of all such blood relations as are competent to be sharers or residuaries.<sup>6</sup> Thus a niece, or any other female relation remoter than a niece, or any uterine relation remoter than a uterine brother or sister, is excluded from inheritance if there is any male agnate how remote soever. In this regard, however, the niece, etc., are on the same footing as the nearest cognate, e.g., the son of a daughter, who is similarly excluded.

RULES DETERMINING PRIORITIES AMONGST FEMALES FOR BEING SHARERS.

Son's daughter.

The rules of priority as Quranic sharers are similar in the case of female agnatic descendants and sisters; the mother and other female ascendants are kept in a category of their own:

(1) Daughter, . . . . . (being the nearest female agnate and there being no son) is entitled to a share of 1/2; two or more taking 2/3.

<sup>1</sup> *Sirajia*, 16.

<sup>2</sup> In England, by the old law, the half blood could not inherit, but now it is provided by the Inheritance Act, (1883) 3 & 4 Will. IV c. 106, s. 9 "that any person from whom descent is to be traced by the half blood shall be capable of being his heir," Goodlove, "Real Property," (1897, 4th ed.) 140.

<sup>3</sup> See comment to s. 604 (fourth head), and to s. 614, above.

<sup>4</sup> No male collateral except the uterine brother is a sharer. Nor are any male ag-

nates sharers, with the sole exception of the father or true grandfather who is a sharer when he is not the nearest agnate (or customary heir), i.e., where he co-exists with descendants. Cf. comment to s. 614, above.

<sup>5</sup> Nor do they become co-residuary with the nearest male agnate (or customary heir).

<sup>6</sup> Which terms together include (a) all male agnates, (b) female agnates not remoter than the sister (see last note), (c) some cognates, viz., (i) some of the true grandmothers, (ii) uterine sisters and brothers.

- (2) Son's daughter,<sup>1</sup>..... her rights liable to be reduced to 1/6 by SECTION 619 presence of (1).
- (3) Son's son's daughter<sup>1</sup>.. bears same relation to (1), as (2) bears to (1).
- (4) Mother ..... her share liable to be reduced by existence  
(a) of (1), (2), or (3), or  
(b) of two or more of (5), (6), or (7).
- (5) Full sister,<sup>1</sup>..... becomes residuary if (1), (2), or (3) exists.
- (6) Consanguine sister,<sup>1</sup>... bears same relation to (5) as (2) bears to (1)
- (7) Uterine sister and  
uterine brother,<sup>1</sup>.. } their rights depend on (1), (2), (3)

The female descendants, ascendants and collaterals, it will thus be seen, really form one series, and their rights depend on each other's, notwithstanding that the rules relating to the female ascendants and collaterals do not follow exactly the analogy of those relating to descendants.

(iv) *Anomalous or Exceptional Cases.*

**620.** The grandmother and the sisters and brothers under certain circumstances take rights (referred to in s. 624, below), which are neither those of pure sharers nor of pure residuaries.<sup>2</sup>

THE INCREASE OR 'AUL'

It will be remembered that the sharers take each of them their respective fraction of the estate, and if all the fractions added together exceed unity, and therefore cannot be satisfied in full, the fraction to which each sharer is entitled must under s. 610 (1) above abate rateably, and that this process is called "increase" or 'aul' in Arabic.<sup>3</sup> As for instance<sup>4</sup> if a man dies leaving his widow, two daughters, father and mother, the shares are 1/8, 2/3, 1/6, 1/6, respectively, making up a sum total of 27/24; and the common denominator has to be "increased" from 24 to 27, so that they take respectively 3/27, 16/27, 4/27 and 4/27.

Sections 621 to 625 deal with cases where not only do the shares not exceed unity, but where after satisfying the sharers in full, some residue is left, or where there are no sharers at all.

<sup>1</sup> It is assumed in these cases that the nearest male agnate (or customary heir) is remote.

<sup>2</sup> These cases are referred to in detail under s. 623 *ibid.* (22) (the case of *Himarayya*); and see s. 624, below.

<sup>3</sup> *Ibid.* I 713; s. 610 (1), above.

<sup>4</sup> The Khalit'Ali had, to decide a case where the survivors were as above stated, and the case is referred to as the *mimbariyat*, *mimbar* meaning pulpit. See also s. 623, *ibid.* (10) to (20)

*Rights of female descendants and collaterals bear on each other*

*Grandmother, brothers and sisters:*  
*Anomalous rights.*

SECTION 621. § 5.—*The Residuaries : The Second Class of Heirs.*(1) *Persons who inherit as Residuaries.*

**621.** The residue of the estate (if any) left after the Quranic sharers have been allotted their shares, devolves upon the following persons,—

- I. Male agnates.** (1) The nearest <sup>1</sup> male agnate or agnates,<sup>2</sup> subject to clause (b) of sub-section (4), below ;
- II. Female agnates,—** (2) such female agnatic descendants as are—
- (a) in the same line as the nearest male agnate, or
- (b) intermediate between the nearest male agnate, and the nearest female agnates, provided that the nearest male agnate is a descendant ;
- (b) **ascendants,** (3) [the mother to the extent referred to in s. 615, above ;]<sup>3</sup>
- (c) **collaterals,** (4) full or consanguine sisters in either of the following cases :—
- (a) when the brother (full or consanguine respectively) is the nearest male agnate, or
- (b) when the nearest male agnate is remoter than the full or consanguine brother (as the case may be), and there co-exists with the sister any female agnatic descendant.<sup>4</sup>

Sister as  
residuary.

Remote male  
agnates.

[A male agnate, however remote, is competent to inherit as residuary.<sup>5</sup> He may, however, be excluded in one of two ways: (1) If

<sup>1</sup> See s. 622, as to the order of priority.

<sup>2</sup> Male agnate—customary heir, *e. g.*, the paternal uncle's son is a residuary, but not the maternal half uncle: *Syed Ali v. Nyaz Ali* [1886] 5 All. W. N. 277. As only the nearest succeed, a pre-deceased son's son is excluded by a son: (*Moolu*) *Kasim v. (Moolu) Abdul Rahim* (1905) 33 Cal. 173, 32 I.A. 177.

<sup>3</sup> A mother is not strictly a residuary. She is included here to complete the three divisions of relations—descendants, ascendants and collaterals. The law is completely developed only in the case of descendants. See comment to s. 615, above.

<sup>4</sup> *Meherjan Begum v. (Nawab Mir) Nurudin* (1899) 24 Bom. 112. This is the only circumstance in which the customary heir (*i.e.*, the nearest male agnate) is deprived of the

right to succeed to (the residue of) the estate, in order that he might make room for another relation. In all other cases he is allowed to remain the nominal residuary, though in many cases there may be no residue left. See *na.* to s. 604 (1) (d) and s. 610, above.

<sup>5</sup> Thus see *Rahim Bakh v. Muhammad Hussain* (1888) 11 All. 1, (the father's paternal cousin); *Mohidin Ahmad Khan v. Muhammad* (1882) 1 Mad. H. C. R. 92; 1 Ind. Jur. (O. S.) 132 (agnatic descendant of paternal great grandfather); *Syed Shonekul Ali v. Ahmad Ali*, (1867) 8 W. R. 39 (descendants of paternal grandfather's brother are residuaries, and thus exclude such grand daughters as are cognates); *Mahomet Haneef v. Mahomet* (1874) 21 W.R. 371. A list of the male agnates is given in s. 623, below.

a male agnate nearer than him survives the deceased, the nearer will SECTION 621. exclude him; (2) if he is remoter than a brother, and if a sister co-exists with a daughter (or son's daughter) then the sister becomes residuary and the remoter male agnate is excluded. Female agnatic descendants and the full and consanguine sisters are competent to be residuaries, but no females remoter than the sisters are so competent. The whole estate is taken by the residuaries if there is no sharer.]

Absence of sharers

With reference to the provision contained in s. 621 (4) clause (b), it should be remarked that the sister must, on principle, be given some portion of the inheritance in cases where the customary heir (or the nearest male agnate) is remoter than herself.<sup>1</sup> For the principle underlying the Quranic amendments of the customary law is to provide for those who are nearer than the customary heir: such provision might have taken one of three forms:

- (1) the sister might have been given a Quranic share, or
- (2) she might have been made co-residuary with the customary heir, notwithstanding that the latter is remoter than herself,<sup>2</sup> or
- (3) she might have taken the place of the customary heir, excluding him from the residue.

She may have been made co-residuary with remoter agnate.

The last course is the one actually adopted, in order to provide for the sister when she co-exists with a female agnatic descendant: If this course had not been adopted and the sister had been made a Quranic sharer, then she would have ranked 'pari passu' with the descendants, and might have been the means of abating the daughter's share by 'aul.' The second alternative, of making the sister co-residuary with a remoter male agnate, was also rejected, though following it would have made the sister's rights analogous to those of the son's daughter, but the rights of the male descendants were probably considered too important and well established to be ousted;<sup>3</sup> whereas a collateral could be excluded more easily, to make room for a nearer claimant. It is at the same time less likely that the law should develop harmoniously in regard to collaterals, than in regard to descendants, who must succeed in the far greater number of cases; while the necessity for providing for a larger number of claimants must also necessitate new modes of succession when the collaterals succeed. See the comment to s. 623, below, 2nd and 3rd heads.

<sup>1</sup> See s. 604, above, and second head of comment thereto.

<sup>2</sup> As happens when a nearer female descendant becomes co-residuary with a remoter female descendant. See s. 623, and comment thereto.

<sup>3</sup> The Sunni interpretation of the law is here referred to; in Shiah law the nearer female whether agnate or cognate excludes the remoter male, agnate or cognate.

## SECTION 622.

(2) *Priorities amongst the Residuarys.*

Priority,

**622.** For the purpose of inheriting as a residuary, priority amongst male<sup>1</sup> agnates is given in accordance with the following rules,<sup>2</sup>—

1. Descendants.

(1) Descendants are preferred to both ascendants and collaterals.<sup>3</sup>

2. Ascendants.

(2) Ascendants are (subject to s. 624, below,) preferred to collaterals.<sup>4</sup>

3. Collaterals.

(3) Amongst descendants and ascendants respectively those between whom and the deceased the fewest degrees intervene are preferred to the others.<sup>5</sup>

(4) Amongst collaterals,—

Descendant of nearest common ancestor preferred.

(a) The descendant how low soever of a nearer common ancestor<sup>6</sup> is preferred to the nearest descendant of a remoter ascendant.<sup>7</sup>

Descendant of same common ancestor preferred if he is nearer to him. Full blood preferred to consanguine relations in the same line.

(b) Where two or more collateral relations of the deceased are descended from the same common ancestor, he is preferred who is nearest to the said common ancestor.<sup>8</sup>

(c) The full blood relations are preferred to the consanguine relations in the same line, *i.e.*, where two or more collateral relations of the deceased are descended from the same common ancestor, and are removed by the same number of degrees from the said common ancestor,<sup>9</sup> and one of them has both the male and the female ancestors in common

<sup>1</sup> As regards females, see comment.

<sup>2</sup> (cf. Bail. I. 686, (ll. 4-5), 695, 696; *Minhaj*, 248 (Bk. 28, s. 3).

<sup>3</sup> *E.g.*, a son, or grand-son or great grand-son is preferred to, and excludes, the father (and *a fortiori*, the grandfather) from the residue.

<sup>4</sup> *E.g.*, the great grandfather is preferred to a brother. On this point there may have been some difference in the various pre-Islamic customs. According to some the brother (as the son of the grandfather) was, it seems, preferred to the great grandfather. The combinations must have existed so seldom that there can be little to surprise us in the customs not being quite uniform.

<sup>5</sup> *E.g.*, a son is preferred to a grandson; and the father to the grandfather.

<sup>6</sup> By "common ancestor" is meant the nearest paternal ancestor of the propolitus, from whom the claimant can also trace descent.

<sup>7</sup> *E.g.*, F, the father of the propolitus, is the common ancestor of the propolitus, and of B, his brother, and also of all descendants of B, as, for instance, of B's son's son (BSS). On the other hand, the ancestor who is common to the propolitus and his uncle, is the grandfather of the propolitus (FF). So BSS is preferred to the uncle. See Macn., *Proc.*, *Inh.* cases 2, 26, 29, 35, 83.

<sup>8</sup> *E.g.*, the brother is preferred to the nephew, as the brother is one degree from the father (the common ancestor); and the nephew is two degrees from him, being the father's son's son. Macn., *Inh.*, *Proc.*, case 26.

<sup>9</sup> *I.e.*, if the claimants are, all of them, either sons, or grandsons, or great grandsons, etc., of the common ancestor. (1817) *East's Notes*, Case 65, *SUP. COURT, CAL.*; Macn., *Dig.*, *Inh.*, No. 5.



with the deceased, while another has only the male ancestor in common with the deceased,—then the former is preferred.<sup>1</sup> SECTION 622.

In every case the nearer excludes the more remote, so that the son excludes a predeceased son's son (*i.e.*, grandson of the proposer), and the father excludes the grandfather, the brother excludes the nephew, or uncle;<sup>2</sup> and the residuaries may be enumerated in their order of priority,<sup>3</sup> as follows:—

*Residuaries in their own right.*<sup>4</sup>

1. Sons.
2. Sons' sons.
3. Sons' sons' sons, etc.
4. Father.
5. Father's father.
6. Father's father's father, etc.
7. Full brothers.
8. Consanguine brothers.
9. Full brothers' sons.
10. Consanguine brothers' sons.
11. Full brothers' sons' sons.
12. Consanguine brothers' sons' sons, etc.
13. Father's full brothers.

*Residuaries by or with another.*<sup>5</sup>

- |   |                 |
|---|-----------------|
| Daughters.  | Descendants.    |
| Sons' daughters.  |                 |
| [Son's daughter may be residuary though there is no son's son]  |                 |
| Sons' sons' daughters.  |                 |
| [As above, <i>mutatis mutandis</i> .]                           |                 |
| [Mother] <sup>6</sup>   | Ascendants.     |
| Full sisters.   | Collaterals.    |
| [Full sister may be residuary though there is no full brother.] | (1) Descendants |
| Consanguine sister.   | of father's     |
| [As above, <i>mutatis mutandis</i> ]                            | brothers        |
|   | and their       |
|   | descendants.    |

<sup>1</sup> In other words, the descendant of a full brother of the deceased is preferred to the descendant of consanguine half brother of the deceased (both being in the same line), and the descendant of a full brother of an ancestor of the deceased, is preferred to a descendant of consanguine brother of the same ancestor of the deceased (both being in the same line). *E.g.*, the full brother is preferred to the consanguine half brother; cf. s. 61, above. One who has only a female ancestor in common is not an agnate, and cannot compete with agnates.

<sup>2</sup> Sir R. Wilson points out that, in not recognising representation, Muhammadan law differs from Roman and Hindu law and from system allied to the former. He also quotes an interesting anecdote from Jenk's "Law and Politics in the Middle Ages," p. 9, in which it is stated from the Saxon Annalist Widerkind that Otto the Great of Germany had to adjudicate in the 10th. century after Christ, upon the point whether grandchildren should inherit with

their uncles or be excluded by them. "It was proposed that the matter should be examined by a general assembly convoked for the purpose. But the king was unwilling that a question concerning the difference of laws should be settled by an appeal to numbers. So he ordered a battle by champions and victory declaring itself for the party which represented the claim of the grandchildren, the law was solemnly declared in that sense."

<sup>3</sup> Ball. I. 691.

<sup>4</sup> These are all male agnates, *i.e.*, the *ʿasaba*, who were the customary heirs.

<sup>5</sup> *I.e.*, female agnates, being co-residuaries with the male agnates who are mentioned in the first column of the list; they are sometimes referred to (in this work) as Quranic residuaries, to show that their rights arise under the Quran.

<sup>6</sup> The mother is not a residuary; but she occupies an anomalous position; see comment to s. 615, above.

## SECTION 622.

(d) Descendants of grandfather :  
uncles and their descendants

14. Father's consanguine brothers.
15. Father's full brothers' sons.
16. Father's consanguine brothers' sons.
17. Father's full brothers' sons' sons.
18. Father's consanguine brothers' sons' sons, etc.
19. Father's father's full brothers.
20. Father's father's consanguine brothers.
21. Father's father's full brothers' sons.
22. Father's father's consanguine brothers' sons, etc.

(nl) Descendants of great grandfather.

The list given above will be found to agree with the list in columns A and B of the large table of sharers and residuaries, given in this chapter, from which will also appear who are the possible sharers entitled to take Quranic shares, in priority to each of the above-mentioned residuaries.<sup>1</sup>

Female agnates not compared with each other their rights as residuaries depend on their position relatively to the customary heir.

The rules of priority in the section are restricted, it will be observed, to the relative claims of male agnates. When female agnates come into competition with each other as regards the residue, their rights depend not upon a comparison of their proximity with each other, but upon their respective positions relative to the customary heir, or nearest male agnate.<sup>2</sup> This will appear from the following statement of the conditions on which female agnates succeed as residuaries :

No female (agnate<sup>3</sup>) inherits as a residuary except

Statement of rights of females to be residuaries.

1. When she is in the same line with the nearest male agnate (she is then a residuary,<sup>4</sup>) or
2. When, being a descendant, she is in a nearer line than the nearest male agnate, provided first that the said nearest male agnate is a descendant,<sup>5</sup> and secondly that there are

<sup>1</sup> Thus (a) the sons get the residue subject to the shares of husband, or wife, father (or true grandfather) and mother (or true grandmother); (b) Sons' sons subject to the said shares, and to that of daughter; (c) Sons' sons' sons and father or grandfather, subject to the said shares, and to that of the sons' daughters; (d) Full brothers subject to the said shares, and to that of uterine brothers or sisters,—but see the case of *Himayya*, s. 623, *III*, (23), (c) Consanguine brothers and all later agnates subject to all these shares and to that of the full sister.

<sup>2</sup> Thus, (a) If there is a daughter *D*, and son's daughter *SD*, the right of either of them to succeed as residuary does not depend on their respective proximity to the deceased, but on the question whether the nearest male agnate

(or customary heir) is in the same line with *D*, or *SD*, or some one else. (b) So with *D* and *SD*, if there were a father, the father would be residuary; (c) and if there were *D*, *SD* with a brother and sister (and no other claimant) then the sister would be residuary.

<sup>3</sup> Cognates (whether male or female) do not inherit as residuaries in any case. They take, either (a) by "return" which can occur when those alone exist who are sharers, [*viz.*, (i) true grandmothers and (ii) uterine brothers and sisters], or, secondly, (b) they (cognates) inherit as distant kindred, see s. 626.

<sup>4</sup> Except in the case provided by s. 621 (4) (b), above.

<sup>5</sup> If the nearest male agnate is other than a descendant, the female descendants may be sharers, but cannot be residuaries.

other female descendants nearer than the claimant who are SECTION 622.  
Quranic sharers.<sup>1</sup>

3. The full (or failing her, the consanguine) sister may be residuary by herself, provided that there is a female descendant and no male agnate as near as, or nearer than, herself.

Hence there are no rules referring to the relative priorities of females as residuaries.

(3) *Distribution of Estate amongst Residuaries.*

623. The residue of the estate (which is left after Residuaries giving to the Quranic sharers their respective shares) take 'per capita' each is divided amongst the nearest<sup>2</sup> residuaries 'per capita' male twice as much as each (and not 'per stirpes')<sup>3</sup> in such proportions that each female.<sup>4</sup>  
male receives twice as large a portion of the residue as that received by each female.<sup>4</sup>

N.B. { The claimant being as stated in the first lines of each illustration. Illustrations.  
tion, the estate will be divided as indicated below:—

- |                                    |                  |               |                 |
|------------------------------------|------------------|---------------|-----------------|
| (1) Two daughters                  | .....joint share | .....         | 2/3             |
| one son's son                      | .....            | { residue 1/3 | { 2/9<br>1/9    |
| one daughter of a son <sup>5</sup> | .....            |               |                 |
| (2) Widow                          | .....share       | .....         | 1/8             |
| son                                | .....            | { residue 7/8 | { 14/24<br>7/24 |
| daughter                           | .....            |               |                 |
| two brothers <sup>6</sup>          | .....excluded.   |               |                 |
| (3) Husband                        | .....share       | .....         | 1/4             |
| two daughters                      | .....joint share | .....         | 2/3             |
| one sister                         | .....residue     | .....         | 1/12            |
| son of father's uncle <sup>7</sup> | .....excluded.   |               |                 |

\* 1 If there are no female descendants in a higher line, she may be (a) residuary with male agnate descendant, in her own line (provided he is the nearest male agnate), or (b) sharer, provided the male agnate is remoter than herself, whether or not he is a descendant.

2 See s. 622, above.

3 "As, e.g., if there is a son of one brother and ten sons of another, or the son of one paternal uncle, and ten sons of another, the property is to be divided into 11 parts of which each takes one part."—Bail. I. 692. Here the customary rule seems to be left unaltered.

4 Bail. I. 687 (par. 2); *Minhaj*, 248, 249. The females take only half as much as the

males, since (i) on the ground of proximity both are alike, (ii) on the ground of old-established rights the male is *potior jure*. Macn., *Proc. Inh.*, cases 37, 86; (1804) 1 S. D. A. (BENG.) 83.

5 Macn., *Proc. Inh.*, case 53, see further instances in first head of the comment to s. 623.

6 (1803) 1 S. D. A. (BENG.) 68 (Macn. Dig. *Inh.* 21).

7 *Meherjan v. Shajadi* (1890) 1 Bom. L.R. 549. The Court with super-abundant caution left undecided what part of the estate the sister took as residuary, but that question admits of no doubt.

## SECTION 623.

## Illustrations.

- (4) Widow ..... share ..... 1/4  
 six full brothers .. } residue { 12/15 of 3/4 = 3/5, i.e., 1/10 each  
 three full sisters<sup>1</sup> .. } residue { 3/15 of 3/4 = 3/20, i.e., 1/20 each.
- (5) Full sister ..... share ..... 1/2  
 uterine brother ..... share ..... 1/6  
 uterine sister ..... share ..... 1/6  
 consanguine brother } residue 1/6 ..... { 1/9  
 consanguine sister .. } residue 1/6 ..... { 1/18.
- (6) Three paternal uncles. residue ..... 1/3  
 three daughters<sup>1</sup> .. joint share ..... 2/3.
- (7) Five grandmothers .. joint share ..... 1/6, i.e., 1/30 each  
 five full sisters ..... joint share ..... 2/3, i.e., 2/15 each  
 one paternal uncle<sup>2</sup> .. residue ..... 1/6.
- (8) Daughter ..... share ..... 1/2  
 six grandmothers .. joint share ..... 1/6, i.e., 1/36 each  
 four daughters of a son joint share ..... 1/6, i.e., 1/24 each  
 paternal uncle<sup>2</sup> .. residue ..... 1/6.
- (9) Four wives ..... joint share ..... 1/4, i.e., 1/16 each  
 three grandmothers .. joint share ..... 1/6, i.e., 1/18 each  
 twelve paternal uncles<sup>2</sup> residue ..... 7/12, i.e., 7/144 each.
- (10) Six grandmothers .. joint share ..... 1/6, i.e., 1/35 each  
 nine daughters ..... joint share ..... 2/3, i.e., 2/27 each  
 fifteen paternal uncles<sup>3</sup> residue ..... 1/6, i.e., 1/90 each.
- (11) Wife<sup>4</sup> ..... share ..... 1/8  
 grandmother ..... share ..... 1/6  
 two daughters ..... joint share ..... 2/3  
 twelve brothers .... } residue 1/24 { .. 24/600, i.e., 2/600 each  
 one full sister ..... } residue 1/24 { .. 1/600.

The estate consisting of 600 dinars, the wife takes 75, the grandmother 100, the two daughters 400, and each brother 2 and the sister 1 dinar.<sup>4</sup>

## "Imtihan"

- (12) Four wives<sup>5</sup> ..... joint share ..... 1/4, i.e., 1/16 each  
 five grandmothers .. joint share ..... 1/6, i.e., 1/30 each  
 seven daughters ..... joint share ..... 2/3, i.e., 2/21 each  
 nine consanguine sisters<sup>5</sup> residue ..... 1/24
- (13) Father ..... share ..... 1/6  
 mother ..... share ..... 1/6

<sup>1</sup> Bail. I. 709.<sup>2</sup> Bail. I. 710.<sup>3</sup> Bail. I. 710.<sup>4</sup> Bail. I. 724: This case is called the *Din-arīq*, from the single dinar taken by thesister: also *Du'udat* from *Da'ud-ut-Taj*, who pronounced the decision<sup>5</sup> Bail. I. 725: This case is called *Imtihan* or examination.

two daughters ..joint share .....2/3 SECTION 623

son's son ..... } residue... { There being no residue these Illustrations.

son's daughter .... } take nothing.

(14) Six grandmothers, six full sisters and nine uterine sisters,<sup>1</sup>—

Here the shares are 1/6, 2/3, and 1/3, i.e., the shares have to abate by the common denominator being "increased" to 7, and the shares ultimately become: grandmother 1/7, full sisters 4/7, and uterine sisters 2/7<sup>1</sup>

(15) Husband,<sup>2</sup> original share 1/2 } Total of { abated share 3/8  
two full sisters ,, ,, 2/3 } or ginal { ,, ,, 4/8  
mother— ,, ,, 1/6 } shares=8/6 { ,, ,, 1/8.

(16) Grandmother<sup>3</sup> original share 1/6 } Total of { abated share 3/7  
full sister ,, ,, 1/2 } original { ,, ,, 1/7  
two uterine sisters ,, ,, 1/3 } shares=7/6 { ,, ,, 3/7.  
consanguine sister ,, ,, 1/6 } ,, ,, 1/7

(17) Husband<sup>3</sup> original share 1/2 } Total of { abated share 3/8  
mother<sup>4</sup> ,, ,, 1/6 } original { ,, ,, 1/8  
two full sisters ,, ,, 2/3 } shares=8/6 { ,, ,, 4/3.

(18) Husband original share 1/2 } Total of { abated share 3/9  
mother ,, ,, 1/6 } original { ,, ,, 1/9  
full sister ,, ,, 1/2 } shares=9/6 { ,, ,, 3/9  
consanguine sister ,, ,, 1/6 } ,, ,, 1/9  
uterine sister ,, ,, 1/6 } ,, ,, 1/9

(19) Husband<sup>5</sup> original share 1/2 } Total of { abated share 8/9<sup>1</sup> Merwaniya,  
two full sisters ,, ,, 2/3 } original { ,, ,, 4/9  
two consanguine sisters, excluded } shares=8/6 { excluded  
two uterine sisters, original share 1/3 } abated share 2/9

(20) The following case is called the "Hamziyah" from Hamza, who 'Hamana,' being questioned regarding it, gave these answers":<sup>6</sup>

Surviving claimants	According to Abu Bakr and Ibn Abbas	According to Ali	According to Zaid
3 grandmothers....	joint share 1/6	joint share 1/6	joint share 1/6
grandfather.....	residue 5/6	residue 1/6	
full sister.....	excluded	share 1/2	} joint share 5/6
consanguine sister....	excluded	share 1/6	
uterine sister.....	excluded	excluded	excluded

<sup>1</sup> (1883) 18, D. A. (BENG.) 63 (Macn. Dig. Inb. 21).

<sup>2</sup> Bail. I. 713

<sup>3</sup> Bail. I. 714.

<sup>4</sup> The mother takes 1/6, and not 1/3 there

being two sisters

<sup>5</sup> Bail. I. 724: this case is called the *Merwaniyah*, having occurred in the time of Merwan

<sup>6</sup> Bail. I. 724, (the *Hamziyah*); Zaid's view

SECTION 623.  
'Mamunia.'

(21) The deceased, X, dies leaving the father, F, the mother, M, and two daughters, D, and DA; and then DA dies. X's estate would first be divided so as to give to the F and M, 1/6 each, and to D and DA, 1/3 each. Then the division of the estate of DA depends upon whether X was a male or a female—viz.,—

(a) if X was a male, his father, F, would be the true grandfather of DA, and would (i) according to Abu Bakr exclude DA's sister, D, from the estate; (ii) according to Zaid, the grandmother would take 1/6 and the residue be divided between the grandfather, F, and the sister, D, in the proportion of 2 : 1

(b) if X was a female, then F would be a false grandfather of DA, and he would be excluded by M and D (viz., by DA's true grandmother and sister, respectively, who would take first 1/6 and 1/2, respectively, and again the 1/3 residue by "return").<sup>1</sup>

'Himarlyah'  
or 'Mashraka.'

(22) If a woman dies leaving her surviving,—husband, mother, uterine brothers, uterine sisters, full brothers and full sisters—the shares being : husband 1/2, mother 1/6, uterine brother and sister 1/3, there is no residue left for the full brothers and sisters, and Abu Bakr and Ibn 'Abbas and the Hanafi authorities apparently hold that the full brothers and sisters take nothing. But Ibn Mas'ud, Zaid ibn Thabit, 'Umar and Sha'b'i hold that the full and uterine brothers and sisters should all participate in the 1/3 of the estate after the husband and mother have taken their shares.<sup>2</sup>

'Kharqa.'

(23) If a person dies leaving his mother and grandfather and a sister, the opinions as to the inheritance of the estate are greatly divided, being as follows—

- |                      |             |                                     |
|----------------------|-------------|-------------------------------------|
| (a) Abu Bakr :       | mother 1/3, | grandfather 2/3 (excluding sister). |
| (b) Zaid :           | mother 1/3, | grandfather 2/9, sister 2/9.        |
| (c) Ali :            | mother 1/3, | sister 1/2, grandfather 1/6.        |
| (d) Ibn 'Abbas (i) : | mother 1/3, | sister 1/2, grandfather 1/6.        |

is expressed in the following somewhat obscure terms: "The grandmothers should have a sixth, the remainder to be divided between the grandfather, the full sisters and the half sister by the father." It is unlikely that such a strange conjunction of heirs should present themselves for the harassment of the Courts of British India.

<sup>1</sup> Bail. I. 725-726. This case is called *Mamunia*, the Khalif Mamun (when he intended to appoint a judge of Baira) having put it to Yahya Ibn Aktum, having a low opinion of him. But Yahya enquired the sex of X, thus showing that he knew the law, and was selected for the appointment. The facts of the case are stated very much more cryptically in the *Fatawa 'Alamiyya*: "This was a case of two parents and two

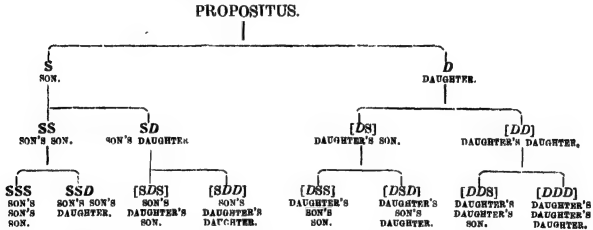
daughters, but one of them died, and left whom she did leave," etc.

<sup>2</sup> Bail. I. 728. *Minkahj*, 260 (Bk. 28.) a. 6. This case is called the *Mashraka* (from participation), or *Himarlyah*, from, *himar*, an ass, because the full brothers in arguing that they should be entitled to succeed with (and not be excluded in favour of) their uterine brothers and sisters, said to 'Umar: "Oh Commander of the Faithful, grant that our father was an ass, still we had one mother." *Minkahj*, 250, Bk. 28, a. 6: "In this particular case, the whole brother participates along with the two uterine brothers or sisters, in the third assigned to them by the Koran; but, if in these circumstances, it is the case of a half brother on the father's side and not a whole brother, the half brother inherits nothing."

- (e) Ibn 'Abbas (ii): mother 1/3, sister 1/3, grandfather 1/3. SECTION 623.  
 (f) 'Umar agreed with Ibn 'Abbas: (d) above.<sup>1</sup>

TABLE OF DESCENDANTS SHOWING RESIDUARIES, SHARERS  
 AND DISTANT KINDRED IN SUNNI LAW.

N.B.— { The sharers and residuaries are indicated by heavy type letters, e.g., S, S. S., SD  
 All the rest (enclosed in [ ]) are "distant kindred"  
 Italic letters are used to refer to females.



Ss. 612, 613, 617 and 618 state the rights of female descendants, SUMMARY of and the sisters, as Quranic sharers. Their rights as (Quranic) residuaries DAUGHTERS RIGHTS are included in the present section.

1. RIGHTS OF DAUGHTERS AND FEMALE AGNATIC DESCENDANTS.

1. Where there are female descendants<sup>2</sup> in the same line as the 1. nearest male agnate or customary heir (and this implies that the customary heir is a descendant), they always become Quranic co-residuaries with him, taking the residue (if any)<sup>3</sup> in such proportions that the males get twice as much as the females;

2. Where there are female descendants<sup>4</sup> who are nearer than 2. the customary heir—which may happen by the customary heir being either (i) a lower descendant, or (ii) an ancestor or (iii) collateral, (there being in cases (ii) and (iii) no male agnatic descendant),—the rights of the female descendants are as follows:—

- (a) The female descendant or descendants<sup>4</sup> in the generation nearest to the deceased<sup>5</sup> becomes or become Quranic

When equal in proximity to customary heir, she is co-residuary with him.  
 When nearer than customary heir, she is sharer—

<sup>1</sup> Ball. I. 724. Owing to the difference of opinions this case is referred to as the *Kharq*, which means unsettled point.

<sup>2</sup> Only agnates are referred to.

<sup>3</sup> There may be no residue, e.g., in s. 623, *W*, (13) and in any of the *W*. 14-18 to s. 623, if

there were any residuary, he would get nothing.

<sup>4</sup> Only agnates are referred to.

<sup>5</sup> I.e., the daughter, or failing her, the daughter of a son, then the daughter of a son's son, and so on.

## SECTION 623.

sharer or sharers (taking  $1/2$  or  $2/3$  of the estate according as there is only one or more than one).

(b) If there are such female descendants in more lines than one—

(i) those in the generation nearest to the deceased take the Quranic share  $1/2$ , if one;  $2/3$ , if more;

(ii) if there is only one in the first grade then she takes  $1/2$ , leaving  $1/6$  to those in the generation next in proximity to the deceased;

(iii) if there is any in a grade intermediate between the grade of those who are entitled to the Quranic share and of the customary heir,—then she becomes Quranic co-heir with the customary heir; provided that the customary heir is a descendant.<sup>1</sup>

The rules may be re-stated in the following terms—

1. The nearest female descendants<sup>2</sup> become Quranic sharers; provided that they are nearer than the customary heir.

2. Those female descendants<sup>3</sup> who are in the same generation as the customary heir, become not sharers, but co-residuary with him.

3. Female descendants<sup>2</sup> intermediate between the two classes above referred to, become co-residuary with the nearest male agnate. provided that he is a descendant.<sup>3</sup>

In which case she becomes co-residuary with a lower male agnate descendant.

*Illustrations.*

These rules will become clear through illustrations:

Thus if P dies leaving—

1. Daughter and son.

1. S<sup>4</sup> and D<sup>5</sup>—

S is the customary heir, and D, (being in the same line as S) will be (Quranic heir, or) residuary with S, D taking  $1/3$  and S  $2/3$ .

2. Daughter and son's son.

2. If there are D and SS,<sup>4</sup>—

D is nearer than SS, the customary heir, and will consequently take  $1/2$  as Quranic sharer, leaving  $1/2$  to SS.

3. Daughter, son's son and son's daughter

3. If there are D, SS and SD,<sup>5</sup>—

D will take  $1/2$ , and SS and SD will take the other half in the proportion of a double share to a male and a single share to a female; i.e., SS will take  $1/3$ , and SD,  $1/6$ .

<sup>1</sup> It is only the nearest male agnate (or customary heir) who is a descendant, that her intermediate position becomes clear. If, e.g., there are two daughters, D and Da, with SD, and SSs, then D and Da take their  $2/3$  and SSs takes the residue, making SD (who is clearly nearer than himself, and ought to inherit as much as he) co-residuary with himself. But if instead of SSs there were F, a father, or even B, a brother, the intermediate position of

SD is lost sight of, and she does not inherit.

<sup>2</sup> Only agnates are referred to.

<sup>3</sup> Ball. I. 687.

<sup>4</sup> S stands for "son" or "son's": thus, S S means son's son.

<sup>5</sup> D stand for "daughter" or "daughter's" e.g., DD means daughter's daughter, Ds daughter's son, DDSS daughter's daughter's son's son.



4. If there are SS and two daughters, *D* and *DA* with *SD*,— SECTION 623  
*D* and *DA* will take 2/3 between them (1/3 each) leaving 1/3 to be divided by SS and *SD* (i.e., SS will take 2/9 and *SD* 1/9).
5. If there are *D*, *SD* and SSS,—  
*D* takes 1/2 as Quranic sharer, leaving 1/6 as the Quranic share to *SD*, and the residue of 1/3 to SSS.
6. If with *D*, *SD* and SSS there are other daughters of a son's son viz., SSD, SSDA, SSDB, then *D* and *SD* will take 2/3 between them (i.e., *D* 1/2 and *SD* 1/6) and the residual 1/3 will be divided amongst SSS, SSD, SSDA and SSDB; SSS taking 2/15, the other three 1/15 each.
7. If there are *D*, *SD*, SSD, SSSS, and SSSD, then,—  
the last becomes Quranic co-heir with SSSS, and takes the residue with him, *D* and *SD* take their Quranic shares aggregating to 2/3; but there is no Quranic share for SSD in the third generation, though SSSD in the fourth generation succeeds as residuary (Quranic co-heir): To remedy the exclusion of SSSD, she is made Quranic residuary (co-heir) with SSSS who is not in the same line, but in a lower grade than herself.
8. In the same manner if there were two daughters, *D* and *DA* with *SD*, SSD, SSSS, SSSD, then,—  
*D* and *DA* take the 2/3, SSSS is the customary heir with whom not only SSSD (who is in the same grade as himself) but also *SD* and SSD in the higher grade, become residuaries or Quranic heirs.

4. Two daughters, son's son and son's daughter.  
5. Daughter, son's daughter, son's son's son.  
6. The same with son's son's daughter.  
7. Daughter, son's daughter, son's son's daughter, son's son's son's son and his sister.  
8. Two daughters, and the same.  
Intermediate female descendants become co-residuaries with lower male agnates.

A learned author draws attention to the rule illustrated by the last two cases mentioned above, referring to it as anomalous, and suggesting enquiry whether it really represents the deliberate intention of the Hanafi lawyers, being, according to him, the solitary exception to the rule that amongst claimants of the same description, the nearer excludes the more remote.<sup>1</sup> He then says that though a male in a lower generation may succeed with a female in a higher, but that the case of "females in different generations being equalised with each other, merely because they are all potentially equalised with a male in a still lower degree, is a different matter." This criticism is based on the assumption of there being only one principle governing these rights, viz., that the nearer claimants of the same description (viz., Quranic sharers) exclude the remoter,—but in reality there seems to be another, perhaps even more important, principle, based on a consideration of the fact that the proximity which the claimants bear to the deceased, is greater than that borne by the customary heir. In other words, the customary heir (or the

<sup>1</sup> Wilson "Anglo-Muhammedan Law," 268.

**SECTION 623.** nearest male agnate) being recognised as having the right to inherit, it is provided that those who are nearer than the customary heir should inherit a portion: on this principle *all* those female descendants who are nearer than the customary heir ought to inherit, notwithstanding that some of them may be nearer than others. It is only on this last principle that when a daughter, mother and sister co-exist with a brother or remoter male agnate, all the three females are entitled to succeed although the daughter is nearer than the mother,<sup>1</sup> and they are both nearer than the sister. An exception to the principle so stated may, no doubt, be found in the case of the mother and true grandmother, only the nearest of whom can be the sharer, and the remoter does not participate in the estate in any form. The case must, however, be extremely rare when a deceased person dies leaving him surviving such a combination of ancestors as would require a comparison of their relative priorities, and it is not to such unusual cases that we must turn for discovering the principles of the law. In the case of the female descendants, the law is most frequently called into operation, and is most likely to be developed in accordance with principles.

Anomaly of excluding females who are nearer than the customary heir.

These remarks are, however, not made so much to minimize the interest attaching to the criticism above referred to, but rather to show the ground on which the existing law is based, and the analogy it bears to other rules, though the analogy may not have been strictly followed in every case. However that be, when the whole scheme of the Quranic law is considered—which is to provide for those who were excluded by the customary law owing to an extremely crude notion of kinship—the anomaly seems to lie not in that portion of the interpretation of the Quran which provides that female descendants who are nearer than the nearest male agnate should succeed with him, but in the absence of such a provision in the case of female ancestors and collaterals, and in the restriction of this principle (even in the case of female descendants) to cases where the nearest male agnate is also a descendant. In these regards the Shiah authorities have taken a different view.

Explanation suggested.

The explanation of the restriction last referred to seems to be, that though when the claimant and the customary heir are both descendants, the greater or lesser relative proximity of each to the deceased can be perceived immediately, yet it is no longer easy to say that a female descendant is nearer than an ancestor; and if the relative proximity of a female descendant and an ancestor is subject to doubt, the same doubt

<sup>1</sup> Subject, of course, to Quran, IV. 12, cited in comment to s. 604, above.

seems to be present when a female descendant has to compete with SECTION 623. a collateral for whom a share has been ordained in the Quran.<sup>1</sup>

## 2. SUMMARY OF FULL SISTER'S RIGHTS.

Where the nearest male agnate is nearer than the sister (i.e., where FULL SISTERS, the male agnate is a descendant or collateral) it need hardly be repeated that the (full) sister cannot succeed.<sup>2</sup> She can succeed only if there is no male agnate nearer than the (full) brother.

1. When the nearest male agnate is a brother, the sister becomes 1. As co-residuary with brother. As sharers

2. When he is remoter than the brother, then the sisters become 2 entitled to succeed as sharers, provided that there are no daughters or other female agnatic descendants who have a prior claim to take the share allotted for the nearer female agnates,<sup>3</sup> so that the sister cannot claim the Quranic share if the daughter is present<sup>4</sup>; but -

3. the sister (even in the absence of a brother) becomes residuary 3. As residuary without brother, (when there is any daughter or son's daughter). Priorities between full and consanguine sisters for Quranic shares.

4. As regards the Quranic share taken by the sisters (when the customary heir is remoter than a brother, and there are no female descendants) there are priorities similar to those amongst the female descendants. The full sister, if there is only one, takes her 1/2 share, and 4. leaves 1/6 to the consanguine sister, whereas the uterine sister takes her share with the full sister as well as with the consanguine sister.<sup>5</sup>

## 3. SUMMARY OF THE CONSANGUINE SISTER'S RIGHTS.

1. The consanguine sister takes no part of the estate if the customary heir (or nearest male agnate) is nearer than herself, i.e., is a descendant or ascendant or a full brother, or if the full sister or sisters are residuaries by themselves, see ss. 621, 622.

2. The consanguine sister becomes Quranic co-residuary when the consanguine brother is the nearest agnate, and when he is not 2. excluded from the residue by the full sister in the manner above referred to.

### CONSANGUINE SISTER'S RIGHTS.

1. Excluded if nearest male agnate nearer than herself. As residuary.

<sup>1</sup> Cf. Quran, IV. 12, penultimate sentence, cited in comment to s. 604, above; the extensive rights of the ancestors; both male and female, show that the old simple priorities (of descendants over ascendants) can no more be a guiding principle. It might be argued that this applies as between descendants and ascendants alone, and that where there is competition between a descendant and a collateral, the greater proximity of des-

cendant is not doubtful; but the old system of reckoning proximity was assumed, it seems, to have been altogether discarded.

<sup>2</sup> See s. 604 (f) above.

<sup>3</sup> When collaterals succeed, the husband or wife, daughter, and mother, are all entitled to take shares if any of them exists.

<sup>4</sup> I.e., such as are nearer than the customary heir.

<sup>5</sup> See ss. 2, 3, above.

## SECTION 623.

3. When the customary heir is remoter than the consanguine brother and the consanguine sister.--

(a) They become Quranic sharers provided that there is no female descendant nor full sister, and--

(i) a single consanguine sister takes 1/2 of the estate, or

(ii) two or more consanguine sisters take 2/3 of the estate in equal shares.

(b) If there is no female descendant and there is one full sister-- the consanguine sisters become Quranic sharers, and--

(i) the full sister takes 1/2 as sharer, and

(ii) the consanguine sister or sisters take 1/6 of the estate as Quranic sharers, and if there are two or more of them they divide it equally amongst themselves.

(c) If there are female descendants but no full sisters, the consanguine sisters become (Quranic) residuaries by themselves, in which case they take the residue excluding the sons of full brothers, and all remoter agnates (who would have been customary heirs) from any participation in the estate.<sup>1</sup>

*Special Rules applying to Grandfather co-existing with Brothers or Sisters.*

Grandfather co-existing with brothers or sisters may elect.

**624.** According to the Shafi'i and Maliki<sup>2</sup> schools of Sunni law,<sup>3</sup> where the true grandfather co-exists, with one or more full or consanguine sisters<sup>4</sup> or brothers, the grandfather does not exclude the agnatic<sup>5</sup> sisters or brothers from inheritance, but he may elect any one out of the following four options, viz.--

(1) to take 1/6 of the estate as Quranic sharer (leaving the residue to the sisters and brothers); or

1. To be pure sharer.

<sup>1</sup> *Siraj*, 21. Macn. Prec. Inh., 73; *Amern* v. *Ruheemus* (1897) 2 Agra, 362.

<sup>2</sup> *Minhaj*; 252, (Bk. 28 s. 8). Abu Yusuf's and Imam Muhammad's view of Hanafi law seems to be to the same effect as provided in s. 624, but Abu Hanifa's view prevails-- according to which the grandfather excludes brothers and sisters.

<sup>3</sup> See comment.

<sup>4</sup> The sister is excluded by the grandfather unless she co-exists with a brother, except in the case referred to in s. 624 (4) (the *Aqdaria*) which is prefaced by the author of the *Siraj* with the following words: "Know that Zaid the son of Thabit (on whom be God's grace) has not placed the sister full or consan-

guine as entitled to a share (*farz*) with the grandfather except in the case named *Aqdaria*," viz. ill. 8 to s. 624.

<sup>5</sup> *I.e.*, the full or consanguine sisters or brothers. On the other hand the uterine sisters or brothers, who can be only sharers, are always excluded from their share by the grandfather, "according to Abu Hanifa" (Ball. I. 689, l. 13)--which would imply that the other authorities take a different view. The *Fatawa Alamgiri* gives only Abu Hanifa's view, except that the *Aqdaria* case is stated and explained. It is stated, however, in the *Siraj*: "The mother's children are excluded by the grandfather, as all the learned agree."

(2) to take  $\frac{1}{3}$  of the residue (leaving  $\frac{2}{3}$  of the residue to the sisters and brothers); or

(3) to participate in the residue with the brothers and sisters. Such participation is called 'muqasimat' or division, and is given effect to in the following manner—

(a) the estate is, in the first instance, notionally apportioned amongst the grandfather and the brothers and sisters (full as well as consanguine)<sup>1</sup> so that each male is allotted twice as large a share as each female;

(b) then of the portions so allotted—

(i) the grandfather takes the portion allotted to himself, but—

(ii) the portions allotted to the brothers and sisters are consolidated, and re-divided amongst the full brothers and sisters alone, to the exclusion of the consanguine brothers and sisters,<sup>1</sup> provided that—

(iii) if in such a case there is only one full sister with one or more consanguine brothers and sisters, but no full brother, and the shares so consolidated amount to more than  $\frac{1}{2}$  of the estate,<sup>2</sup> then the full sister takes only  $\frac{1}{2}$  of the estate, and the consanguine sisters and brothers take the excess over the  $\frac{1}{2}$ , dividing it amongst themselves in such proportions that each male gets twice as much as each female.<sup>3</sup>

(4) Where there co-exists with the grandfather only one sister,<sup>4</sup> (and neither a brother<sup>5</sup> nor a daughter, nor

2. To take  $\frac{1}{3}$  of real line.

To participate in residue with brothers and sisters in which case—

(a) First allotment as between the grandfather and the collaterals

(b) Then the collaterals distribute amongst themselves (with due priorities).

<sup>1</sup> It being considered that the brothers (consanguine as well as full) are not excluded by the grandfather, the consanguine brothers inherit as against the grandfather, though not as against the full brothers.

<sup>2</sup> One half of the estate is the full Quranic share of the full sister.

<sup>3</sup> *Nirajan*, Jones, VIII. 238-239. This provision follows the analogy of the consanguine sister getting  $\frac{1}{6}$  of the estate as sharer where there is only one full sister. See s. 617 (1), (c).

<sup>4</sup> Either full or consanguine.

<sup>5</sup> Full, if the sister is full: consanguine, if she is consanguine.

To participate in Quranic share of single sister. ('Aqda-riya')

SECTION 624. other female agnatic descendant, is surviving),<sup>1</sup>—the grandfather has another option, viz., of having  $\frac{1}{6}$  share allotted to himself, and  $\frac{1}{2}$  to the sister, and having the two shares consolidated (forming together  $\frac{2}{3}$  of the estate), and then participating in the said consolidated portion with the sister in the proportion of  $\frac{2}{3}$  to himself and  $\frac{1}{3}$  to the sister.<sup>2</sup>

#### Illustrations

The following illustrations are all taken from the chapter in the *Sirajia*, entitled "Division of the Paternal Grandfather."

A connecting bracket implies that the shares are to be either consolidated for the purposes of the final division, or taken jointly by the persons referred to.

CLAIMANTS,	SHARES—	
	in preliminary division :	in final division :
surviving the deceased :		
(1) Full brother ..... residue $\frac{1}{3}$ }	$\frac{1}{3}$ }	$\frac{2}{3}$
Consanguine brother.. ..	$\frac{1}{3}$ }	<i>nil</i>
Father's father .....	$\frac{1}{3}$ }	$\frac{1}{3}$
(2) Full sister .....	$\frac{1}{6}$ }	$\frac{1}{2}$ .. $\frac{1}{2}$
Consanguine sister....	$\frac{1}{6}$ }	$\frac{1}{10}$ .. { $\frac{1}{20}$
Second consanguine		
sister .....	$\frac{1}{6}$ }	
Father's father .....	$\frac{2}{10}$ }	$\frac{2}{5}$
(3) Full sister .....	$\frac{1}{4}$ }	$\frac{1}{2}$
Consanguine sister ..	$\frac{1}{4}$ }	<i>nil</i>
Father's father .....	$\frac{1}{2}$ }	$\frac{1}{2}$
(4) Husband..... share $\frac{1}{2}$ }	$\frac{1}{2}$ }	$\frac{1}{2}$
Brother .....	residue $\frac{1}{2}$ }	$\frac{1}{4}$
Father's father ..		$\frac{1}{4}$
(5) Brother .....	$\frac{2}{3}$ of $\frac{5}{6} = \frac{5}{9}$ }	$\frac{2}{9}$
Second brother... ..		$\frac{2}{9}$
Sister .....		$\frac{1}{9}$
Father's father .....	$\frac{1}{3}$ of $\frac{5}{6} = \frac{5}{18}$ }	$\frac{5}{18}$
Father's mother..... share $\frac{1}{6}$ }	$\frac{1}{6}$ }	$\frac{1}{6}$
(6) Brother .....	residue $\frac{1}{6}$ }	$\frac{1}{12}$
Second Brother.. ..		$\frac{1}{12}$
Father's father .....	$\frac{1}{6}$ }	$\frac{1}{6}$

<sup>1</sup> The sister may be a residuary (but not a share) if a brother or a female descendant co-exists with her.

<sup>2</sup> This course is a species of *mugamat*, and

is beneficial to the true grandfather only in the case given as *ill.* (8) to this section—which is termed, *Aqdariya*, as it occurred on the death of a woman belonging to the tribe of *Aqdur*.

Father's mother . . . .		share	1/6			1/6	SECTION 624.
Daughter <sup>1</sup> . . . . .		"	1/2			1/2.	
(7)	Husband . . . . .	"	1/4=3/12	} reduced to	"increase" to	3/13	
	Mother . . . . .	"	1/6=2/12			2/13	
	Daughter . . . . .	"	1/2=6/12			6/13	
Full or consanguine sister . . . . .		residue	nil			nil	
Father's father . . . .		share	1/6=2/12	reduced to		2/13.	
(8)	Husband <sup>2</sup> . . . . .	"	1/2=6/12	} reduced by "consanguinity" to	{	3/13	updates
	Mother . . . . .	"	1/6=2/12			2/13	
	Full or consanguine sister . . . . .	"	1/2=6/12			3/13	
Father's father . . . .		"	1/6			4/27	

This section exemplifies the difficulty about adjusting the relative priority in priorities between collaterals and ancestors remoter than the father, adjusting rights of collaterals and The law of succession is not the only subject where this difficulty arises, 3 ancestors.

The main principle underlying this section is that the grandfather Principle of s. 624 does not exclude the brother (and sister), but they share simultaneously. This view does not prevail under the Hanafi school of Sunni law, though it was adopted by the two disciples of Abu Hanifa against his view, and against the view of Abu Bakr, the first Khalif. The simultaneous succession by the grandfather and brothers prevails also in the Shiah system and is based on the Quran, IV., 12, and on the analogy of the rule by which F, the father of the propositus, succeeds simultaneously with S, the son of the propositus. Now F is the grandfather of S. Similarly, it is held (by all except Abu Hanifa and Abu Bakr,) that FF (the grand-

1 Here the father's mother and the daughter being necessarily only sharers, the residue is 1/2, and if the grandfather chose to be residuary he would take 1/3 of 1/3 (i.e., 1/9) having also the two brothers as residuaries; by electing to be Quanic sharer he can get 1/6.

2 This case is called the *Aqdariya* case n. to s. 624 (4), above. It is very special (a) were there no husband, then the residue would be 2/3 and it would be more beneficial to the grandfather to elect the option in s. 624 (3), i.e., to take 2/3 of the residue (which would give him 1/9), (b) again "if instead of the sister there be a brother or two sisters, there is no increase, nor is that case an *Aqdariya*," *Saraj*, (VIII, 240) for (i) if there be a brother (instead of, or with, a sister) he would be a residuary, and the husband and mother having taken 1/2 and 1/3 respectively would leave only 1/6 as residue, so it would be better for the grandfather to claim such 1/6 in his own right as sharer, than to participate in the residual 1/6 with the brother. But if (ii) there are two sisters (instead

of one) they are entitled to a share of 2/3 so that by "increase," the common denominator, of each share would have to be raised to from 6 to 9 and the collective share (by *mugassamat*) of the grandfather and sisters would be 4/9, 1/9=5/9 of which the grandfather would take a moiety, i.e., 5/18 of the estate, and this would be better for him than any of the other alternatives. [Note that the presence of two sisters reduced the mother's claim from 1/3 to 1/6] The *Sinjia* (*abi-yarpan*) however excludes the applicability of the *Aqdariya* ruling when there are more sisters than one.

3 Cf. e.g., ss. 321-326, above. The Quran IV. 12 disturbed the absolute priority of descendant over ancestors cited in comment to s. 604, above. The bearing of that verse on the priority between the brothers and grandfather of the deceased arises in this way, that the grandfather of the deceased bears the same relation to the brother of the deceased, as the father of the deceased bears to the son of the deceased. See the comment to s. 621, above.

SECTION 624. father of the propositus) succeeds with his own grandson, B, (the brother of the propositus,)—FF being the grandfather of B, just as F is the grandfather of S. Sir W. Jones remarks that the chapter of the 'Sirajia' dealing with this view "will be useful to us if this question should arise in a family of Shiahs who follow, no doubt, the opinions of Ali and Zaid." This remark, according to Sir R. Wilson, "merely shows that Sir William had not given much attention to the Shiah law, which regulates on a wholly different and much broader principle the competition between ancestors and collaterals." ("Anglo-Muhammadian Law," 271). It is submitted, however, that Sir William's conjecture shows much insight: "The wholly different principle" to which Sir Roland refers is merely the acceptance and application of the view that grandparents do not exclude, but share simultaneously with, brothers and sisters and their children, (that the sister is in the same position as the brother is in accordance with the general Shiah law). The 'Sirajia' is, however, not recognised by the Shiahs as having any authority.

### § 6.—Return : Residue taken by Sharers.

625. Where no person can establish his or her claim to succeed as residuary,<sup>1</sup> the residue is divided amongst such blood relations<sup>2</sup> of the deceased as are entitled to be (Quranic) sharers, in the proportion of their respective (Quranic) shares.<sup>3</sup> The right of the sharers so to take the residue (in the absence of the residuaries) is referred to as the right to take by "return."<sup>4</sup>

In absence of residuaries the residuum "returns" to sharers other than husband or wife.

Illustrations.

N.B.—The claimants being those whose names are given in the first instance below, the estate will be divided as stated in each case—

<sup>1</sup> Since the remotest male agnate is competent to succeed as residuary, it can never happen that there should exist no person entitled to succeed as such; but he may be too remote to be known, or to be able to establish his claim.

<sup>2</sup> Hence the husband or wife do not take by return under s. 625 (but see s. 633, below): *Gujadhar Pershad v. (Shakh) Abdoolah* (1869) 11 W.R. 220; (*Sheik*) *Musseeoolah v. (Mie samut Beebe)* *Sherifun* (1864) 1 W. R. 122, (widow not entitled to return); (*Moonshie*) *Mahomed Noor Bukhsh v. (Moulw)* *Mahomed Hameedool Huq* (1866) 5 W.R. 23; *Koonari Bibi v. Dalim Bibi* (1884) 11 Cal. 14.

<sup>3</sup> The Quranic sharers are given precedence over the "distant kindred" as to the residue for this reason that the title of the

latter is based on the general statements in the Quran (IV. 36, VIII. 76, IV. 36, XXXIII. 6) that blood relation of any degree gives a right to succession, whereas the sharers (*viz.*, such as are blood relations) are included not only in the said general statements, but are also specifically mentioned in the Quran; the husband or wife, not being blood relations, cannot come within the general statements, but they succeed under this head (if at all) on an analogical extension from those statements—hence they are postponed to all. This is the Sunni interpretation of the Quran: The Shiahs interpret it so as to place cognates and agnates on the same footing as regards priority. See ss. 638-640, below.

<sup>4</sup> The return (in Arabic, *rad*) is the converse of the "increase." See s. 610 (1) above.



(1) Husband, 3 daughters.—Original shares,  $1/4$ ,  $2/3$ . The residual SECTION 625  $1/12$  returns to the daughters alone, and they take  $3/4$  ultimately, *i.e.*, *illustrations*  $1/4$  each.<sup>1</sup>

(2) Wife, grandmother, 2 uterine sisters.—Original shares  $1/4$ ,  $1/6$ ,  $1/3$ . The residual  $3/12$  returns to the grandmother, and the uterine sisters,—each take  $3/12$  of it, *i.e.*, ultimately the wife gets  $1/4$ , the grandmother  $1/4$ , and the two sisters jointly  $1/2$ .

(3) 4 wives, 9 daughters, 6 grandmothers.—Original shares  $1/8$ ,  $2/3$   $1/6$ . Return of residue,  $1/24$ , to daughters and grandmothers. Ultimate shares: wives  $5/40$ , daughters  $28/40$ , grandmothers  $7/40$ .<sup>2</sup>

(4) Grandmother, uterine sister.—Each takes  $1/6$  as share, and the residual  $2/3$  returns to them in equal shares, *i.e.*, they take  $1/3$  more each, or each takes  $1/2$  of the estate.<sup>3</sup>

(5) Grandmother, 2 uterine sisters.—The shares are  $1/6$  and  $1/3$ , respectively, and the residual  $1/2$  returns to them, so that the grandmother gets another  $1/6$  and the 2 sisters another  $1/3$ .<sup>3</sup>

(6) Daughter, mother.—The original shares are  $1/2$  and  $1/6$ , respectively, the residual  $1/3$  returns to them, and they ultimately get  $3/4$  and  $1/4$ , respectively.<sup>3</sup>

(7) Mother, 4 daughters.—They take originally  $1/6$  and  $2/3$ ; ultimately, including the return,  $1/5$  and  $4/5$ , respectively.<sup>4</sup>

(8) Mother, daughter, wife.—The original shares are  $1/6$ ,  $1/2$ ,  $1/8$ . The residual  $3/24$  returns to the mother and daughter in the proportion of  $1/6$  and  $1/2$ , *i.e.*, of the residue the mother takes  $5/96$ , and the daughter  $15/96$ ; ultimately the wife will have  $1/8$ , and the residual  $7/8$  is divided in the proportion of  $1/6$ ,  $1/2$  (or  $1:3$ ) between the mother and daughter.

#### 1. EFFECT OF THE RULES AS TO RETURN.

1. When there is no male agnate (customary heir) *and*

2. the two following are not co-existing <sup>5</sup> *viz.*—

(a) daughter or other female agnatic descendant, *and*

(b) full or consanguine sisters <sup>5</sup>—

then the estate is divided amongst,<sup>3</sup>

mother (or true grand- mother),	} and {	(i) the daughter, or the other	} together {	
		(ii) nearest female agnatic descendant, or the		uterine sister with the } or brother,
		(iii) full sister, or the		
		(iv) consanguine sister		

Effect of  
return :

1. Mother or  
true grand-  
mother  
shares  
with  
2. daughters  
or sisters.

<sup>1</sup> Bail. I. 716; cf. *Hakim Khan v. Fata Bibi* 1895) 21 Bom. 118.

<sup>2</sup> Bail. I. 717.

<sup>3</sup> Bail. I. 716;

<sup>4</sup> Bail. I. 716.

<sup>5</sup> If they co-exist, the sister becomes residuary;

SECTION 625. in other words, (1) the mother (*or* grandmother) *and* (2) the daughter (*or* son's daughter) *or* the sister take the residue on failure of male agnates.

Husband, wife,  
father, grand-  
father,

This, it will be seen, includes all the 12 sharers except the (1) husband, (2) wife, (3) father and (4) grandfather. The husband and wife are excluded from the return, as they are not blood relations, and father and grandfather do not take the return because they are competent to be residuaries, and when either of them exists there is no "return."

How sharers  
and residuaries  
may succeed.

This brings to a close the rules relating to the first alternative mode of succession: *viz.*, succession by the sharers and residuaries. The sharers and residuaries may succeed—

1. Sharers  
and resi-  
duaries *or*

(1) jointly *or*

2. Sharers  
alone *or*

(2) only the sharers may succeed, either

(a) because the shares exhaust the estate, *or*

(b) because there are no residuaries, and they take by return, *or*

3. Residuaries  
alone.

(3) only the residuaries may succeed, because there are no sharers :

the existence of some relations who are themselves only residuaries, prevents other relations from being sharers, either excluding them altogether (if they are remoter), or rendering them co-residuaries with themselves, if they are in the same line.

#### 2. ALTERNATIVE GROUPS OF HEIRS SUCCEEDING SIMULTANEOUSLY.

SUMMARY

The whole of the law of inheritance, so far stated, may be summarised as follows: --

Groups in  
which heirs  
arranged if  
there are any  
sharers *or*  
residuaries

A. The husband takes  $1/4$ , or the wife  $1/8$ , of the estate if there are agnatic descendants, and twice as much if there are none, and the nearest male agnate takes the residue (if any) unless otherwise stated below :

I. Male agnatic  
descendants  
succeed  
with female  
agnatic  
descendants  
in the same  
and higher  
lines.

B. Subject to the husband's or wife's rights—

1. If the nearest male agnate (or the customary heir) is a descendant,--

(1) The nearest female agnatic descendant (provided she is nearer than the customary heir) takes  $1/2$  ; or if there are more than one, they take  $2/3$ ,

(2) female agnatic descendants in the same line as the nearest male agnate take the residue with him in the proportion of 1 to 2,

(3) the intermediate female agnatic descendants (*i.e.*, those who are between the nearest female descendants and the customary heir) for whom no portion of the  $2/3$  Quranic share is left, take the residue of the estate with the customary heir,

(4) the father and mother take  $1/6$  each as Quranic sharers ; in

their absence true grandfathers and true grandmothers take SECTION 625.  
1/6, respectively.

Father and  
mother.

- II. If the nearest male agnate is an ascendant (*i.e.*, there is no male agnatic descendant,) -

II. Male agnatic  
ascendants  
with female  
descendants  
and ascen-  
dants.

- (1.) the female agnatic descendants take 1/2 if one, and 2/3 if more than one ;
- (2.) the mother takes 1/6 or 1/3 of the estate or of the residue;<sup>1</sup> failing the mother, the true grandmother takes 1/6 of the estate;

- III. If the nearest male agnate is a collateral (*i.e.*, if there is no male agnatic descendant or ascendant).

III. Male agnatic  
collaterals  
with female  
agnatic des-  
cendants  
and ascen-  
dants and  
sisters

- (1.) female agnatic descendants take 1/2 if one, and 2/3 if more than one ;
- (2.) the mother takes 1/6 or 1/3 of the estate, and failing the mother, the grandmother takes 1/6 of the estate;
- (3.) the sister—
  - (a) becomes co-residuary with the brother if he is the nearest male agnate ;

Unless the  
male collateral  
is excluded by  
the sister.

- (b) in the absence of the brother,—
  - (i) if there is any female descendant, the sister becomes by herself the sole residuary, ousting a remoter male agnate (who would have been the customary heir), -
  - (ii) if there are no female descendants, one sister takes 1/2 of the estate, and more than one take 2/3

- IV. In the absence of male agnates the estate is inherited by the sharers in the manner referred to at the beginning of the comment to this section, and failing them, -

Failing male  
agnates return  
to sharers.

- V. By the distant kindred as explained in ss 626-632, below.

" Distant kin-  
dred "

## § 7.—Distant Kindred: Third Class of Heirs.

### (1) Persons who are classed as Distant Kindred.

626. The nearest<sup>2</sup> of the distant kindred<sup>3</sup> succeed to the whole of the estate in the absence of such sharers and residuaries<sup>4</sup> as are blood relations.<sup>5</sup>

Distant  
kindred  
succeed in  
absence of  
sharers and  
residuaries.

<sup>1</sup> See s. 615, above.

<sup>2</sup> For the relative proximities amongst distant kindred, see s. 627.

<sup>4</sup> For definition see comment.

<sup>5</sup> Bail. L. 705.

<sup>3</sup> *I.e.*, they succeed *with* the husband or wife, taking what is left over, after the husband or wife has taken his or her share.—But the term "residuary" is never applied to the "distant kindred."

**SECTION 626.**  
 "Distant  
 kindred,"

These blood relations who are not competent to be either sharers<sup>1</sup> or residuaries are called "distant kindred," or 'zavil-arham.'<sup>2</sup> They bear a relation to the deceased which is not necessarily distant, unless it is accepted that all cognates are remoter than the remotest agnate. The distant kindred, it will be seen, include—

1. All cognates except (i) such as are true grandmothers (ii) uterine sisters and brothers.

II. Female agnates remoter than the sisters :<sup>3</sup>

They may be classified in detail as follows :<sup>4</sup>

1. of the descendants, all cognates, and no others,<sup>5</sup>
2. of the ascendants, all false grandfathers, i.e. all male ascendants who are cognates, and all false grandmothers,<sup>6</sup>
3. of the collaterals,—
  - (a) all cognates except the uterine brother and sister,
  - (b) all female agnates except the sisters

As to the place of the distant kindred in the table of priorities, see s. 610 (4), and the comment to s. 625, above.

(2) *Priorities amongst the Distant Kindred.*

Priority amongst  
 distant kindred :  
 1. Descendants,  
 2. Ascendants,  
 3. Collaterals.

**627.** (1) Amongst distant kindred, descendants are preferred to both ascendants and collaterals, and ascendants are preferred to collaterals. Amongst descendants and ascendants respectively (subject to the rules given below) the one who is related to the deceased through the fewest degrees is preferred.

(2) Amongst descendants in the same generation, the

Amongst  
 descendants  
 child of sharer  
 or residuary  
 preferred to  
 others.

<sup>1</sup> See s. 605, clause (13A), above.

<sup>2</sup> I.e., possessors of relationship. *Arham* is the plural of *rahm* which means "womb," and represents blood relationship. Cf. "The bonds of kinship are expressed alike in Arabic and Hebrew by the words *rehem*, *rahim*, the womb; Amos I. 11 . . . does not mean 'he cast off all pity,' but 'he burst the bonds of kinship'."—Smith, "Kinship and Marriage," 32. The distant kindred consist of cognates and females. See comment. The remotest relations inherit under this head, e.g., the son of the granddaughter of the brother of the grandfather; *Abdul Serang v. Putee Bibi* (1902) 29 Cal 738.

<sup>3</sup> The Quranic provisions in favour of the collaterals are interpreted by the Sunnis as

being restricted to the persons named, i.e., the full, consanguine, and uterine sisters, and the uterine brothers; the Shiah on the other hand, interpret those provisions as single instances representing general principles, and give similar rights to nieces, and remoter female agnates and uterine relations.

<sup>4</sup> Bail. I. 705.

<sup>5</sup> E.g., (taking D=daughter, S=son) the following are distant kindred amongst descendants DS, DD, DSS, DSSS, SDS, SSSS, SSDD, etc.

<sup>6</sup> I.e., the distant kindred amongst the ascendants, are all cognate grandparents except (a) MM, or MMH or MMMH and (b) FM, or FFM, or FFM, FMH, or FMMH FMMH, FFFMMH, etc.

children of female <sup>1</sup> agnates <sup>2</sup> are preferred to the children of cognates.<sup>3</sup> Section 627.

(3) Amongst ascendants in the same generation, the parents of true grandmothers <sup>4</sup> are, according to the 'Sirajia,' preferred to the parents of false grandparents; but according to the 'Fatawa 'Alamgiri' there is no such preference.<sup>5</sup> Parents of true grand-parent preferred to parents of false grandparents

(4) Amongst collaterals, subject to sub-sections (5), and, (7), below,<sup>6</sup> the priorities are as follows Collateral-general rules.

(a) the descendants of a nearer common ancestor is preferred to the descendant of a remoter common ancestor :

(b) amongst the descendants of the same, or of equally distant common ancestors, the one who is nearer to the common ancestor is preferred to one who is remoter, whether both of them are paternal or maternal relations of the deceased, or one is paternal, and the other maternal.

(5) Where the claimants are the descendants of full or consanguine brothers or sisters, subject to sub-section (4) above, the priorities are as follows— Descendants of full or consanguine brothers and sisters

(a) where two or more are in the same generation, the descendant of the full brother or sister is preferred to the descendant of the consanguine brother or sister,

<sup>1</sup> The children of male agnates would of course be themselves agnates, and would be either sharers or residuaries.

<sup>2</sup> Bail. I. 705-707. Cf. s. 622, and s. 61, above.

<sup>3</sup> Agnates are throughout preferred by Sunni law to cognates. Female agnates being Quranic sharers or residuaries, there is additional reason for this preference. *E.g.*, *SDD* would be preferred to *DDS*. Bail. I. 706 words the rule contained in s. 627 (2) as follows:— "When there is an equality in degree, i.e. in proximity to the deceased, the child of an heir, whether sharer or residuary, is preferred."

<sup>4</sup> The parents of true grandfathers are themselves true grandparents, and as such sharers.

<sup>5</sup> *Fatawa 'Alamgiri*, *Faraiz*, Ch VII, where

the point is thus illustrated: *MJF* (mother's mother's father), and *MFF* (mother's father's father) will (according to the *'Sirajia'*) both succeed. According to the *Sirajia*, *MFF* (being the father of *MJF*, a true grandmother) will have preference over *MFF*, (the father of a false grandfather).

<sup>6</sup> Of course, only those are contemplated who fall within the description of distant kindred, and full and consanguine brothers of the father or true grandfather of the deceased, would be male agnates, and be classed as residuaries, and would exclude all distant kindred. See s. 626, above. The only sharers amongst collateral are sisters, and the residuaries include all male agnates.

## SECTION 627.

(b) where the claimants are in the same generation, and are either all full or consanguine relations,—the child of a sharer or residuary<sup>1</sup> is preferred to one who is not the child of a sharer or residuary;<sup>2</sup>

Descendants of full or consanguine and of uterine brothers or sisters

(6) Where the claimants are the descendants of full or consanguine brothers or sisters together with the descendants of uterine brothers and sisters, subject to sub-sections (4) and (5), above, there is a difference of opinion as to their priorities, viz.,—

Uterines rank with full or consanguine.

(a) according to Imam Muhammad, the descendants of the uterine brothers and sisters rank with either the full-blood or the half-blood relations (as the case may be) in the same generation, neither excluding, nor being excluded by, either of them;<sup>3</sup>

(b) according to Abu Yusuf, the full-blood relations exclude the consanguine, and the consanguine exclude the uterine [in each line of descent];<sup>4</sup>

Uncles or aunts, or their descendants

(7) Where the claimants consist of the paternal or maternal uncles or aunts of the deceased, or such uncles or aunts of an ancestor of the deceased, or where they

<sup>1</sup> *Siraj*, Jones, VIII 253. see Table of distant kindred, and s 631, *ill* (5), below.

<sup>2</sup> *Fatawa 'Alamgiri*, *Partiz*, ch VII. Thus BBD the brother's son's daughter will exclude BDD the brother's daughter's daughter, as the BS son is a residuary, but the BD is neither residuary nor sharer; *Siraj*, Jones, VIII 252. the full brother's daughter will exclude the consanguine brother's daughter, and also the uterine brother's daughter, "by the unanimous opinion of the learned, since he is the child of a residuary, and has also the strength of consanguinity." *Ibid* 254; thus the son of a full paternal aunt will be excluded by the daughter of a full paternal uncle, and similarly the son of a consanguine paternal aunt will be excluded by the daughter of a consanguine paternal uncle, but the son of the full paternal aunt will exclude the daughter of a consanguine paternal uncle. See comment.

<sup>3</sup> I.e., the descendants of a uterine half-brother or sister of the deceased (or of an ancestor of the deceased) rank equally with the descendants of either the full or consanguine

brother of the deceased, (or of the said ancestor of the deceased, as the case may be) *Eg*, a uterine brother's daughter (UBD), will rank *with* the full brother's daughter or consanguine brother's daughter (FBD CBD) and will not be excluded by either, though FBD will exclude CBD. This is the result of the fact that by the customary law full blood relations excluded consanguine relations, but both were competent to inherit; so no new rights were given to CB, (the consanguine brother) he being left in possession of his original rights. On the other hand, UB (the uterine brother) was entirely incompetent to inherit—his existence was ignored, and he had therefore to be given rights altogether new. According to Abu Yusuf he is postponed to the consanguine brother, taking the third place, but Imam Muhammad follows the analogy of the full consanguine and uterine brothers and sisters, and does not allow the full or consanguine to exclude the uterine relations in the same line.

<sup>4</sup> *Siraj*, Jones, VIII. 251. See, s. 631 *ill*. (4) below.

consist of the descendants of such uncles or aunts,—SECTION 627. subject to sub-section (4), above, on the paternal and maternal sides, respectively, the full-blood relations are preferred to the consanguine, and the consanguine to the uterine; but the full-blood on either side have no preference over the half-blood on the other side.<sup>1</sup>

DISTANT KINDRED IN ORDER OF PRIORITY.

N.B. { D = "daughter," or "daughters." S = "son," or "sons."  
 { M = "mother," or "mothers." F = "father," or "fathers."

- |   |   |
|---|---|
| 1. <i>DS</i> , and <i>DD</i> ,  | <i>i. e.</i> daughter's children.               |
| 2. <i>SDD</i> , and <i>SDS</i> , <sup>1</sup>                           | <i>i. e.</i> , son's daughter's children.       |
| 3. <i>DSS</i> , <i>DSd</i> , <i>DDS</i> , and <i>DDd</i> , <sup>3</sup> | <i>i. e.</i> , grand-children of daughters.     |
| 4. <i>SSDS</i> , and <i>SSDD</i> , <sup>2</sup>                         | <i>i. e.</i> , son's son's daughter's children. |
| 5. <i>DSSS</i> , <i>DSSD</i> , <i>DSdS</i> , <i>DSdd</i> , <sup>1</sup> | <i>i. e.</i> , daughter's great grand-children  |
| <i>DDdS</i> , <i>DDdd</i> , <i>DDSS</i> , <i>DDSD</i> ,                 | and son's daughter's grand-                     |
| <i>SDSS</i> , <i>SDSD</i> , <i>SDdS</i> , <i>SDdd</i> . <sup>2</sup>    | children.                                       |

Other descendants in the same order.

- |                           |  |
|---------------------------|--|
| 6. MF,                    | i. e., mother's father                                 |
| 7. FMF, MMF, <sup>d</sup> | i. e., parents' maternal grand-<br>fathers.            |
| 8. MFF, MFM. <sup>1</sup> | i. e., mother's <sup>1</sup> paternal<br>grandparents. |

(1) their ascendants in the same order.

9. Full brothers' daughters,<sup>5</sup> and  
full sisters' children,<sup>6</sup> } with { uterine brothers' and  
10. Consanguine brothers' daughters,<sup>5</sup> } sisters' children.<sup>7</sup>  
and consanguine sisters' children, }  
11. Full brothers' sons' daughters.<sup>8</sup>

1 *i.e.*, the nearest, on whichever side he be, succeeds, but if two are equally near, and one of them is on the paternal side and the other on the maternal side, then though one of them is of the full blood, and the other of the half blood, that does not give to the former any preference.

2 Though 2 and 3 are in the same generation, still 2 have priority, being the children of female agnates. Similarly as regards 4 and 5.

7 have priority, being the parents of true grandparents, and 8 are postponed as being the parents of false grandparents.

\* The father's paternal grandparents would

be true grandfather and true grandmother, and  
thus would be sharers.

7 Sons of brothers are realuaries.

6 (Moonshi) Mahomed Noor Bulsh v. Mahomed Hameedool Hug (1866) 5 W.R., 23.

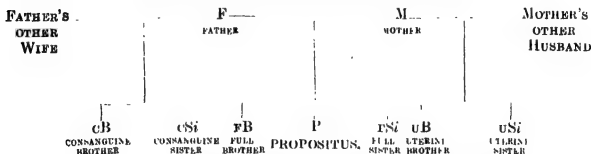
7 This is according to Imam Muhammad: according to Abu Yusuf the uterine brother's and sister's children follow 10, and precede 11, whereas Imam Muhammad makes them succeed concurrently with 9 or 10. See s. 631 *ult.* (4), below.

\* 11 and 12 are the children of "residuarles" hence preferred to 13 and 14, respectively.

- SECTION 627. 12. Consanguine brothers' sons' daughters,<sup>1</sup>  
 13. Full brothers' daughters' children,  
*and full sisters' grandchildren,* } *with* { uterine brothers  
 14. Consanguine brothers' daughters' } *and sisters' grand-*  
 children, *and consanguine sisters'* } *children.*<sup>2</sup>  
 grandchildren, }
- Lower descendants of brothers *and* of sisters *in the same order.*
15. Father's full sister,<sup>3</sup> *and* mother's full brother *and* sister.  
 16. Father's consanguine sister,<sup>3</sup> *and* mother's consanguine brother  
*and* sister.  
 17. Uterine brothers *and* sisters of father *and* mother <sup>4</sup>

See the table of half-blood relations, below : only the brothers and sisters of the *propositus* are mentioned in the table, but it can be made applicable to the paternal uncles and aunts, by supposing P to be the father of the *propositus* ; and to maternal uncles and aunts by supposing P to be the mother of the *propositus* ; and adding the words "of the father" or "of the mother," as the case may be, in each place.

TABLE ILLUSTRATING HALF-BLOOD RELATIONSHIP.

TABLE OF PRIORITIES BETWEEN DISTANT KINDRED WHEN  
THE CLAIMANTS ARE UNCLAS AND AUNTS.

In the first generation the distribution of the shares according to Abu Yusuf is also indicated (see s. 631, below), it is unnecessary to state it

<sup>1</sup> See s. 627, page 885, n. 8.

<sup>2</sup> According to Abu Yusuf the uterine brother's and sister's grand-children follow 14 Imam Muhammad makes them share concurrently with 13, or 14.

<sup>3</sup> The father's brothers are residuaries.

<sup>4</sup> Here the uterine relations do not succeed with the full or consanguine, but follow them. See s. 627, clause (e); cf. "The fourth sort (of distant kindred) are descended from the two grandfathers, and two grandmothers of the deceased and they are (1) paternal aunts and (2) [paternal] uncles by the same mother only, and

(3) maternal uncles and aunts . . . and when there are several, then the stronger of them in consanguinity is preferred, by general assent ; I mean they who are related by father and mother are preferred to those who are related by the father only, and they who are related by the mother only, whether they be males or females ; and if there be males and females, and their relation be equal, then the male has the allotment of two females."—*Straus, Jones, VIII.* 243: 253.



in the later generations, in which the same principle is followed, *viz.*, (1) SECTION 627. within the same generation no claimant on the paternal side excludes any claimant on the maternal side, nor vice versa, but (2) the groups of persons within each rectangle (divided from each other by dotted lines), have priority in the order in which they precede each other, below: when there is no priority they are bracketed together

Paternal side 2/3		Maternal side 1/3	
AGGREGATE SHARE 2/3	Share taken by each	AGGREGATE SHARE 1/3	Share taken by each
1. Father's full sister	2/3	1 { Mother's full brother 2/3 of 1/3 " " sister 1/3 of 1/3	1st Generation.
2. " Consanguine sister	2/3	2 { " consanguine brother 2/3 of 1/3 " " sister 1/3 of 1/3	
3. { " Uterine " 1/3 of 2/3 " " Brother 2/3 of 2/3		3. { Uterine brother 2/3 of 1/3 " sister 1/3 of 1/3	
1. Father's full brother's daughter, 3		1. { Mother's full brother's children, 2nd " " sister's children " Generation.	
2. " " " "			
3. " consanguine brother's daughter, 3		2. { " consanguine brother's and sister's children,	
4. " " sister's children			
5. { " uterine brother's children " " sister's " "		3. { " uterine brother's and sister's children.	

The same process is followed when the claimants belong to more distant generations. After the division has already been made between the paternal and maternal sides, respectively, the share of each side is divided amongst the claimants on that side in the same manner as the Distribution amongst collateral distant kindred.

<sup>1</sup> Though these are the children of a sharer, *viz.*, of the mother's mother, who is a true grandmother, they have no priority over those who are not the children of sharers, *viz.*, the consanguine brother's children; for the tie of blood is first to be considered; if within the full,

consanguine and uterine group, one is the child of a sharer, and another not, the former has priority.

<sup>2</sup> Compare the last footnote.

<sup>3</sup> Being the child of a re-uduary, she has priority over the next, who is not such.

SECTION 627. whole estate is divided amongst the descendants: So that Abu Yusuf distributes it with reference merely to the sex of the claimant, and Imam Muhammad in the manner referred to in s. 629, below.

Descendants of brothers and sisters.

In the case of descendants of the brothers and sisters of the grandparents of the deceased, the two columns given above would have to be redivided each into two, for a fresh division of the  $\frac{2}{3}$  on the father's and mother's side: thus—

Paternal side $\frac{2}{3}$		Maternal side $\frac{1}{3}$	
Father's father's side $\frac{2}{3}$ of $\frac{2}{3}$	Father's mother's side $\frac{1}{3}$ of $\frac{2}{3}$	Mother's father's side $\frac{2}{3}$ of $\frac{1}{3}$	Mother's mother's side $\frac{1}{3}$ of $\frac{1}{3}$

and, similarly, the columns have to be redivided for each higher generation in which the common ancestor is. Then after the common ancestors on both sides have been reached, the portions allotted to them are redivided amongst their descendants respectively.<sup>1</sup>

### (3) *Distribution of Estate amongst Distant Kindred.*

#### (a) *Where the Claimants are Descendants.*

##### (i) *Abu Yusuf's System.*

Abu Yusuf:—  
distribution  
'per capita'  
double portions  
to males.

628. The division of the estate amongst the nearest of the distant kindred when they consist of descendants is, according to Abu Yusuf, always so made that (subject to s. 632, below) each male gets twice as large a portion as each female, the distribution being 'per capita' not 'per stirpes.'<sup>2</sup>

##### (ii) *Imam Muhammad's System.*

629. According to Imam Muhammad, subject to s. 632, below,—

(1) The estate is divided as provided in s. 628, above, only where the intermediate<sup>3</sup> ancestors of each claimant

According to Imam Muhammad: Re-distribution at each generation where intermediate ancestors differ in sex—  
Giving to each male intermediate ancestor two shares for each descendant from himself, and to each female intermediate ancestor one share.

<sup>1</sup> *Sirajia*, Jones, VIII. 253.

<sup>2</sup> Bail I 706; i.e., If the deceased has children by two predeceased daughters *D*, *Da*; and *D* leaves 3 sons and 3 daughters, and *Da* one son and one daughter, there are 4 grandsons and 6 granddaughters; and the estate will according to Abu Yusuf be divided into 14 parts, each

granddaughter taking  $\frac{1}{14}$  and each grandson  $\frac{1}{7}$ . As the intermediate ancestors of the claimant (see next note) *D* and *Da* are both females, so the division will be the same according to Imam Muhammad as according to Abu Yusuf.

<sup>3</sup> Intermediate ancestor—one intervening between the claimant and the propositus.

are, in each generation, of the same sex as the intermediate ancestors (in the corresponding generation) of every other claimant ;<sup>1</sup> but,—

(2) Where in one generation the intermediate ancestor of a claimant is not of the same sex as the intermediate ancestor (in the corresponding generation) of every other claimant, the ultimate share of each claimant has to be determined by following the three processes referred to in sub-sections (3), (4), and (5), below :—

(3) The estate is, in the first instance, (notionally) divided as though the said intermediate ancestors of the claimants (in the generation in which they differ in their sex from each other) were the actual claimants,<sup>2</sup> but so that, (a) each such (male) ancestor is allotted a double share on behalf of each of the claimants<sup>3</sup> who is descended from him,<sup>4</sup> and, (b) each such (female) ancestress is allotted a single share on behalf of each of the claimants who is descended from her.<sup>5</sup>

(4) Secondly, the portion allotted under sub-section (3), above, to each of the said male intermediate ancestors are all consolidated or added together ; and the total so consolidated or added together is distributed amongst the descendants of the said male intermediate ancestors in such proportions as to give (out of the said consolidated portions) to each male claimant twice as large a share as to each female.

Three shares of male and female intermediate ancestors respectively consolidated and divided amongst descendants respectively of males and of females.

(5) Thirdly, the portions so allotted to each of the female intermediate ancestresses is similarly consolidated,

<sup>1</sup> See the footnote to s. 628, above.

<sup>2</sup> E.g., if the claimants are *DSD* and *DDS*, the intermediate ancestors in the first generation are females in the case of both, but in the next generation *DSD* has a male ancestor, and *DDS* a female ancestress.

<sup>3</sup> Thus when the claimants are *DSD* and *DDS*, the estate has to be first divided as though *DS* and *DD* were the claimants.

<sup>4</sup> Whether the claimant's own sex be male or female.

<sup>5</sup> So that when the claimants are *DSD* and *DDS*,—*DS* being a male, and having one claimant descended from him, gets a double share allotted to him, and *DD* being a female gets a single share allotted to herself, although the claimant descended from herself is a male ; Hence *DS* is allotted  $\frac{2}{3}$ , and *DD*  $\frac{1}{3}$ ,—which shares are then taken by their respective descendants, i.e., *DSD* takes  $\frac{2}{3}$ , and *DDS* takes  $\frac{1}{3}$ , though the latter is a male. See *ult.* to s. 629.

SECTION 629. or added together, and similarly<sup>1</sup> distributed amongst the claimants descendant from themselves.

This process  
repeated at  
each stage

(6) Where the intermediate ancestors of the claimants differ in sex from each other in more generations than one, the process referred to in sub-section (2), above, has to be repeated, in each such generation.

Illustrations.

N.B. { D= "daughter" or "daughter's." S="son" or "son's." }  
The claimants are given in the first line of each illustration :

(1) *DSD* and *DDD*, being the claimants, -

(a) Abu Yusuf : they will both take equally, being both females ;

(b) Imam Muhammad : *DSD* will take  $\frac{2}{3}$  and *DDD*  $\frac{1}{3}$ , as there will be a division in the second generation (i.e., between *DS* and *DD*) and the double share allotted in such division to *DS* (as a male) will devolve on his daughter *DSD*.<sup>2</sup>

(2)  $\left. \begin{matrix} DSS \\ DSD \end{matrix} \right\}$  and  $\left\{ \begin{matrix} DDS \\ DDD \end{matrix} \right\}$  being the claimants,

(a) Abu Yusuf : the estate will be divided according to the sexes of the claimants thus *DSS*  $\frac{2}{6}$ , *DSD*  $\frac{1}{6}$ , *DDS*  $\frac{2}{6}$ , *DDD*  $\frac{1}{6}$ .

(b) Imam Muhammad : the estate will be divided

(i) in the second generation, i.e., between *DS* and *DD*, and *DS* will be allotted  $\frac{4}{6}$  and *DD*  $\frac{2}{6}$ , for *DS* will get two shares for each of his descendants, viz., 4 shares in all ; and *DD* will get one share for each of her descendants, viz., 2 shares in all ;

(ii) then the  $\frac{4}{6}$  (or  $\frac{2}{3}$ ) of *DS* will be divided between *DSS* and *DSD*, so that *DSS* gets  $\frac{4}{9}$ , and *DSD*  $\frac{2}{9}$ , and

(iii) the share of *DD* (viz.,  $\frac{1}{3}$ ) will similarly be divided between *DDS* and *DDD*, the former getting  $\frac{2}{9}$  and the latter  $\frac{1}{9}$ .

(3)  $\left. \begin{matrix} DSD \\ DSDA \end{matrix} \right\}$  and *DDS*, being the claimants,—

According to Imam Muhammad,—

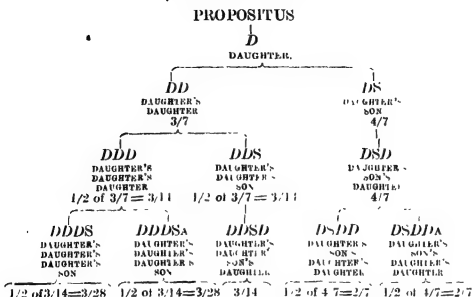
(i) the estate will be first divided in the second generation (i.e., between *DS*, and *DD*, so that *DS* is allotted a double share for each of his two daughters (viz., *DSD* and *DSDA*) and *DD* is allotted a single share for her son, viz., *DS* will get  $\frac{4}{5}$  and *DD*  $\frac{1}{5}$ .

(ii) Then *DS*'s  $\frac{4}{5}$  will be divided equally between *DSD* and *DSDA*, each taking  $\frac{3}{5}$ , and *DDS* will get his mother's  $\frac{1}{5}$ .

(4) (a)  $\left. \begin{matrix} DDDS \\ DDDSA \end{matrix} \right\}$  (c)  $\left. \begin{matrix} DSDSD \\ DSDSDA \end{matrix} \right\}$  (d) *DSDD* (e) *DSDDA* } being the claimants,—

<sup>1</sup> I.e., so that each male gets twice as much as each female.

<sup>2</sup> *Fatawa 'Ahmadiyya*. Book on *Faraz*, Ch. VII. on *Zu'd Atham*.



(a) According to Abu Yusuf the estate will be divided into 7 parts, allotting to them 2, 2, 1, 1, 1, of such parts, respectively.

(b) according to Imam Muhammad :

(i) in the second generation the first division will take place, *i.e.* between *DD* and *DS*,—*DD* getting  $3/7$  and *DS*  $4/7$ , *i.e.* the former getting a single share in respect of each of her 3 descendants who are claimants, and *DS* a double share in respect of each of his two descendants ;

(ii) the  $4/7$  share of *DS* will be divided between *DSDD* and *DSDDA*, equally, each getting  $2/7$  ;

(iii) then the  $3/7$  of *DD* will be re-divided at the next generation, *i.e.*, between *DDD* and *DDS* ; and, as *DDD* has two descendants (amongst the claimants), she will be allotted a single share in respect of each of them, and *DDS* has one descendant who will be allotted one double share, *i.e.* the  $3/7$  will be divided equally between *DDD* and *DDS*, each getting  $3/14$  ;

(iv) *DDD*'s  $3/14$  will be divided equally between *DDDS* and *DDDSA*, *i.e.* each taking  $3/28$ , and *DDSD* will take  $3/14$  from her father

Imam Muhammad's complicated system of distribution amongst the distant kindred is an attempt to give priority to males and agnates<sup>1</sup> over females and cognates, without adopting a stirpital division. Until the distant kindred are reached there are only the agnates to be dealt with, and the intermediate ancestors are all males.<sup>2</sup>

scheme of  
Imam  
Muhammad.

<sup>1</sup> Or rather partial agnates, if the expression may be allowed.

<sup>2</sup> Except that the true grandmothers and uterine brothers and sisters are cognates. In the case of the latter there is no difficulty about

the intermediate ancestors differing in sex, as they are both descendant from the mother of the deceased. In the case of the grandmother, the intermediate ancestors may occasionally differ in sex, but the claimants are always females.

## SECTION 629A.

(III) *Abu Hanifa's opinion on the system of Distribution*

- i) Abu Hanifa (apparently) agrees with Imam Muhammad.

- (ii) Shaikh Asbijabi with Abu Yusuf.

- (iii) Also Shaikhs of Bukhara.

**629A.** Abu Hanifa's opinion appears to have been<sup>1</sup> in favour of Imam Muhammad's system. *Quaere*, whether the Courts in British India will not prefer Abu Yusuf's system for its simplicity.<sup>1</sup>

Cf. "Be it known (i) that there are two reports about Abu Hanifa's view as regards this, and of the two the better known report is that as regards all the rights of the 'zavil arham' (distant kindred) he agrees with Imam Muhammad, and the 'fatwa' is upon the same view, but (ii) Shaikh Asbijabi has said in the 'Mabsut' that the view of Imam Abu Yusuf is more correct, inasmuch as it is more easy of application and (iii) the author of the 'Muhit' states that the Shaikhs of Bukhara have adopted in such questions the opinion of Imam Abu Yusuf."<sup>2</sup>

(b) *Distribution. when Distant Kindred are Ascendants*

Ascendants on father's side take 2/3 and on mother's 1/3.

**630.** Where the distant kindred who are entitled to inherit are ascendants, some being ancestors of the father of the deceased, and others of his mother, 2/3 of the estate is first allotted to the ancestors of the father, and 1/3 to the ancestors of the mother, the said ancestors dividing the said 2/3 and 1/3, respectively, amongst themselves; in such proportions, that, according to Abu Yusuf, each male receives twice as large a portion as each female; and, according to Imam Muhammad in the same manner as the estate would be divided in accordance with s. 629, above, if the relation of the claimants were at each step in the descending, instead of the ascending, line.<sup>3</sup>

*Illustration.*

F="Father" or "father's." M="Mother" or "mother's."

The claimants being,—

(a) FFMF } father's ancestors { (c) MFMF } mother's ancestors,—  
(b) FMMF } { (d) MFFF }

the estate will be first divided so that the father's ancestors get 2/3 and the mother's 1/3, thus (a) and (b) will each take 1/3; and (c) and (d) 1/6 each.<sup>3</sup>

<sup>1</sup> See comment.

<sup>2</sup> *Fatawa Alamgiri*, Book on Faraiz, Ch.

VII. on *Zavil Arham*.

<sup>3</sup> *Swaick*, Jones, VIII, 219.

1. "The degrees in this case are either equal or unequal -
- (a) "if unequal the nearer is preferred ;
- (b) "if equal, the preference is given to the person claiming through a sharer.
2. "If there be equality in that respect, the sides must be the same <sup>2</sup> or different—
- (a) "if different, the distribution must be made in thirds, the paternal side having a double share.
- (b) "if the same, the sexes of the roots or ancestors<sup>1</sup> must agree, or not—
- (i) "if they agree, the estate must be distributed according to the persons of the branches or claimants ;
- (ii) "if not, according to the first rank that differs as in the preceding class."<sup>2</sup>

## SECTION 630.

1 Preference to nearest. Parent of sharer preferred.

Distribution Paternal side maternal Sexes of intermediate ancestors differing.

**631.** (1) Where the claimants are descendants of the brothers or sisters of the deceased,<sup>3</sup> subject to s. 632, below the distribution of the estate is as follows:—

(a) according to Abu Yusuf they divide the estate 'per capita' so that each male gets twice as large a portion as each female ;

Abu Yusuf for division 'per capita.'

(b) according to Imam Muhammad,<sup>4</sup>—

IMAM MUHAMMAD

- (i) the estate is in the first instance allotted as though the brother or sister of the deceased<sup>5</sup> through whom the claimants are respectively descended, were the actual claimants but so that if there are two or more claimants descended from the same brother or sister, that brother or sister is allotted the share of two or more, as the case may be,<sup>6</sup>
- (ii) secondly, the portions so allotted to the full brothers and sisters are consolidated, and the portion

1. Allotment to sisters and brothers

Full brother or sister

<sup>1</sup> I.e., of the intermediate ancestors

<sup>2</sup> *Al Sharifa*—Jones, Works, VIII. 312. The numbers are nine. Here too presumably there is the same difference of view between Abu Yusuf and Imam Muhammad about clause (b) (ii) as there is about the descendants.

<sup>3</sup> See illustration.

<sup>4</sup> East's Notes SUP. COURT, CAL., Case 113. (15th Feb. 1820) seems to have been decided according to Imam Muhammad's opinion.

<sup>5</sup> Collaterals, it is evident are either (1) the descendants of the brothers and sisters of the deceased or (2) of the uncles and aunts of the deceased ; see subss. (1) and (2) respectively.

<sup>6</sup> Thus the share of a full or consanguine sister is 1/2 of the estate but of two sisters or more 2/3 ; so, if there are two descendants of the same sister, they get 2/3 not merely 1/2. Similarly one uterine brother or sister gets 1/6, and two or more 1/3, but if there are two children

## SECTION 631.

Consanguine  
brother or  
sister.

Uterine  
brother or  
sister.

Distribution  
amongst uncles  
and aunts  
of the deceased  
(or of his  
ancestor) and  
the descendants  
of such  
uncles and  
aunts

so consolidated is re-divided amongst their descendants in the manner provided in s. 629, above.

(iii) thirdly, the portions so allotted to the consanguine brothers and sisters<sup>1</sup> are consolidated and divided in the same manner as referred to in clause (ii), above;

(iv) fourthly, the portion so allotted to the uterine brothers or sisters<sup>2</sup> is divided amongst the claimants descended from them 'per capita' so that males and females take equal portions.

(2) Where the claimants are the uncles and aunts of the deceased or their descendants, *i.e.*, when they are the brothers or sisters of the parents or grandparents of the deceased, or the descendants of such brothers or sisters,—the estate is according to both Abu Yusuf and Imam Muhammad first divided into three parts; two of such parts being allotted to those who are related to the deceased on the paternal side, and one part to those who are related to the deceased on the maternal side; and the said  $\frac{2}{3}$  and  $\frac{1}{3}$  are then distributed amongst the claimants on their respective sides in the manner stated in clause (a) or (b) of sub-section (1) above.

In the illustrations below the letters or groups of letters in the first lines represent the existing claimants

A B { "son" or "son's", D="daughter" or "daughter's"; B="brother" or "brother's"; S="sister" or "sister's"; F, U or V indicates respectively that the sister or brother is full, consanguine, or uterine.

## Illustrations

- (1), BDD, *i.e.*, brother's daughter's daughter,  
BDS, *i.e.*, brother's daughter's son,  
SiDD, *i.e.*, sister's daughter's daughter,—

Abu Yusuf: BDS will take  $\frac{1}{2}$ , and BDD and SiDD  $\frac{1}{4}$  each.

of one uterine sister the share allotted to them is  $\frac{1}{3}$  not  $\frac{1}{6}$ . For the purposes of this first allotment it will be observed that the share of two is the same as that of any greater number, conversely if there were originally two sisters and only one of them has one claimant descended from her, that sister will be allotted only half and not two thirds.

<sup>1</sup> The consanguine brother or sister is excluded by the full; besides there may be no portion left for him, but if there is only one claimant descended from a full sister then the claimant descended from the consanguine sister will get  $\frac{1}{6}$ .

<sup>2</sup> The portion allotted to the uterines can only be either  $\frac{1}{6}$  or  $\frac{1}{3}$ .



Imam Muhammad: the estate will be divided first so that the brother's SECTION 631 children each take a double share, and the sister's child a single share. *Illustrations.* i.e., (i) *BDD* and *BDS* take together  $\frac{4}{5}$ , and (ii) *SiDD*  $\frac{1}{5}$ ; (iii) then the  $\frac{4}{5}$  of the former is re-divided between them so that *BDD* takes  $\frac{1}{3}$  of  $\frac{4}{5}$ , i.e.,  $\frac{4}{15}$ , and *BDS*  $\frac{2}{3}$  of  $\frac{4}{5}$  i.e.,  $\frac{8}{15}$ , respectively.

(2) *uBSD*, i.e., uterine brother's son's daughter,

*uSiDS*, i.e., uterine sister's daughter's son,

Abu Yusuf: the former will take  $\frac{1}{3}$  (being a female) and the latter  $\frac{2}{3}$  (being a male). Imam Muhammad: they will each take a half, as *uB* and *uSi* would have taken<sup>1</sup> in equal shares.<sup>2</sup>

(3) *FSiDD*, i.e., full sister's daughter's daughter, —

*oBDS*, i.e., consanguine brother's daughter's son—

Abu Yusuf: the former will exclude the latter, as she is descended from the full blood and *oBDS* is descended from the half blood and both are in the same line. Imam Muhammad: each of them takes  $\frac{1}{2}$  which is the share of *FSi* and *oB*, respectively.<sup>3</sup>

(4) *FSiDD*, i.e., full sister's daughter's daughter,

*cSiDS*, i.e., consanguine sister's daughter's son,

*uSiDS*, i.e., uterine sister's daughter's son,

*uSiDD*, i.e., uterine sister's daughter's daughter,—

Abu Yusuf: the whole will be taken by *FSiDD* as the full blood claimant.

Imam Muhammad: The full sister is first allotted  $\frac{1}{2}$  as sharer, the consanguine sister  $\frac{1}{6}$ , the uterine sister  $\frac{1}{3}$  as she has two claimants descended from her, the ultimate shares being *FSiDD*  $\frac{1}{2}$ , *cSiDS*  $\frac{1}{6}$ , *uSiDS*  $\frac{1}{6}$ , *uSiDD*  $\frac{1}{6}$ .

(5) *uSiD*, i.e., uterine sister's daughter,

*cSiS*, i.e., consanguine sister's son,

*oSiD*, i.e., consanguine sister's daughter,

*FSiSS*, i.e., full sister's son's son,—

The last, *FSiSS*, is excluded as being in the third generation, the other three being in the second, *uSi* (as a single uterine sister) is first allotted  $\frac{1}{6}$ , *cSi* is, according to Imam Muhammad, allotted the share of two consanguine sisters, i.e.,  $\frac{2}{3}$ , as she has two claimants descended from her. *Secondly*, there is a residue of  $\frac{1}{6}$ , which "returns,"<sup>4</sup> and is allotted to *uSi* and *cSi* in the proportion of  $\frac{1}{6}$  to  $\frac{2}{3}$ ; hence the shares

<sup>1</sup> Cf. s. 618, above.

<sup>2</sup> *Fatawa 'Alamgiri*, Faraz Ch. VII: the same illustration is given in *Nirajna*, Jones VII., 249-250.

<sup>3</sup> *Nirajna*, Jones VII. 250-251. Cf. s. 617,

above.

<sup>4</sup> Of course there would be no return if one of the ancestors of the claimants were a residuary. *ey*, a consanguine brother.

SECTION C31. become (after the return)  $1/5$  and  $4/5$ , respectively. *Thirdly*, the  $1/5$  allotted to  $uSi$  is taken by  $uSiD$ , and the  $4/5$  allotted to  $oSi$  is

*Illustrations.*

divided between  $oSiS$  and  $oSiD$  in the proportion of  $2:1$ ; so that  $oSiS$  takes  $2/3$  of  $4/5$ , i.e.,  $8/15$ , and  $oSiD$  takes  $1/3$  of  $4/5$ , i.e., of  $4/15$ .

(6) The claimants being a full paternal aunt,  $fPA$ , and a uterine maternal aunt,  $uMA$ , the former does not exclude the latter though of the full blood, because she is on the father's side, and the latter on the mother's side; but  $fPA$  will take  $2/3$ , and  $uMA$  will take  $1/3$ , being the father's and mother's portion, respectively.<sup>1</sup>

(7) Similarly, the consanguine paternal aunt,  $oPA$ , will not be excluded by the full maternal aunt,  $uMA$ , but the former will take  $2/3$ , and the latter  $1/3$ .<sup>1</sup>

(8) The claimants being—

$fBD$	i.e., full brother's daughter,	
$fSiD$	" sister's "	
$fSiS$	" " son,	
$oBD$	consanguine brother's daughter,	}
$oSiD$	" sister's "	
$oSiS$	" " son,	
$uBD$	uterine brother's daughter,	
$uSiD$	" sister's "	
$uSiS$	" " son,—	

Abu Yusuf: the full blood will exclude the consanguine relations, and the consanguine will exclude the uterine. In each case the male will take  $1/2$ , and the females  $1/4$  each.<sup>2</sup>

Imam Muhammad: the full blood will exclude the consanguine, but not the uterine: (i) the uterine will take  $1/3$  of the estate,<sup>3</sup> and then this  $1/3$  will be divided equally amongst the uterines, i.e.,  $uBD$ ,  $uSiD$  and  $uSiS$  will each take  $1/9$ . (ii) The rest, i.e.,  $2/3$  of the estate will be divided amongst the full blood relations, i.e.,  $fBD$ ,  $fSiD$ , and  $fSiS$ , but so that out of this  $2/3$  (a) in the first instance,  $fB$  will be (notionally) allotted one double share,<sup>4</sup> (b)  $fSi$  will be allotted two single shares,<sup>5</sup> i.e., the  $2/3$  will be so allotted that  $fB$  and  $fSi$  will each be allotted  $1/3$  of it then (c) the  $1/3$  allotted to  $fB$  will be taken by his daughter  $fBD$  and (d) the  $1/3$  allotted to  $fSi$  will be divided between  $fSiD$  and  $fSiS$  in

<sup>1</sup> *Sirajus*, Jones VIII. 253.

<sup>2</sup> *Sirajus*, Jones VII. 251.

<sup>3</sup> On the principle that two or more uterine sisters or brothers take  $1/3$  of the estate when they co-exist with full or consanguine brothers or sisters. See s. 618, above.

<sup>4</sup> One share, because he has one claimant descended from him; and a double share,

because he is himself a male (though the claimant descended from him is female).

<sup>5</sup> Two shares, because there are two claimants, and single shares because she is herself a female, (though one of the claimants descended from her is a male, and the other a female).

the proportion of 1 : 2, i.e., the former will take 1/9 and the latter 2/9. SECTION 631. The distribution according to Imam Muhammad appears from the *Illustrations*. following table :

Residuaries : taking 2/3			Excluded by full blood			Sharers : taking 1/3.		
rB FULL BROTHER 1/2 OF 2/3	rSi FULL SISTER 1/2 OF 2/3		cB CONSANGUINE BROTHER	cSi CONSANGUINE SISTER		uB UTERINE BROTHER	uSi UTERINE SISTER	
rBD FULL BROTHER'S DAUGHTER 1/2 OF 2/3 = 1/3	rSiS FULL SISTER'S SON 1/2 OF 2/3 OF 2/3 = 2/9	rSiD FULL SISTER'S DAUGHTER 1/2 OF 2/3 OF 1/3 = 1/9	cBD CONSANGUINE BROTHER'S DAUGHTER	cSiS CONSANGUINE SISTER'S SON	cSiD CONSANGUINE SISTER'S DAUGHTER	uBS UTERINE BROTHER'S SON = 1/9	uSiS UTERINE SISTER'S SON 1/3 OF 1/3 = 1/9	uSiD UTERINE SISTER'S DAUGHTER 1/3 OF 1/3 = 1/9

(9) If the claimants include two or more grandchildren of uterine brothers or sisters, (a) they take 1/3, dividing it equally amongst themselves, then (b) the grandchildren of full (or failing them of consanguine brothers and sisters) take collectively the 2/3 (c) as to this 2/3 if there was one pre-deceased brother (full or consanguine) through whom two claimants are descended, and one pre-deceased sister (full or consanguine) through whom three claimants are descended (i) the brother is first allotted a double share for each of the descendants through him, i.e., 4 shares and (ii) the sister a single share for each claimant through her, i.e., the brother is allotted 4/7 of 2/3 = 8/21 and the sister 3/7 of 2/3 = 6/21. (d) Finally, the 8/21 and 6/21 are divided respectively amongst the grandchildren of the brother and sister in the proportion of 2 : 1. This may be tabulated as follows :—

1/3				2/3			
uB UTERINE BROTHER		uSi UTERINE SISTER		B 4/7 OF 2/3 = 8/21 FULL OR CONSANGUINE BROTHER		S 3/7 OF 2/3 = 6/21 FULL OR CONSANGUINE SISTER	
uBS	uBD	uSiS	uSiD	B D 8/21		SSS 1/3 OF 2/7 = 8/35 SISTER'S SON	SiD 1/3 OF 2/7 = 2/35 SISTER'S DAUGHTER
UTERINE BROTHER'S SON	UTERINE BROTHER'S DAUGHTER	UTERINE SISTER'S SON	UTERINE SISTER'S DAUGHTER	BROTHER'S DAUGHTER		SISTER'S SON	SISTER'S DAUGHTER
uBSD	uBDS	uSiSD	uSiDS	BDS	BDD	SSSS	SiSD
UTERINE BROTHER'S SON'S DAUGHTER	UTERINE BROTHER'S DAUGHTER'S SON	UTERINE SISTER'S SON'S DAUGHTER	UTERINE SISTER'S DAUGHTER'S SON	BROTHER'S DAUGHTER'S SON	BROTHER'S DAUGHTER'S DAUGHTER	SISTER'S SON'S SON	SISTER'S SON'S DAUGHTER
1/12	1/12	1/12	1/12	2/3 OF 8/21	1/3 OF 8/21	2/3 OF 8/35	1/3 OF 8/35
				2/35			

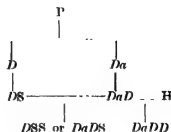
(d) Portions Claimants Related in More Ways than one.

632. Where any of the claimants is related to the A claimant related to

SECTION 631. deceased in more ways than one<sup>1</sup> he or she inherits in respect of each such relation with the exception that according to Abu Yusuf<sup>2</sup> a grandmother can inherit in only one way, notwithstanding that she be related to the deceased in more ways than one.<sup>3</sup>

deceased in  
more ways  
than one  
inherits in  
respect of  
each such  
relationship.  
Exception.  
Illustrations.

(1) If the deceased, P, has two daughters *D* and *Da*, the former having a son *DS*, and the latter a daughter *DaD*, who intermarry and give birth to a son,—that son traces his



relation to the deceased in two ways, and may therefore be styled *DSS* or *DaDS*. If afterwards *DaD* marries another husband *H*, and gives birth to a daughter *DaDD*, then on the death of all the other persons mentioned above, *DSS* (who is also *DaDS*) and *DaDD* will be heirs. (a) According to Abu Yusuf, *DSS*, being a male, and being related to the deceased in two ways, will take the share of two males, i.e., a quadruple share, and *DaDD* being a female, and related to the deceased in only one way, will take a single share, i.e., *DSS* will take 4/5 and *DaDD* 1/5. (b) According to Imam Muhammad the first distribution will be in the generation of *DS* and *DaD* where the intermediate ancestors differ in sex, and *DS* will be allotted one double share, i.e., 2/3 and *DaD* one single share, i.e., 1/3.<sup>4</sup> The 2/3 of *DS* come to *DSS* and the 1/3 of *DaD* will be divided equally between *DaDS* and *DaDD*, i.e., the last will get only a 1/6 and *DSS* or *DaDS* will take 5/6.

(2) *P* dies leaving the consanguine sister of his father (consanguine paternal aunt) and the uterine brother of his mother (uterine maternal uncle). If the former is also his uterine maternal aunt,<sup>5</sup> then *P*'s estate will first be divided into 2/3 for the paternal side, and 1/3 for the maternal; the aunt will take the whole 2/3. Then the 1/3 for the

<sup>1</sup> Provided, of course, that each relationship would have entitled him, by itself to inherit.

<sup>2</sup> Imam Muhammad does not agree with Abu Yusuf on this point.

<sup>3</sup> Ball. I. 707.

<sup>4</sup> See in Ball. I. 707 *sed quare* whether *DaD* should not be allotted two single shares, inasmuch as there are two claimants descended from her, viz. *DaDS* and *DaDD*; the illustration is taken from the *Fatawa 'Alamgiri*; and it seems hardly possible that there should be

an error in it, but the present author is unable to think of any other explanation of this instance, except an error in the text.

<sup>5</sup> If a man *F* has two wives, *W* and *Wa*, and he son (*S*) of *F* and *W* marries the daughter (*D*) of *Wa* (by a husband other than *F*), and a child *P* is born to *S* and *D*; then *Da* the daughter of *F* and *Wa* will be both the consanguine sister of *S*, and uterine sister of *D*, i.e., both the consanguine sister of *P*'s father and uterine sister of *P*'s mother.

maternal side will again be divided so that the uncle gets  $\frac{2}{9}$  out of it **SECTION 632** and the aunt  $\frac{1}{9}$ , so that the latter will get in all  $\frac{2}{3}$  and again,  $\frac{1}{9}$  *Illustrations.* totalling  $\frac{7}{9}$ .<sup>1</sup>

(3) The grandchildren of the uncles and aunts of the deceased being the claimants, as shown in the table on p. 900, viz. —

CPU consanguine paternal uncle, CMU consanguine maternal uncle

CPA „ „ aunt. CMA „ „ „ aunt.

CPAA „ „ „ aunt. CMAA „ „ „ „ aunt.

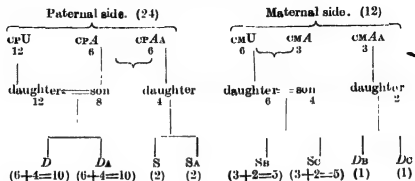
then CPU's daughter marries CPA's son and two daughters are born to them *D*, *DA*; there are also two sons of CPAA's daughter, viz., *S*, *SA*; then CMU's daughter marries CMA's son and has two sons *SB*, *SC*, finally CMAA's daughter has two daughters *DB*, *DC* :—

(a) According to Abu Yusuf the estate is to be divided into 30 parts, of which the paternal side will take 20, and the maternal 10, of which *D*, *DA*, *S* and *SA* will each take 5, because *D* and *DA* have a double relationship, and *S*, *SA*, are males, and the 10 on the maternal side will be divided, so that *SB* and *SC* take 4 each, and *DB* and *DC* 1 each.

(b) Imam Muhammad, however, would: (i) divide the estate into 36 parts giving ( $\frac{2}{3}$  =) 24 to the paternal side, and ( $\frac{1}{3}$  =) 12 to the maternal; (ii) the 24 would be re-divided in the first instance between CPU on the one hand, and his two sisters CPA, and CPAA, on the other: CPU counts as two males, having 2 claimants descended from him; CPA and CPAA as 2 females each, i.e., they take it in the proportion of 4; 2:2; hence CPU gets 12 shares, CPA, 6 and CPAA, 6, making up the 24 on the paternal side; (iii) the 12 shares of CPU are inherited by the claimants descended through him, viz. *D*, *DA*, who, as his grandchildren take 6 each; (iv) the 6 shares of CPA, and 6 of CPAA, 12 in all, are consolidated, and re-divided in the next generation (since they have a son and a daughter, i.e., the intermediate ancestors of the claimants through them differ in sex): CPA's son counts as 2 males, and CPAA's daughter as 2 females, (each having two claimants descended from him and her viz., *D*, *DA*, and *S*, *SA*) so that CPA's descendants have 8 out of the 12 allotted to them, and CPAA's descendants have 4 allotted to them. (v) Then CPA's descendants take 4 each out of the said 8; they have already got 6 each through CPU; and (vi) CPAA's sons, *S*, *SA*, take 2 each out of the 4 allotted to their mother in division (iv). Similarly the 12 shares allotted to the maternal side are divided and redivided six times giving ultimately to *SB* and *SC* 3 each from CMU and 2 each from CMA; and to *DB* and

<sup>1</sup> *Sharīfa, Juncos, VIII. 313, 314.*

SECTION 632. *Dc*, 1 each from *CMAA*.<sup>1</sup> The figures in the following table represent the apportionment according to Imam Muhammad—



Return, to  
husband or wife  
if no distant  
kindred (nor  
residuary nor  
other sharers).

### § 8.—The Husband or Wife Inheriting the Whole.

**633.** Where no blood relation of the deceased of any description whatever can establish his claim to inherit, the husband or wife (if either is surviving) will take the whole of the estate,<sup>2</sup> subject however to any testamentary disposition by the deceased, which may validly affect 5/6 of the estate where the deceased is a male and has no heir except his widow; and 2/3 of the estate where the deceased is a female, and has no heir except her husband.<sup>3</sup>

Reason.

The husband and wife are postponed to all the blood relations, apparently because the Quran specifically mentions that every person related (by blood) to the deceased should inherit, without restricting their rights to any special mode of succession, whereas the husband and wife are mentioned merely as being entitled to inherit their Quranic share. "There can be no doubt," said Kemp, J., "that the more ancient

<sup>1</sup> *Sharifu*, Jones, VIII. 314-316.

<sup>2</sup> *Mahomed Arshad v. Sayda Banoo* (1878) Cal. 702, following (*Musannaf*) *Soobhane* *Bhatia* (1811) 1 S. D. A. (Cal.) 346. Kemp J. also refers to Sircar, "Muhammadan Law," II. 233, 234 for the modern authorities; *Bafutan v. Bilati Khanum* (1903) 30 Cal. 688; Cf. (*Musannaf*) *Hurmat-ool-Nissa Begam v. Allahdin Khan* (1871) 17 W. R. 108 (P.C.).

<sup>3</sup> The explanation of these fractions is as follows:—The testamentary powers in the circumstances cover all that the husband or wife is not entitled to inherit as of right; ordinarily

the testamentary right takes away 1/3 of the estate from the heirs (if the testator so desires). Therefore the husband, if sole heir, is entitled as of right to 1/2 of 2/3 i.e., to 1/3, leaving to the deceased wife testamentary powers over 2/3 of the estate: the wife if sole heir is entitled as of right to inherit 1/4 of 2/3 i.e. to 1/6, leaving to the husband testamentary powers over 5/6 of the estate. See s. 579, above, subs. (5) of which refers to testamentary powers where the only survivor is a husband or wife and is explained in the comment to s. 579.

authorities did hold that the widow and the husband were not entitled to the 'rudd' or return, under the Muhammadan law : but more modern authorities have ruled that in the absence of the 'bait-ul-mal', the widow and the husband, are entitled to the return." <sup>1</sup>

§ 9.—*The 'Maula' or Successor by Contract.*

634. (1) In default of all blood relations, and of the husband or wife, the estate devolves according to Hanafi, but not Shafi'i, law <sup>2</sup> upon the 'maula,' or successor by contract as defined below. <sup>3</sup>

(2) Where a person (in this paragraph referred to as the "declarant"), having attained majority and being of sound mind, makes a declaration, that if he dies leaving him surviving, either no heir, or only a husband or wife, as her or his heir, then another person who is of unknown descent shall have the right to inherit the declarant's estate (subject to the rights of the declarant's husband or wife, if any) and that other person agrees, in consideration thereof, to pay any fine to which the declarant may be liable, then that other person is called the 'maula' of the deceased; and the agreement is called an agreement of 'mawalat.' <sup>4</sup>

This rule of law, like so many others, is a relic of pre-Islamic customs in Arabia. <sup>5</sup> It can have little applicability in British India. The consideration cannot be recognised in India : the fine contemplated by the text-writers is the 'diyat,' payable as compensation for criminal acts.

§ 10.—*The Acknowledged Kinsman.*

635. In default of all blood relations, of the husband or wife, and of the successor by contract, the estate devolves

<sup>1</sup> *Mahomed Arshad v. Sayida Banoo* (1878) 3 Cal. 702.

<sup>2</sup> "The *Mishaj* is silent as to the "successor by contract" but Luciani (*Succession Muslims*, 108) states expressly that this form of succession is peculiar to the Hanafites, and is not recognised by the Shafaites." Wilson "Anglo-Muhammadan Law" 414

<sup>3</sup> Cf. *u.* to Quran IV. 36, 37, cited in comment to s. 604, above. There may be a mutual contract for succession between two persons, so that each may be the *maula* of the other.

<sup>4</sup> Ball, I. 387, 388, 684.

<sup>5</sup> Cf. Smith's "Kinship and Marriage," 55; and Quran IV. 37, cited in comment to s. 604, above.

SECTION 635. upon the "acknowledged kinsman," i.e., a person of unknown descent whom the deceased has declared<sup>1</sup> to be descended from a kinsman of himself.<sup>2</sup>

It will be observed that a person whose claim is based on a mere acknowledgment, has his rights postponed to the rights of those who have other proof to establish their rights.

### § 11.—*Universal Legatee as Successor.*

Testamentary power enhanced if there are no heirs.

—or only husband or wife.

**636.** In default of all those who are referred to in s. 635, above, a Mussulman has the right to make a testamentary disposition of the whole of his estate.<sup>3</sup>

The case where only the husband or wife survives the deceased, is referred to in s. 633, above. The testamentary powers of the deceased are restricted so as to operate to the extent of only 1/3 of the estate as against the husband or wife's interest in the estate (as Quranic sharer), but are unrestricted as against the rest of the property.<sup>3</sup>

### § 12.—*Escheat to the Government.*

Escheat to the Government if no one can establish his claim.

**637.** In default of all the persons referred to in ss. 635 and 636, above, the estate, or such portion of it as is not disposed of by the will of the deceased, escheats to the Government.

"Private ownership not existing," said the Privy Council, "the State must be owner as ultimate lord." <sup>4</sup> There is a dictum in an old case that where the widow of the deceased is the only surviving heir, the residual 3/4 of the estate also reverts to the widow—it being ruled by 'fatwas' that there is in modern times no 'bait-ul-mal' or public treasury, regularly established <sup>5</sup>

<sup>1</sup> A declaration of this nature may be retracted, and if retracted, is of no effect, Cf s. 223, above.

<sup>2</sup> Such an acknowledgment does not refer to descent from the deceased himself. If it does so refer, it may take effect so as to establish parentage,—in which case the acknowledged person would succeed in the same way as if he were descended from the deceased; whereas an acknowledgment under s. 635 gives a right which is postponed to all other rights, Cf. Bail. I. 406 (ll. 1-4); Smith's "Kin-

ship and Marriage in Ancient Arabia," 15. See also *Sahbazad Bagan v. (Mirza) Himmat* (1869) 12 W. R. 512.

<sup>3</sup> Bail. I. 634. See ss 579, 633 above, and comment thereto.

<sup>4</sup> Privy Council in *Collector of Masulipatam v Caraly* (1860) 8 Moo. I. A. 498, 525.

<sup>5</sup> (*Musammant v. Soodhance v. Bhetum alias Shah Asmalah* (1811) 1 S. D. A. (CALT.) 346, 348, cited with approval by Kemp, J., in *Mahomed Arshad v. Sujata* (1878) 3 Cal. 702



## PART III.—SHIAH LAW OF INHERITANCE.

## § 1.—Scheme of Shiah law of Inheritance.

638. In accordance with Shiah law, —

SHIAH LAW

(1) The husband or wife, together with the nearest blood relations, male or female, agnate or cognate,<sup>1</sup> are entitled to succeed to the estate: proximity being reckoned as provided in s. 640, below, and in no case does a person remoter than the said nearest blood relations inherit any portion of the said estate.<sup>2</sup> The expression "heirs" hereinafter includes (unless the context otherwise indicates) the husband or wife and the said nearest blood relations, but no others.

The nearest (male or female agnate) or cognate succeed.

(2) The estate is divided amongst the heirs, by first allotting (subject to sub-section (3) below), their respective shares to such heirs as are entitled to Quranic shares;<sup>3</sup> the residue<sup>3</sup> is then divided amongst the rest of the heirs 'per stirpes,' and not 'per capita';<sup>3</sup> and if the heirs comprise such only as are given merely (Quranic) shares, then they divide the said residue as stated in sub-section (4), below.

Distribution first to shiars.

(3) Where the sum total of the Quranic shares exceeds unity,<sup>4</sup> the shares do not all abate rateably,<sup>5</sup> but the distribution is so made that the deficit is borne by the daughters or sisters, as mentioned in ss. 642, and 643, below.<sup>6</sup>

No rateable abatement of 'aul' in Shiah law.

<sup>1</sup> Cf. Bail. II. 274 (par. 2).

<sup>2</sup> Bail. II. 270. Inasmuch that there is no inheritance for a son's son, when there is only a daughter. *Id.* 303 (par. 2).

<sup>3</sup> Bail. II. 263 (par. 2), 274. The principle that males be allotted twice as large a portion as females is applied (a) to descendants, (b) to agnates. It is not applied in the case of ascendants or collaterals who are cognates, or uterine. Cf. Bail. II. 303 (*ult.* 17-18); see also Bail. II. 400: "I was directed to ask the Imam Jaffer Sadik, on whom be peace, to whom doth the property of a person deceased of right appertain? to his own nearest relation, or to his Asbat?" He replied:—"Verily it belongs to the nearest relation, and as to the Asbat or more distant male kindred, "Dust in their jaws." "

<sup>4</sup> Under the operation of the Shiah rules of succession it can never happen that no residue is left in a case where there is any

person who is a pure residuary (i.e., where there is any person entitled to inherit, who does not take any Quranic share).

<sup>5</sup> The abatement is referred to as '*aul*' or "increase," and prevails in Sunnī law. "The '*aul*' is null, or not recognised with us," i.e., in Shiah law. Cf. Bail. II. 274. "The nullity of the doctrine of *aul*," *ib.* 273. "innumerable traditions . . . expressly annul and prohibit this practice," *ib.* 307.

<sup>6</sup> See s. 642 (2) (c) and s. 643. The deficit always falls either upon (a) the daughters, or (b) the full or consanguine sisters. It is only when either of these are present that there can be a deficit.—Bail. II. 305, (par. 3), 306-307; 263, 273, 274, 336. It has seemed best to describe in this work the position of the full sisters as that of residuaries inasmuch as they take the whole of the residue and bear the deficit (if any) caused by the existence of sharers. See s. 643, (2) (c), below.

## SECTION 638.

"Return"  
to sharers.

(4) Where the heirs do not include a residuary (and the total of the (Quranic) shares of the heirs do not exhaust the whole estate)<sup>1</sup> the residue is divided amongst them in the proportion of their respective shares.

Effect of  
distinction  
between sharer  
and residuary  
in Shiah law.

*Explanation.*—Under Shiah law the distinction between the (Quranic) sharers and residuaries arises only in the distribution of the estate: it does not affect the question as to who are entitled to succeed.

The sharer in  
Shiah law.

The sharer or 'zû farz' refers in Shiah, as in Sunni law to a kinsman specifically named or mentioned in the Quran.<sup>2</sup> All other heirs (for whom shares are not allotted in the Quran) are referred to as 'zû qarabat' <sup>3</sup> by the Shiah authorities.<sup>2</sup> The latter are referred to in Baillie as residuaries. The same heir may in some circumstances be a sharer, and in others a residuary.

SHARERS IN  
SHIAH LAW.

The sharers in Shiah law may, subject to s. 640, below, be thus enumerated:—

- (1) Husband, in all circumstances a sharer (taking  $1/2$  or  $1/4$ );
- (2) widow, in all circumstances (taking  $1/4$  or  $1/8$ );
- (3) daughter, when there is no son (one takes  $1/2$ , two or more  $2/3$ );
- (4) father, when there are any descendants (taking  $1/6$ );
- (5) mother in all circumstances (taking  $1/3$  or  $1/6$ );
- (6) full or consanguine sister, where there is no brother or grandfather <sup>1</sup> (sharing in a manner similar to daughters);
- (7) uterine brothers and sisters ( $1/6$  or  $1/3$ ).

Of these the daughters, the father and sisters are occasionally residuaries, viz., daughter where there is a son; father, where there are no descendants; sister, where there is a brother or grandfather.<sup>2</sup>

Sunnis include  
more persons  
amongst shar-  
ers as individ-  
uals entitled  
in their own  
rights.

It will be observed that the following are not classed as Quranic sharers by the Shiahs, though they are so classed by the Sunnis, viz., (i) the son's daughter, (ii) true grandfather, (iii) true grandmother. The reason is that the Shiahs adopt a species of representation <sup>3</sup> and

<sup>1</sup> *Viz.*, when the shares are added together, their sum is less than unity.

<sup>2</sup> Bail. II. 377, 378. See ss. 603, 604, and comment to s. 604, under the heading "Quantum of interest taken by the various heirs." *Zu*=master of; *farz*=ordinance, hence the special rules of the Quran relating to shares in inheritance, the share itself is thus referred to as *farz*; and *faraz* is the term used for the law of inheritance.

<sup>3</sup> *Qarabat*=kinship; cf. "Zoo *Karabat*, or a

residuary." Bail. II. 377 (last line).

<sup>4</sup> The grandfather takes the same interest as a brother when he co-exists with a brother or sister; see s. 643 (4).

<sup>5</sup> Merely as regards the quantum of the estate taken, not as regards the right to inherit: with reference to the latter the nearer rigorously excludes the remoter, and a pre-deceased relation's descendants do not represent him, in regard to the right to inherit.

a stripital distribution throughout, so that (to take an example) in SECTION 638.

Shiah law the son's daughter takes the share not of a daughter, but of a son, and it is the daughter's child (whether male or female) who takes the share of the daughter not the son's daughter. At the same time, the principle which according to the Shiah interpretation of the Quran underlies the doctrine of the "shares," is extended in all directions, and through all generations to the remotest kinsmen.<sup>1</sup>

In other words, the Shiahs interpret the specific provisions in the Quran about inheritance, as indicating a scheme by which the respective rights of the various relations in the first degree immediately surrounding the deceased, are adjusted and defined as an orientation of the relative positions of such kinsmen in regard to each other, with reference both to their title to inherit, and the proportion or ratio of their respective interests when they compete one with the other.

The Shiahs include fewer individuals as shares in their own right, but extend the principle to all kinsmen related through these individuals.

Thus the immediate relations of a person being taken to be (i) the spouse, (ii) descendants, (iii) parents, (iv) sister or brother,<sup>2</sup> all these are referred to in the Quran and according to the Shiahs their mention in the Quran lays down not only in what proportions they themselves inherit, but also fixes the position that each kinsman holds with respect to the propositus, by reason of the particular relationship existing between the two; and, as a consequence, determines the relative importance (in the law of succession) of their respective relationships.

Principle of Shiah interpretation of Quran.

The way in which the three classes of heirs have been arrived at, has already been adverted to. The portions which the various heirs take are always the counterpart of the portions which these primary persons are given under the Quran.

With reference to the residuaries, in accordance with the Hanafi interpretation of the law the male agnates are alone residuaries in their own right, and female agnates are residuaries only when they co-exist with male agnates in the same line, whereas the Shiah interpretation extends the principles which prevail in the case of the immediate relations, to the most distant of them, introducing radical changes for the purpose of adopting those rules. As a daughter or a full or consanguine sister is a residuary under certain circumstances, so are

Sunnah and Shiah principles compared.

<sup>1</sup> *E.g.*, the uterine sister's share is not restricted to her, but her children take her share in her absence,—unless of course, there are relations in a nearer generation,—for in no case does a more distant kinsman succeed with a nearer one, under Shiah law (except in the anomalous case referred to in s. 640E. below).

<sup>2</sup> *Quære*, whether the influence of the tribal system of brotherhood in arms may be traced in the raising of brotherhood (and sisterhood) to one of the principal modes of forming kinship, and in its being placed on the same footing as marriage, and parentage.

SECTION 638. also the descendants of the daughter, or those connected to the deceased through the full or consanguine sister. See table on p. 912, below.

### § 2.—Competence to Inherit—Exclusion.

Child in the womb

**638A.** A child in the womb of its mother is competent to inherit, provided that it is born alive.<sup>1</sup>

(Y. "If born six months from the death of its father, the right of inheritance is established; or even if born at nine months, if its mother has not married again."

Rules of exclusion. Accidentally causing death does not exclude from inheritance.

**639.** (1) In accordance with Shiah law<sup>2</sup> a person who has wilfully and unjustly caused the death of another is disqualified to be the heir of the person so killed;<sup>3</sup> but not one who has accidentally or rightfully caused the death of the deceased.

Child of parent- who have taken 'li'an' not related to father, but only to mother.

(2) Where a person has disclaimed the paternity of a child by 'li'an' under s. 218, above, there is no legal relation between the said person and the child; and neither can inherit from the other; provided that, if the said person subsequently withdraws the 'li'an,' the child may inherit from the father, but the father does not inherit from the child;<sup>4</sup> nor are there any rights of inheritance between the said child and the relations of the father.<sup>5</sup>

Illegitimate child.

(3) Subject to sub-section (4), below, an illegitimate child<sup>6</sup> is not related in Shiah law<sup>7</sup> either to his<sup>8</sup> mother,<sup>9</sup>

<sup>1</sup> See s. 606 (1), above.

<sup>2</sup> Bail. II. 264-268, 366-377.

<sup>3</sup> *Id.* 266: "Though *Mafed* has, apparently with some propriety, excluded from the operation of this rule the *deat* or fine to be paid in expiation of the deed, which the slayer is prevented from inheriting." The impediment to succession for causing death is personal to the killer,—it is not transmitted to those who claim through him, and others may succeed through the killer. *E.g.*, if K kills P, and K's son would be entitled in the absence of K, then K's son will succeed, as though K had pre-deceased P: Bail. II. 267 (par. 1). Similarly a slave is excluded, but not the son of a slave (*ib.* last par.). Cf. also *ib.*, 369 (par. 2, 3), 370 (*third*).

<sup>4</sup> Bail. II. 269, 303, 304 (*II* 9-11; *first*), 305 (par. 4), 372 (*first*). Except the descendants of

the bastard child, all his other relations must be through the mother, *i.e.*, cognates, hence they inherit males and females in equal portions: s. 643 (3) (a), and s. 644 (2) (c) (ii).

<sup>5</sup> Bail. II. 304 (*II* 12-19).

<sup>6</sup> Bail. II. 306 (*II* 16-9).

<sup>7</sup> S. 639 (4) refers to a child by fornication and adultery of parents who are not married, whereas sub-section (3) refers to the child of married parents, who have made *li'an*.

<sup>8</sup> The masculine includes the feminine in sub-section (3).

<sup>9</sup> Under Shiah law the illegitimate mother is incompetent to inherit: *Sahabzadi Begum v. Mirza Himmatt Bahadur* (1860) 4 Beng. L. R. (A.C.) 103; 12 W.R. 512; affirmed on review: (1870) 14 W. R. 125; *Koonari Bibi v. Dalim Bibi* (1884) 11 Cal. 14; *Bofatun v. Biladi Khanum* (1893) 30 Cal. 683.

or to his father ; and rights of inheritance exist only between him and his own children and his wife ;<sup>1</sup> they do not exist between him and any of his ascendants or collaterals.<sup>2</sup> SECTION 639.

(4) Where persons believe themselves in good faith to be lawfully married, and give birth to a child, the parentage of that child is established in the said persons ; and if only one of the parents is under such mistake in good faith, the parentage of that one alone is established.<sup>3</sup> Children of persons under mistake considering themselves married

" If a husband disavows the parentage of a ' foetus ' or embryo in the womb of his wife, and ' the li'an ' or mutual imprecation takes place, after which she produces twins, they are both heirs to each other as brothers by the mother's side, but not by the father's " <sup>4</sup>

**639A.** The rules contained in ss. 607, 608 and 609 are applicable also to Shiahs in British India. Un-born and missing persons.

It is stated that there are the following opinions about the procedure to be adopted in case a person is missing,<sup>5</sup> viz., (1) to wait until there is no probability of the missing person being alive. (2) until the expiration of 10 years, (3) " some doctors have prescribed 4 years," (4) to divide the state " amongst his heirs if they are in opulent circumstances, to be restored to him if he should return, " <sup>5</sup> (5) " others have denied the legality of the distribution altogether, directing that the property should be entrusted to the keeping of an heir in opulent circumstances. But the first opinion is to be preferred as best founded in reason and justice." <sup>5</sup>

See s. 587, above, and comment thereto, and compare s. 606 (3), for the principle underlying the rule that a murderer is disqualified from inheriting.

<sup>1</sup> Or " husband," if the deceased is a female.

<sup>2</sup> Ball. II. 306, (par. 3), where another shiah report is alluded to, according to which the illegitimate mother and child inherit from each other, (which would agree with the Sunni law) "but this report is now rejected"—*ib.*

<sup>3</sup> Ball. II. 374 (par. 1)—though their mistaken belief does not entitle them to inherit from one another as husband and wife. See s. 641. The converse case (where persons are really husband and wife but consider themselves to be committing adultery) is also mentioned ; in such a case the offspring is lawful: Ball. II. 374 (par. 2).

<sup>4</sup> Ball. II. 305 (*third*) ; cf. p. 567, above.

<sup>5</sup> Ball. II. 289 (*second*). 372 (*second*), 307 (para. 4),—where it is stated that (1) is the

opinion in the *Khulaf*, (2) is in the *Mafed* on the ground of a report of *Aly bin Muhrar*, as having been so decided by *Abou Jafar* . . . with respect to the sale of a small part of a mansion, but a general inference from a decision of this nature seems to be unreasonable." (3) is the opinion of the *Sheikh*, (4) is stated in the *Summi* (on a report of *Asman bin Essa*) as having been so decided by *Abou Abdoolah* . . . "but this report is weak, or not sufficiently authenticated " (5) accord with a report by *Ishak Bin Omar* of a decision by *Abou Abdoolah* " But there are some doubts as to " *Ishak's* " authority, and though the report is maintained by *Sahul bin Zuad*, it is still considered weak "

SECTION 640. § 3.—*Priorities among Blood Relations : Three Classes.*

Three classes  
of heirs  
mutually  
excluding  
each other

**640.** Priority amongst blood relations<sup>1</sup> for purposes of succession is reckoned in Shiah law on the following basis:<sup>2</sup> All the blood relations are divided into the three classes<sup>3</sup> referred to in ss. 640A, 640B and 640C, below: the existence of any member of the first class of heirs excludes all members of the second and third classes, and any member of the second class excludes all members of the third class:<sup>4</sup> the members of each class, have priority as against each other in the manner referred to in s. 640D, below.<sup>2</sup>

Sections 640A—640C give the main divisions of heirs into three classes: s. 640D explains the priorities within each class.

FIRST CLASS.  
Descendants,  
father and  
mother.

**640A.** The first class of heirs consists of—  
(a) all descendants,<sup>5</sup> together with  
(b) the father and mother of the deceased:  
these are preferred to all grandparents and collaterals.<sup>6</sup>

SECOND  
CLASS.  
All grand-  
parents and  
the brothers  
and sisters  
with their  
descendants.

**640B.** The second class of heirs consists of—  
(a) all the ascendants<sup>5</sup> how high soever of the father  
and mother of the deceased, together with  
(b) the descendants how low soever of his father and  
mother:<sup>7</sup>  
these are preferred to those collaterals who are descended  
from a grandparent or other higher ancestor of the  
deceased.<sup>8</sup>

THIRD CLASS:  
Uncles and  
aunts, and  
their  
descendants

**640C.** The third class of heirs consists of all other  
blood relations of the deceased, viz., the uncles and aunts  
of the deceased, or of an ancestor<sup>5</sup> of the deceased, and  
the descendants<sup>8</sup> of such uncles or aunts.<sup>9</sup>

<sup>1</sup> For the principle of s. 640, see comment

<sup>2</sup> *Tabsiq* in Arabic. Baillie renders it "class," and I have adhered to it, though "group" or "series" would have been preferable.

<sup>3</sup> Ball. II. 323

<sup>4</sup> Male or female, agnate or cognate: cf.

together with (b) the brothers and sisters (full consanguine or uterine) and their descendants how low soever, form the second class.

<sup>5</sup> Ball. 271, 280, 328-328, 364.

<sup>6</sup> Ball. II. 271 (par. 2) 285, 328-331, 364, (par. 3).

640D. (1) Within each of the three classes of heirs mentioned above, where the question is whether one descendant is nearer than another descendant, or one ascendant nearer than another ascendant, priority is given to the claimant between whom and the deceased the fewest links (whether male or female) intervene, but (in the first class) no descendant excludes or is excluded by the father or mother; and (in the third class) no ascendant excludes or is excluded by a collateral.<sup>1</sup>

SECTION 640D.

Priorities within the three classes amongst—  
1. Descendants.  
2. Ascendants.

(2) Amongst those included respectively within the second and third classes of heirs mentioned in ss. 640B and 640C, above, where the question is whether one collateral is nearer than another,—

3. Collaterals.

(a) the descendant how low soever (and whether full consanguine or uterine) of a nearer common ancestor<sup>2</sup> has priority over all the descendants of a remoter common ancestor;<sup>3</sup>

Descendant of nearest common ancestor preferred.

(b) amongst the descendants of the same common ancestor the following priorities prevail,—

(i) the claimant between whom and the said common ancestor the fewest links intervene, has (subject to s. 640E below) priority over all other descendants of the same common ancestor;

(ii) the full blood relations and their descendants, have priority over the consanguine relations and their descendants, respectively, in the same line;<sup>4</sup> but the uterine relations and their descendants rank with, and do not exclude, nor are they excluded by, the full blood, or the consanguine relations, or their descendants respectively, in the same line.<sup>1</sup>

Full blood preferred to consanguine, but uterine not excluded by full or consanguine.

(3) Amongst members of the third class of heirs, the uncles and aunts on the paternal side as well as the mater-

Competition between paternal and maternal side relates merely to generation but not full blood or Consanguine relationship.

<sup>1</sup> Bail. II. 324-325.

<sup>2</sup> "Common ancestor" here means the nearest ancestor, agnate or cognate of the deceased from whom the claimant can also trace descent: cf. s. 604 (4), above.

<sup>3</sup> Bail. II. 286, (par. 3), 287 (*first*), 329, 331,

(par. 4), 332 (par. 1) e.g., the maternal uncle as the son of the maternal grandfather excludes the great-great-grandfather's great-grandson: *Njabat Ali v. Wazir Ali* [1908] All. W. N. 149.

<sup>4</sup> Bail. II. 271 (par. 3), 280 (par. 4).

SECTION 640D. nalside are considered to be relations of the same description, and the nearest of them on either side excludes a claimant in a lower line, even though the latter belongs to the other side : but so that the full blood relation excludes a consanguine relation if the latter is on the same side and in the same (or a lower) line, but does not exclude a consanguine relation in the same line on the other side.<sup>1</sup>

See the comment following s. 640E, below.

*Exceptional case.*  
Son of full  
paternal uncle  
excludes  
consanguine  
uncles.

**640E.** Where the claimants are the son of a full paternal uncle and a consanguine paternal uncle, (there being no maternal uncle) the son of the full paternal uncle is preferred to the consanguine paternal uncle, notwithstanding that the latter is in a higher generation.<sup>2</sup>

#### PRINCIPLES ON WHICH PRIORITY IS BASED.

1. Nearest:  
always  
preferred.
2. Ye know  
not whether  
parents are  
nearer or  
children.
3. Full blood  
preferred  
to con-  
sanguine  
but not  
to uterine;

The nearest in every case (except in the anomalous case mentioned in s. 640E above) excludes the remoter,<sup>3</sup> i.e., the claimant in the generation nearest to the deceased is always preferred; this, however, is subject to the gloss that the parents of the deceased are considered to be neither

<sup>1</sup> In other words, a claimant on one side does not exclude a claimant on the other side, merely on the ground of the former being a full blood relation, and the latter, consanguine, but only if the former is in a nearer line than the latter.

<sup>2</sup> Bail. II. 285 (par. 3) This is a case entirely *ius gentium*; the nephew is preferred to the uncle "while the case remains exactly so; but if it is changed by the addition of a maternal uncle, the son of the paternal uncle is excluded,"—ib. 320. "The son of a paternal full uncle, [that is, the son of an uncle who was full brother to the deceased's father, being by the same father and mother] excludes a paternal half uncle only of the deceased, and takes the whole inheritance preferably to the latter, although nearer in degree, if the succession should be limited to these two; and it is in virtue of this exception, that had the Prophet of God, on whom and his posterity be blessing and peace, left no issue at the period of his dismission, his whole succession must by law have devolved on the . . . Commander of the Faithful, *Ali*, on whom be the blessing of God, in preference, and complete exclusion of, *Abbas*; for *Abou Talib* was the full brother of *Abdoolah*, both by father's and mother's side,

and consequently his son, the Commander of the Faithful, although more remote in degree, must have excluded *Abbas*, half uncle of the Prophet, as being brother to *Abdoolah* by the father's side only . . . *Imam Jafar Sadik*. . . observed, . . . 'Verily, *Abdoolah*, father to the Prophet of God, was full brother of *Abou Talib* by the same father and mother, whence the Commander of the Faithful, as son of *Abou Talib*, had no issue of the Prophet remained, would have excluded *Abbas*, his uncle by the same father only from inheritance.' And hereupon a question has arisen whether the exception is by law restricted to the particular instance before us, without application to any other, or may be also legally extended to all similar cases. The most common and prevalent doctrine has restricted its influence to this particular case alone, and the author of the *Shurays* has expressly declared that if with these two persons, *viz.* the son of a paternal full uncle and paternal uncle of the half blood, any other heir, even a maternal uncle, should exist, the decision of law would be completely altered and the title of the uncle's son entirely cut off."—Bail. II. 320-331.

<sup>3</sup> Bail. II. 308 (par. 2).



remoter nor nearer than his descendants;<sup>1</sup> similarly the parents<sup>2</sup> of the father, or mother of the deceased are on the same footing as the descendants of the father or mother of the deceased. When two or more claimants are in the same generation, and on the same side but some are full blood, and others half blood, then the uterine relations always succeed,<sup>3</sup> but the consanguine relations are excluded by the full blood.<sup>4</sup> See table on p. 912, below.

The same may be stated in the form of the following propositions,—

I. The three classes are each in turn exclusive of the other (so that if any member of the 1st class, male or female, agnate or cognate, ascendant or descendant, exists, none of the 2nd or 3rd class can succeed, and similarly the 2nd class excludes the 3rd.)<sup>5</sup>

The three classes mutually exclusive.

II. As to those included in each of the three classes,—

(1) The 1st class consists of two sub-groups marked (a) and (b) below, members of which do not compete against each other, *i.e.*, the existence of no member of one sub-group has the effect of excluding any member of the other sub-group,<sup>6</sup>—

FIRST CLASS.  
Two divisions

(a) the father and mother,

Amongst descendants nearer exclude remoter, But no competition between the two divisions

(b) descendants.

Of the descendants only the nearest succeed (so that a son of daughter excludes a grandchild, whether male or female, agnate or cognate; a daughter's daughter will, *e.g.*, exclude a son's son's son). But how remote soever the nearest descendant may be he or she will succeed conjointly with the father and mother, and will neither exclude the latter nor be excluded by them (*e.g.*, the children's children's children will succeed with the father and mother; provided that there are no children nor grandchildren.)<sup>7</sup>

SECOND CLASS.  
Two divisions in each, nearer excludes remoter; but no competition between the two divisions.

(2). The 2nd class also consists of the two sub-groups marked (a) and (b) below, members of which do not compete against each other,<sup>8</sup>—

(a) grand-parents (how high soever),

(b), brothers and sisters, and their descendants how low soever.

In each of these sub-groups (a) and (b) there is competition 'inter se,' only amongst the members of that group (*e.g.*, the mother's mother will exclude the father's father's father; and the brother's son is excluded by the sister; but the grandfather will not exclude a sister's daughter's daughter)

<sup>1</sup> See Quran IV. 12, cited in the comment to s. 604A, above.

<sup>2</sup> Not only the parents but any ascendant how high so ever. This is anomalous: on principle the uncle should rank *with* (and not be excluded by) the great grandfather. But the chances of such ancestors surviving are so slight, that it is no wonder the law is not deve-

loped harmoniously regarding them.

<sup>3</sup> Bail. II. 333.

<sup>4</sup> Bail. II. 382 (par. 2).

<sup>5</sup> Bail. II. 323 (par. 2).

<sup>6</sup> Bail. II. 324-325.

<sup>7</sup> Bail. II. 324-325.

<sup>8</sup> Bail. II. 326-327.

## SECTION 640E.

## THIRD CLASS.

Not divided  
into sub-groups  
for the purpose  
of competition.

(3). The 3rd class includes the brothers and sisters of the father and mother of the deceased, and their descendants, and the brothers and sisters of all other ancestors (male or female agnate or cognate of the deceased.) This class, it may be observed, involves only one general description of heirs, because their title to succession is derived from the general relation to the deceased, *viz.*, that of brotherhood or sisterhood to his parents.<sup>1</sup> Hence the nearest of them all succeeds, and any member of the third class competes against all the others: differing from in this respect from the first two classes, which are divided into two watertight compartments. (*E.g.* a paternal uncle or aunt is nearer than, and thus excludes, a paternal uncle or aunt's son, and a maternal aunt<sup>2</sup> will exclude a paternal uncle's son. Again the great grandson, of the brother of the father<sup>3</sup> is nearer than the brother of the grandfather.)

## HEIRS UNDER SHIAH LAW : TABLE OF PRIORITY.

Husband  
or wife.

*N.B.*—The husband or wife always succeeds, whoever be the surviving blood relations. Those mentioned in groups marked in I. II. and III. below succeed simultaneously, unless otherwise stated.<sup>4</sup>

FIRST CLASS  
OF HEIRS.

I. (a) The nearest descendants, (b) father *and/or* (c) mother.

The members of group (a) have priority in the following order, each heir excluding all those below : —

1. Sons *and* or daughter.
2. Son's children *and/or* daughter's children.
3. Great grandchildren.

—and so on.

SECOND CLASS  
OF HEIRS

II. (a) The nearest grandparents (b) brothers *and/or* sisters, and, failing them, their nearest descendants how low soever.<sup>5</sup>

Amongst members of group (a) (*i.e.*, amongst grandparents) priority is given in the following order, each set of claimants excluding the sets that follow (F=father or father's; M=mother or mother's).

1. FF, FM, MF, *and/or* MM.
2. FFF, FFM, FMF, FMM, MFF, MFM, MMF, *and/or* MMM,—

and so on.

Amongst the members of group (b) (*i.e.*, in the case of sisters and brothers and their descendants) priority is given in the following order each set below excludes the sets

<sup>1</sup> Bail. II. 320.

<sup>2</sup> Full, consanguine or uterine.

<sup>3</sup> So any other descendant, how low soever, of the father's brother will exclude the grandfather's brother, just as any descendant of the

propositus will exclude descendants of the brother.

<sup>4</sup> See also table on p. 938, below.

<sup>5</sup> No matter how distant they are, so long as there are none nearer than themselves

following it of with relative priorities amongst those within the same SECTION 640E.  
set as appears below :- -

- |    |  |                      |  |
|----|--|----------------------|--|
| 1. | { full brother <i>and/or</i> sister,<br>and failing them,—<br>consanguine brother <i>and/or</i><br>sister,   | { together<br>with } | { uterine brothers <i>and/or</i> sisters.                    |
| 2. | { full brother's <i>and/or</i> sister's<br>children, and failing<br>them,—<br>consanguine brother's <i>and/or</i><br>sister's children,            | { „ }                | { uterine brother's <i>and/or</i><br>sister's children.      |
| 3. | { full brother's <i>and/or</i> sister's<br>grandchildren, and fail-<br>ing them,<br>consanguine brother's <i>and/or</i><br>sister's grandchildren. | { „ }                | { uterine brother's <i>and/or</i><br>sister's grandchildren. |
- and so on.

III. The uncles *and/or* aunts of the deceased ; *and, failing them*, the <sup>THIRD CLASS</sup> uncles *and/or* aunts of the father and mother of the deceased ; *and failing them*, the uncles *and/or* aunts of the grandparents of the deceased, and so on. The priorities in each group under class III, mentioned above, are as follows : each set numbered 1, 2, 3, 4, respectively, below, excludes the sets following, with the priorities amongst those within the same set as stated.

*Father's side :*

*Mother's side :*

- |    |   |                   |  |  |                   |   |
|----|---|-------------------|--|--|-------------------|---|
| 1. | { (a) The full brothers<br><i>and/or</i> sisters of<br>the father, and<br>failing them,—<br>(b) The consanguine<br>brothers <i>and/or</i><br>sisters of the<br>father, <sup>1</sup> | { together with } | { the uterine<br>brothers<br><i>and/or</i><br>sisters<br>of the<br>father. | { the uterine<br>brothers<br><i>and/or</i><br>sisters<br>of the<br>mother, | { together with } | { (a) the full brothers<br><i>and/or</i> sisters of<br>the mother and<br>failing them,—<br>(b) the consanguine<br>brothers <i>and/or</i><br>sisters of the<br>mother; |
|----|---|-------------------|--|--|-------------------|---|

*failing all the above,—*

- |    |  |                   |  |  |                   |  |
|----|--|-------------------|--|--|-------------------|--|
| 2. | { (a) The children of<br>the full brothers<br><i>and/or</i> sisters of<br>the father, <sup>1</sup> and<br>failing them,—<br>(b) the children of<br>the consanguine<br>brothers <i>and/or</i> sisters<br>of the father, | { together with } | { the children<br>of the<br>uterine<br>brothers<br><i>and/or</i><br>sisters<br>of the<br>father, | { the children<br>of the<br>uterine<br>brothers<br><i>and/or</i><br>sisters<br>of the<br>mother, | { together with } | { (a) the children of<br>the full brothers<br><i>and/or</i> sisters of<br>the mother and<br>failing them,—<br>(b) the children of the<br>consanguine brothers<br><i>and/or</i> sisters<br>of the mother; |
|----|--|-------------------|--|--|-------------------|--|

*and failing all the above,—*

1 This is subject to the anomalous case referred to in s. 640E.

SECTION 640E. 3. the children of each of those included in group 2 above, and failing them—

4. the brothers and/or sisters of the grandparents in the order indicated in *ill.* (32) and (33) to s. 644, below.

#### § 4—Distribution of the Estate amongst the Claimants.

##### (1) *The Husband or Wife a Sharer.*

Husband's share  $\frac{1}{2}$ , if descendant  $\frac{1}{2}$ , if not wife's  $\frac{1}{4}$  or  $\frac{1}{8}$ .

**641.** (1) The husband takes  $\frac{1}{4}$  of the estate if the deceased has left any descendant,<sup>1</sup> and  $\frac{1}{2}$  of the estate if she has not left any.<sup>2</sup>

(2) The wife takes  $\frac{1}{8}$  of the estate if the deceased has left any descendant, and  $\frac{1}{4}$  if he has not left any; provided that where the widow has no child by the deceased, she takes no part of the land left by him, but her share of the value of the household effects and buildings is to be given to her.<sup>3</sup> Where there are two or more widows they take such  $\frac{1}{4}$  or  $\frac{1}{8}$  of the estate in equal portions.<sup>4</sup>

(1) A has four wives. He divorces one of them, and marries another WA, and then dies, leaving no children. If there is a doubt as to which of the four was divorced, then  $\frac{1}{4}$  of  $\frac{1}{4} = \frac{1}{16}$  is taken by WA (whose right is undisputed) and the first four wives take  $\frac{1}{4}$  of  $\frac{3}{16}$  each.<sup>5</sup>

##### *Illustrations*

(2) H marries W, a relative within the prohibited degrees, or WA, the mother of a woman with whom H has had illicit intercourse; there is no valid marriage between H and W or WA; and neither can succeed from H nor H from either;—though H may not have known of the illegality of the marriage.<sup>6</sup>

(3) "If a sick man contract marriage with a woman, whether his distemper be dangerous or otherwise, and die of that distemper, without

<sup>1</sup> Male or female, agnate or cognate.

<sup>2</sup> *Bail.* II. 273, 338; 303-304, 365 (*ll.* 6-30 381 (par. 3). Of course the marriage must be valid, *ib.* 373 (par. 4); cf. *v.* 611, above and comment thereto. As to *mul's* see s. 25 (9) and comment to s. 215, above.

<sup>3</sup> See, however, comment, (*Mir*) *Ali Hussain v. Sajjid Begum* (1897) 21 *Mad.* 27. *U'mardaz Ali v. Wilayat Ali* (1896) 10 *All.* 160; (*Mussumat*) *Toonani v. (Mussumat) Mehnd Begum* (1898) 3 *Agra* 13; (*Mussumat*) *Asloo v. (Mussumat) Umdudoonissa* (1873) 20 *W. R.* 297; *Hussain Khan v. Umadi Bibi* [1889] *All. W. N.* 192. Cf. *Aga Mohamed Jaffer*

*Hindoonem v. Kulsoom Beebe* (1887) 25 *Cal.* 9; 24 *I.A.* 196. In *Mussumat Farbat v. Muhammad Musaffer Ali Khan* (1912) 23 *Mad. L. J.* 11; 9 *All. L. J.* 450 (P.C.) the point was alluded to, but it was unnecessary for the decision. By the *Lex Papia* of Roman law the childless "lost half of all their inheritance and legacies," (*Galus* II. 286. The *Lex Julia* "forbade the unmarried to take inheritance and legacies," *ib.*

<sup>4</sup> See s. 641 *ill.* (1). *Bail.* II. 315 (*ll.* 21-27); 382 (par. 2).

<sup>5</sup> *Bail.* II. 294 (*third*).

<sup>6</sup> *Bail.* II. 311 (*second*).

intervient recovery or convalescence, previous also to consummation SECTION 641 of his nuptials, such contract of marriage is thereby null, or in other words, is not considered to be established in law, until consummation or recovery of the husband from that disease with which he was afflicted at the time." <sup>1</sup>

(4) "An 'oom-i-wulud' or female slave who has borne a child to her master has nevertheless no claim to his inheritance." <sup>2</sup>

For the history of the wife's claim on the estate of the husband see ss. 299 and 611, above, and the comments thereon. And see illustrations to s. 157, above. History of widow's rights.

Under Shiah law the husband never gets less than  $\frac{1}{4}$  or  $\frac{1}{2}$ , as the case may be. He can take more than  $\frac{1}{2}$  only when there is no blood relation of the deceased at all. The wife never takes less than  $\frac{1}{8}$  nor more than  $\frac{1}{4}$ . This is expressed by saying that the estate never "returns" or "reverts" to the wife, and to the husband only when there are no blood relations. See s. 647, below. The shares of the husband or wife never abate by "increase." <sup>3</sup> Husband and wife's shares liable to no variation. Wife does not take by return.

The blood relations take the rest of the estate of the husband or wife has had his or her Quranic share in it, under s. 641. In excluding the widow from the "return" or "surplus" when there are no other heirs, the Shiah law is less favourable to her than the Sunni law; cf., ss. 633, 647.

#### CHILDLESS WIDOW AND IMMOVABLE PROPERTY.

In debarring the childless widow from taking any portion of the land of her husband, the Shiah law differs from the Sunni law. The rule furnishes one of the few instances where Muhammadan law has made a distinction between lands and other property. The 'Sharaya'-ul-Islam <sup>4</sup> has been thus translated on this point: "When the wife has had a child by the deceased, she inherits out of all that he has left; and if there was no child, she takes nothing out of the deceased's land, but her share of the value of Childless widow debarrd from sharing lands.

<sup>1</sup> Bail. III. 340; "It follows that in this case there can be no title of inheritance between the parties, no dower even incumbent on the husband and that the woman is not bound to observe an *Iddat*, or term of probation. This law of annulment of contract entered into by parties legally qualified to contract, without divorce or voluntary dissolution, may certainly at first sight appear irreconcilable, but all objection and doubt is removed necessarily by a reference to those authentic proof of their nullity, already detailed in the Book of marriage." Baillie adds. "This Book, which was

probably added to the Digest compiled under the superintendence of Sir William Jones, by the translator, was never published, and has not been found among his papers which have come to my hands.—Ed." Cf. also s. 101, about; *Siemidiah Begum v. Shah Hanoo Begum* (1914) 18 Oudh Cas. 325; 18 Ind. Law Journ. 179, 22 Ind. Cas. 529.

<sup>2</sup> Bail. II. 371 (par. 4).

<sup>3</sup> See footnotes to s. 608 (3) above, Bail. II. 271-272, 273 (last line), 338, 339, 365, (II. 6-30).

<sup>4</sup> Bail. II. 295; cf. s. 603, above.

**SECTION 641.** the household effects and buildings is to be given to her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while 'Moortuza' (may God be pleased with him) has expressed a third opinion to the effect that the lands should be valued, and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority."<sup>1</sup> This passage shows that there has been a conflict of opinion on this point. If the translation is accurate it expressly limits the rule to cases where the widow *has had* no child by the deceased. But the Allahabad High Court has followed <sup>2</sup> Syed Ameer Ali's dictum that "when she *has* no child, or when a child was born but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects, trees, buildings etc.; she takes no interest in the landed property."<sup>3</sup> On referring to the mere wording of the 'Sharaya'-ul-Islam' in the original Arabic, it seems that the point may not be without some doubt; and there is little to throw light on it even in the very exhaustive commentary, the 'Jawahir-ul-Kalam.' One has, therefore, to fall back on the general principle that in this matter as in others relating to inheritance, deceased persons do not affect the rights of the living, and that unless the widow has a child surviving her deceased husband, she must rank as childless. It must be added, however, that the strict 'Ithna 'Ashari' rule seems to have been varied in several parts of India by custom: as in many cases the widow is allowed to share in all the property of the deceased. It should also be remembered that under the 'Ithna 'Ashari' law the husband make a will in favour of his wife without the consent of the other heirs. Though the decisions are numerous,—they are cited in the footnotes to s. 641—none of them seem to have had to deal with this particular point.

## (2) *Distribution amongst Blood Relations.*

### (a) *Amongst Heirs of the First Class.*

**642.** (1) Where the heirs entitled to succeed under s. 640, above, belong to the first class, and there is amongst

**FIRST CLASS.**  
1. If there  
is a son  
or (des-  
cendant  
of son)  
he is  
residuary  
with  
daughter.  
—the rest  
taking  
shares.

<sup>1</sup> Bad II. 295; cf. s. 603, above.

<sup>2</sup> *Muzaffar Ali Khan v. Parbati* 29 All. 640, 644-645; *Parbati v. Muzaffar Ali Khan* (1912) 9 All. L. J. 450, 459.

<sup>3</sup> "Mahomedan Law," (2nd ed.) II. 118, 78, (3rd ed.) II. 148. The decision was given on June 13th 1907. In 1908 the third edition of

Syed Ameer Ali's learned book came out, and the passage is reproduced there citing decided cases and referring generally to the *Jami'ush-Shariat*. The present writer has not been able to discover any passage in the *Jami'ush-Shariat* that can directly settle the point. See comment.

them a son or the descendant of a son, the distribution of SECTION 642. the estate is, subject to s. 645, below, as follows,—

(a) the husband or wife, takes  $\frac{1}{4}$  or  $\frac{1}{8}$  of the estate, and the parents take  $\frac{1}{6}$  each as Quranic sharers;<sup>1</sup> and

(b) the residue<sup>2</sup> is divided amongst the descendants 'per stirpes' in such proportions that in each generation each male takes twice as large a share as each female;<sup>3</sup>

(c) the eldest son of the deceased is entitled (in addition to his share in the residue), to the body, clothes, ring, sword and Quran of the deceased; provided, first, that the said son is neither a prodigal<sup>4</sup> nor deficient in understanding; secondly, that the deceased has left some other property besides the said property; and thirdly, that the said son is liable for the payment and fulfilment of the un-performed fasts and prayers of the deceased.<sup>5</sup>

(2) Where the heirs entitled to succeed under s. 2. If no son but daughter then she bears the deficit, but the surplus she shares with father (and mother). 640, above, belong to the first class, and there is amongst them no son, nor the descendant of a son, but a daughter or daughters, or the descendants of a daughter or daughters, the distribution of the estate is, subject to s. 645, below, as follows,—

(a) the husband or wife takes  $\frac{1}{4}$  or  $\frac{1}{8}$  of the estate, and the parents take  $\frac{1}{6}$  each as Quranic sharers; and

(b) if there is a single daughter or (there is no daughter but) the descendants of a single daughter, she or they take  $\frac{1}{2}$  of the estate (subject to clause (c), below); if there are two or more daughters, or (there are no daughters, but) the descendants of two or more daughters are

<sup>1</sup> Bail. II. 261, 276, 365, 381. See s. 642, *ill* (1), (3), (8).

<sup>2</sup> There is necessarily some residue left.

<sup>3</sup> Bail. II. 385; *cf.* "The son of *Abou Ayya* having expressed his ignorance and doubt of the cause why a female, the weakest and most helpless of the two, should enjoy only half the portion of inheritance bestowed upon a male, some of our companions stated this matter to the *Imam Jafer Sadik*, on whom be peace; he replied, a female is excused from the perform-

ance of many duties imposed by law upon a male, such as service in the Holy Wars, maintenance or support of relations, and payment of expiatory fines, and for this reason her share of inheritance has been justly limited to half the portion of a male."

<sup>4</sup> Presumably a "prodigal under inhibition"

—*cf.* *Had.* Book xxxv.

<sup>5</sup> Bail. II. 279 (*third*). *Semble*, the words in [ ] refer to religious not legal liability.

SECTION 642. surviving they will take  $\frac{2}{3}$  as sharers (subject to clause (c), below);<sup>1</sup>

Abatement of daughter's shares.

(c) if the sharers are such that the sum total of the shares to which they are entitled exceeds unity,<sup>2</sup> the portions allotted to the daughters or their descendants are alone diminished, and the husband or wife, and parents mentioned in clause (a) take their full shares;<sup>3</sup>

Return of surplus or residue.

(d) if the sharers are such that the sum total of the shares to which they are entitled is less than unity, then no part of the residue is taken by the husband or wife, but it is divided amongst (i) the parents and (ii) the daughter or daughters (or their descendants)<sup>4</sup> in the proportions of their respective shares;<sup>5</sup> provided that if the mother is prevented under clause (3) (b), below, from taking any part of the residue, then it is divided between (i) the father and (ii) the daughter or her descendants in proportion to their respective shares.

3. If no descendants, but only parent and spouse.

(3) Where the heirs entitled to succeed under s. 640, above, belong to the first class, and there is amongst them no descendant, the distribution of the estate is, subject to s. 645, below, as follows,—

(a) the husband takes  $\frac{1}{2}$ , or the wife  $\frac{1}{4}$ , and the mother  $\frac{1}{3}$  or  $\frac{1}{6}$  of the estate as provided in clause (b) below; and the residue<sup>6</sup> is taken by the father;<sup>7</sup>

Mother's share when restricted to  $\frac{1}{6}$  without right to residue.

(b) the mother takes  $\frac{1}{3}$  of the estate<sup>8</sup> where there is no descendant,<sup>9</sup> except that when she co-exists—

<sup>1</sup> See s. 642 *tit.* (4), (5), (8).

<sup>2</sup> Under Shiah law this can happen only in case the husband or wife of the deceased, co-exists with (a) a daughter or daughters (or their descendants): or (b) a sister or sisters (or their descendants): *Ball. II. 395, 396*. The case when the heirs include daughters or daughters' descendants refers to the first class of heirs; and sisters are included in the second class of heirs. The deficiency has, in the first case, to be borne by the daughters (or their descendants), and in the second by the sisters (or their descendants): *Ball. II. 316, 317*. Under SUNNI LAW the deficiency has to be borne by all the sharers together, by "increase" of the common denominator.

<sup>3</sup> *Ball. II. 316* (par. 2); see s. 642 *tit.* (13).

<sup>4</sup> The husband or wife does not take any part of the residue or surplus so long as there are any blood relations; cf. below s. 647.

<sup>5</sup> See s. 642, *tit.* (9), (10), (12), (14).

<sup>6</sup> There is always a residue, and never a deficit, in this case.

<sup>7</sup> *Ball. II. 278* (*tit.* 811); 383 (par. 3).

<sup>8</sup> In Sunni law when both parents co-exist with husband or wife, the mother takes  $\frac{1}{3}$  of the residue after the husband or wife has taken his or her share of  $\frac{1}{2}$ , or  $\frac{1}{4}$ . In Shiah law the mother takes  $\frac{1}{3}$  of the whole estate.

<sup>9</sup> Where there are descendants, s. 642 (1) (a), or s. 642 (2) (a), will apply and the mother will take only  $\frac{1}{6}$ .



- (i) with the father of the deceased and—  
 (ii) with (a) two or more full or consanguine brothers, or  
 (b) with one such brother and two or more such  
 sisters; or (c) with four or more such sisters,—

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then, even though there is no descendant she takes only  $1/6$  of the estate and no part of the residue referred to in clause (2) (d) above. A child 'en ventre sa mère,' infidels, slaves, and (according to the most prevalent doctrine) murderers, are not taken into consideration for the purpose of diminishing the mother's share to  $1/6$ ; nor do children of deceased brothers and sisters take their place for the said purpose.<sup>1</sup>

*N.B.*—The persons mentioned in the beginning of each illustration, *Illustrations*, below being the claimants, the portion of the estate taken by each is indicated by the fractions by their side unless otherwise stated.

- (1) Son's sons,  $2/3$ ; children of a daughter,  $1/3$ .

Similarly, if there were children (or a single daughter) of a son's son and the children (or a single daughter) or a daughter's daughter, the former would take  $2/3$ , and the latter  $1/3$ .<sup>2</sup>

- (2) Daughter's son's children,  $1/3$ ; son's daughter's daughter,  $2/3$ .<sup>3</sup>

(3) One daughter's son's children,  $1/2$ ; daughter's daughter's daughters,  $1/2$ .<sup>2</sup>

- (4) Daughter or daughter's daughter; full sister or brother,—

The daughter or daughter's daughter takes the whole, excluding the brother or sister.<sup>3</sup>

(5) Father, paternal uncle, and grandfather. The father takes the whole property, excluding the rest.<sup>4</sup>

- (6) Husband,  $1/2$ ; mother  $1/3$ ; father,  $1/6$ .<sup>5</sup>

- (7) Wife,  $1/4$ ; mother,  $1/3$ ; father,  $5/12$ .<sup>5</sup>

<sup>1</sup> Ball. II. 272, 278 (*II.* 12-22), 276 (par. 2), 305-306. Where there is no father, the mother takes the whole residue, though there may be two or more brothers or sisters, as there are no descendants—the husband or wife being postponed in that right to all blood relations see s. 647, below.

<sup>2</sup> Ball. II. 386. Under *SUNNI LAW* in *II.* (1) the son's son would alone succeed, excluding the daughter's children who would be classed as distant kindred, and postponed to all male agnates and sharers. All the claimants in *II.* (2), (3), are also cognates.

<sup>3</sup> *Ball.* II. 328 (*II.* 4-8). Under *SUNNI LAW*

in *II.* (4) the daughter's daughter, being a cognate, would be classed amongst the distant kindred, and would be excluded by the sister or brother; if the daughter and sister co-existed they would each take  $1/2$ .

<sup>4</sup> Ball II. 325 (*II.* 23-28). Under *SUNNI LAW* the same result follows.

<sup>5</sup> Ball. II. 383 (par. 3), 384 (pars. 1, 2), 394, (*II.* 27-35)—unless there are two or more full or consanguine brothers or sisters reducing the mother's share to  $1/6$ . Under *SUNNI LAW* in *II.* (6), (7) the mother would take respectively  $1/3$  of  $1/2$  and  $1/3$  of  $3/4$  leaving  $2/3$  of  $1/2$  and  $2/3$  of  $3/4$  to the father.

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(8) Husband,  $1/4$ ; mother (or father),  $1/6$ ; children male and female take the residual  $5/12$  dividing it stipitally, males taking twice the share of females.<sup>1</sup>

(9) Wife,  $1/8$ ; mother (or father)  $1/6 + 1/4$  of  $5/24$ ; daughter  $1/2 + 3/4$  of  $5/24$ ;— the residue is  $5/24$ ; and the first fractions are taken as shares; the second fractions following the  $+$  symbol as return.<sup>2</sup>

(10) (a) Wife,  $1/8$ ; father,  $1/6 + 1/5$  of  $1/24$ ; mother,  $1/6 + 1/5$  of  $1/24$ ; daughter,  $1/2 + 3/5$  of  $1/24$ . (b) Husband,  $1/4$ ; father,  $1/6 + 1/4$  of  $1/12$ ; daughter,  $1/2 + 3/4$  of  $1/12$ . The residue being  $1/24$  and  $1/12$  respectively is taken by the blood relations in the proportion to their respective shares.<sup>3</sup>

(11) Father,  $1/6$ ; mother,  $1/6$ ; two or more daughters,  $2/3$ .<sup>4</sup> If there were the children of two daughters, the division would be the same.<sup>5</sup>

(12) Father, mother, one daughter. The original shares are,  $1/6$ ,  $1/6$ ,  $1/2$  respectively; the surplus of  $1/6$  reverts to them all in the same proportions,<sup>4</sup> unless the mother is excluded from it by the presence of two or more full or consanguine brothers and sisters: see s. 642 (3) (b).

(13) Husband, father, mother, 2 daughters; the full shares would be  $1/4$ ,  $1/6$ ,  $1/6$ ,  $2/3 = 15/12$ . The first three are paid out in full, and the daughters bear the deficit, i.e., they take  $5/12$  instead of  $8/12$ .<sup>4</sup>

If there were only daughter, there would still be a deficit, and she would take  $5/12$  instead of  $1/2$ .<sup>4</sup> If there were a son instead of the daughter the residue would be the same, and it would be divided between the son and daughter, if both exist, in the proportion of 2 : 1. Similarly, if there were the children of daughters or sons respectively.<sup>5</sup>

(14) Mother, daughter, brother (or paternal uncle). Mother,  $1/6$ , daughter,  $1/2$ , and the residue is taken by the mother and daughter in the same proportion, the brother or paternal uncle is excluded.<sup>6</sup>

## 1. FIVE GENERAL RULES.

There are five "general rules," mentioned by Baillie from Sir W. Jones's Digest, which may be referred to here: (1) The father, in the

1. Father pure residuary if no descendants.

<sup>1</sup> Bail. II. 395 (H. 5-9).

<sup>2</sup> Bail. II. 401 (last 6 lines). Under SUNNI LAW the father or any other male agnate would prevent any of the mere sharers from taking any part of the residue.

<sup>3</sup> Bail. II. 402 (par. 1) Under: SUNNI LAW the father would alone take the whole of the residue in addition to the  $1/6$ , i.e., in (a)  $1/24$ ;  $1/6$  and in (b)  $1/12 + 1/6$ . Similarly in H. (12).

<sup>4</sup> Bail. II. 263 (par. 2), 277 (H. 6-9), 313 (H. 11-12, 23-33), 314 (par. 1), 317 (H. 16-27)

318 (H. 1-9), 395 (H. 10-23), 396 (H. 16-29).

<sup>5</sup> Bail. II. 385 (par. 3). In SUNNI LAW, if there is no son, the shares of all the sharers (and not merely the daughter) would abate proportionately.

<sup>6</sup> Bail. II. 274 (H. 21-22, 27, 28), 383 (par. 3), 393 (par. 2), 401; (*Rujah Deidar Houssein v Ramee Zuhoor-oon-Nissa* (1841) 2 Moo. I.A. 441. In SUNNI LAW the residual  $1/3$  would be taken entirely by the brother or paternal uncle.

absence of descendants, is a pure residuary : he does not take any share, but takes whatever residuo is left after the share: (husband or wife and mother) have taken their shares.<sup>1</sup> (2) Amongst descendants the estate is always distributed (not only 'per stirpes' but also) in such manner that at each stage, each male is allotted twice as large a portion as each female.<sup>2</sup> (3) The division is always 'per stirpes,' i.e. that, (a) when a claimant is related to the deceased through one who would have been a sharer, that claimant takes the share of that sharer; and (b) if the claimant is related through a residuary he takes the residue,<sup>3</sup> this is subject to the claimant having been himself specifically mentioned as a sharer in the Quran, and also to rule (5) below; (c) in the secondary distribution amongst full blood and consanguine relations on the father's side, males take double the portion of females, but on the maternal side and amongst uterines on the paternal side, the males and females share alike.<sup>4</sup> (4) When some of the claimants are of the full blood or consanguine, and others uterine, the latter take  $\frac{1}{6}$  if only one, or  $\frac{1}{3}$  if two or more (to be divided equally amongst them), and the former take the residue (to be divided in the proportion of a double share to males).<sup>5</sup> (5) If grandparents and brothers or sisters co-exist, then paternal grandparents rank like full (or consanguine) brothers and sisters; and maternal grandparents like uterine brothers and sisters; but if there are only grandparents and no brother or sister, then the paternal grandparents take the father's  $\frac{2}{3}$  and the maternal grandparents take the mother's  $\frac{1}{3}$ .<sup>6</sup>

## 2. THE MOTHER'S RIGHT IN THE ESTATE.

The mother takes either  $\frac{1}{6}$  or  $\frac{1}{3}$  of the estate with or without the right to take a portion of the residue:

(1) She takes  $\frac{1}{6}$  of the estate:—

- (a) where there is any descendant; or
- (b) where the surviving relations are:

<sup>1</sup> Ball. II. 383 (par. 3). See s. 642, *ib.* (5).

<sup>2</sup> Ball. II. 384 (par. 3). See s. 642, *ib.* (1), (6).

<sup>3</sup> Ball. II. 385 (par. 3); *c.g.* (i) the children of one daughter take  $\frac{1}{2}$  of the estate as a share, and have the right to the residue or surplus together with the father and mother just as the daughter herself would have had; (ii) the children of two daughters take  $\frac{2}{3}$ ; (iii) the children of a son are merely residuaries; (iv) the children of one full (or consanguine) sister take  $\frac{1}{2}$ ; (v) of two or more  $\frac{2}{3}$ ; (vi) of one uterine sister or brother  $\frac{1}{6}$ ; (vii) of two or more  $\frac{2}{3}$ ; (viii) the maternal grandfather (or maternal grand-mother) takes the share of the mother,

*i.e.*,  $\frac{1}{3}$ ; (ix) paternal uncles and aunts receive the shares of the father and mother respectively. (x) the children of the uncles get the share of their parents.

<sup>4</sup> So that uterine brothers and sisters share equally, also all cognate grandparents, and the children of uterine paternal uncles, and of all maternal uncles; but full and consanguine brothers, agnate grandparents, and the children of full and consanguine paternal uncles (and aunts) share in the proportion of a double share to a male.

<sup>5</sup> Ball. II. 388 (par. 2). See s. 644, *ib.*

<sup>6</sup> Ball. II. 391 (par. 2). See s. 644, *ib.*

**SECTION 642.**  
 2. Descendants divide 'per stirpes,'—males twice the portion of females.  
 3. Relations through sharers rank like sharers. Amongst uterines and maternal relations males and females share alike.  
 4. One uterine relation takes  $\frac{1}{6}$ , two or more  $\frac{1}{3}$ .  
 5. Grandparent's share like Brothers and sisters when they co-exist with brothers and sisters. Otherwise the paternal side takes  $\frac{2}{3}$  and the maternal  $\frac{1}{3}$ .

## SECTION 642.

- (i) mother
- (ii) father *and*
- (iii) two or more full or consanguine brothers; *or* one such brother and two or more such sisters; *or* four or more such sisters.

(2) In other cases she takes  $\frac{1}{3}$  of the estate.

(3) She is entitled to partake of the residue except when the surviving relations are those mentioned in clause (1) (b), above.

## 3. INCREASE AND RETURN: THEIR COUNTERPARTS IN SHIAH LAW.

In accordance with Shiah law—

I. Where the sharers are such that the sum total of the fractions of the estate to which they are (primarily) entitled exceeds unity, there is not a proportionate abatement of the shares of each, but the deficit is borne entirely by the daughter or daughters, or the full or consanguine sister or sisters.<sup>1</sup>

II. Where, after the shares are allotted, there is a residue or surplus left, "it is to be returned to the sharers excepting (a) the husband, (b) the wife, and (c) the mother when there are brothers,"<sup>2</sup> but if there are both full blood relations and uterine relations, then the former alone take the surplus<sup>3</sup> provided that they are equal as regards the priority of their rights to inherit.<sup>4</sup>

1. Where there is only one heir entitled to succeed under s. 640, he or she takes the whole estate: whether the heir is agnate or cognate, full blood, consanguine, or uterine, or by contract (under s. 647), or whether he is the husband. (As regards the wife see ss. 641, 647.)<sup>5</sup> If such heir is a pure residuary, he or she takes the estate as such; if a Quranic sharer, his or her specific fraction of the estate is taken as such sharer, and the residue by return.<sup>6</sup>

2. If there are two or more heirs, then they must include either—  
(a) sharers as well as residuaries,—in which case the sharers take their appointed shares, and the residuaries take whatever is left<sup>7</sup> 'per stirpes' either equally (if they

Deficit borne by daughters or sisters.

Residue or surplus taken by full or consanguine blood relations only. Exemplification of the rules

1. If only one heir, he takes the whole.

2. If any residuary amongst heirs he takes the residue after sharers if any.

<sup>1</sup> Ball. II. 263, 273, 274-275, 336, 396-397.

<sup>2</sup> See s. 642, clause (3) (b).

<sup>3</sup> Ball. II. 317, (II. 31, *et seq.*), 335 (par. 2).

<sup>4</sup> *E.g.*, the full paternal uncle does not exclude a uterine sister "either from her residuary title, or her appointed share, by reason of their disparity in degree"—Ball. II. 335 (II. 12-15). In every case the nearest alone succeed, and then the rules as to the distribution apply

merely as between those who are the nearest, and as such entitled to inherit.

<sup>5</sup> Ball. II. 395, 398. See *ibid.* to ss. 642, 644.

<sup>6</sup> Ball. II. 392 (par. 2).

<sup>7</sup> Ball. II. 393-394; under the Shiah law if there is any pure residuary in any combination of heirs, there is always some residue left; the division into the three classes of heirs prevents the sharers from being very numerous,

are of the same sex) or males taking double the portion SECTION 642.  
of females.

- (b) only residuaries—in which case they take the whole estate.
- (c) only sharers—in which case the sum total of the shares, *if no residuaries*.
  - (i) either exactly equals unity,—when each heir is given his share and nothing more has to be done, *or*
  - (ii) exceeds unity,—and this can happen only where there is the husband or wife amongst the sharers, *and* with him or her there co-exist either—
    - (a) one or more daughters *or*
    - (b) one or more (full or consanguine) sisters—
 and in each case the daughters, or sisters, respectively, bear the deficit.<sup>1</sup>
  - (iii) falls short of unity.<sup>2</sup> (*i.e.*, a surplus or residue is left after the shares have been allotted), in which case the surplus is taken in the proportion of their respective shares by,—
    - (a) the full blood or the consanguine relations alone, and failing them, —
    - (b) the uterine relations, and failing them,—
    - (c) the husband (not the wife) takes the whole.

The rules relating to the "return" are not uniform. In the first class of heirs though the daughter alone suffers the loss, she does not get the "return" exclusively, but shares it with the father and mother. In the second class (as will appear from s. 643) the full sister takes the whole surplus by return, just as she bears the whole deficit. On the other hand the consanguine sister's position is not quite settled. Some authorities place her (in competition with the uterine sister) in the same position as the daughter is in competition with parents, *i.e.*, they hold that the consanguine sister alone bears the deficit, but shares the surplus with the uterine sisters and brothers; this view is favoured by the

Rules about return—

1. Daughter bears deficit herself but divides surplus with parents.
2. Full sister alone bears deficit and alone takes surplus.
3. Consanguine sister's rights in doubt.

<sup>1</sup> Bail. II. 395, 396.

<sup>2</sup> If this happens (a) where the heirs are of the 1st class: the father, mother and daughter or their descendants take the residue, for *ex hypothesi*, (i) the son is absent (since he is a pure residuary, and the present point is concerned with the case of sharers alone), (ii) there must also be daughters surviving, for otherwise the father is pure residuary (the mother is excluded from the residue when there are two or more brothers or sisters); (b) where the heirs are of the 2nd class, the full or, failing them, the consanguine sisters alone take the residue: *ex*

*hypothesi* there are no grandfathers, or brothers who are pure residuaries: *cf.* s. 644 *id.* (14); (c) where the heirs are of the third class, there is a primary division of the estate into two-thirds for the paternal side, and one-third for the maternal side, and the surplus on each side is taken by the full or consanguine, and failing them, by the uterine relations. If either side falls entirely, the other side takes the share of that side also. In every case the first point to settle is which persons are entitled to succeed as being the nearest under s. 640, above.

SECTION 642. 'Sharaya'-ul-Islam.' Other authorities place the consanguine sister in the same position as the full sister. See s. 644 *ill.* (14). See also the table on p. 937, below.

(b) *Distribution amongst Heirs of Second Class.*

SECOND CLASS  
of heirs (1)  
grandparents.  
(2) Brothers and  
sisters and their  
descendants.  
Husband or  
wife.

643. In the absence of any heirs of the first class,<sup>1</sup> (after the husband or wife, if any, has received 1/2 or 1/4 of the estate in accordance with s. 641, above) the estate devolves upon heirs of the second class,<sup>2</sup> (*viz.*, the nearest grandparents with the sisters or brothers or their nearest descendants) and is distributed amongst them (subject to s. 645, below) in accordance with the following principles of division,—

Division  
between  
maternal and  
paternal sides.

Definitions

(1) The members of the second class of heirs are in the first instance arranged in two groups: (a) the first group (hereinafter referred to as the "paternal side") consists of those who are related through the father, (*viz.*, the full and consanguine brothers and sisters, or the descendants of such brothers and sisters, together with the father's parents, or the ascendants of the father's parents); (b) the second group (hereinafter referred to as the "maternal side") consists of those who are related through the mother (*viz.*, the uterine brothers and sisters, or the descendants of uterine brothers and sisters, together with the mother's parents, or the ascendants of the mother's parents).<sup>3</sup>

Maternal side's  
portion for  
uterine brothers  
and sisters and  
maternal  
grandparents

(2) Secondly, the paternal and maternal sides are collectively allotted the shares mentioned below:—

(a) The maternal side is allotted (subject to clause (c) below), 1/3 of the estate: *unless* that side consists of

<sup>1</sup> *I.e.*, where there is neither any descendant (male or female, agnate or cognate), nor the father nor mother of the deceased; see s. 640 above.

<sup>2</sup> *I.e.*, the nearest grandparents that exist (how high soever they be), with the brothers and sisters, full, consanguine or uterine, or failing brothers or sisters, their nearest descendants (how low soever they be), or (to give another description of the same relations), the nearest ascendants of the father and mother, with the sisters or bro-

thers, or their nearest descendants; Ball. I : 326.

<sup>3</sup> Ball. II, 301 (par. 2). The "mother's descendants" are the uterine brothers and sisters, and the father's are the full or consanguine brothers or sisters. The full brothers do not rank under both classes for this purpose (see s. 645, below). The mother's ascendants are the maternal grandfather and grandmother, and their ancestors. Similarly the paternal descendants are the father's ancestors: see s. 645, proviso (2), below.

only a single uterine brother or sister or the descendants of SECTION 643.  
a single uterine brother or sister (there being no maternal grandparent), in which case the maternal side is allotted only  $1/6$  of the estate.<sup>1</sup>

(b) The paternal side is allotted (subject to clause (c) (a) for full brother and sisters, (b) paternal grand-parents, below) the residue of the estate, (i.e., so much of the estate as is left over after deducting the share of the husband or wife, if any, and the  $1/3$  or  $1/6$  allotted to the maternal side as stated in clause (a) above.<sup>2</sup>

(c) If in any case the paternal side consists of only consanguine sisters (one or more) or the descendants of one or more consanguine sisters (there being no paternal grandfather),<sup>3</sup> then,—

According to some authorities,<sup>4</sup> the rules stated in clauses (a) and (b), above, do not prevail, but (i) such consanguine sister, if only one, or the descendant of such a sister takes<sup>5</sup>  $1/2$  of the estate as Quranic share, and if there are two or more such sisters (or their descendants) they so take  $2/3$  thereof; and (ii) the surplus or residue of the estate, if any,<sup>6</sup> is divided among the consanguine sisters as well as the claimants on the maternal side in the proportions of their respective shares;<sup>7</sup>

According to other authorities, the rules in clauses (a) and (b) prevail and the consanguine (like the

<sup>1</sup> See *id.* (2.) (3.) to s. 644. Apparently if there exists only a single maternal grandparent, and no uterine brother or sister, and on the paternal side there are full or consanguine brothers and sisters, the maternal grandparent takes  $1/8$  and not only  $1/6$ . As between grandparents (without brothers and sisters), the maternal side clearly takes  $1/3$  though consisting of a single individual—*Ball. II. 391* (par. 2): cf. s. 644, *id.* (11) (12) (13) (15).

<sup>2</sup> The residue will therefore be  $2/3$  or  $5/6$  minus the share of the husband or wife.

<sup>3</sup> The rule does not apply where there are also paternal ancestors, the doctrine of shares

being applied only to the sisters, and the ancestors ranking as pure residuaries.

<sup>4</sup> This opinion is preferred by the author of the *Shara'at-ul-Islam*, *Ball. II. 382* (par. 2, last 2 lines), but see *contra*, *ib.* 336, (par. 2), the latter passage being apparently from the *Kafer* (cf. *ib.* p. xxviii): see *id.* (14).

<sup>5</sup> Or the descendants of such a sister take.

<sup>6</sup> There cannot be a surplus if there is a husband or wife.

<sup>7</sup> The shares referred to are: (a) for the uterine side  $1/6$  if only one, and  $1/3$  if two or more, and (b) for the consanguine side  $1/2$  if only one, or  $2/3$  if two or more.

## SECTION 643.

full) sister or sisters (or their descendants) take the whole residue just as they alone bear the deficit caused by the presence of the husband or wife.<sup>1</sup>

Distribution  
within the  
groups.

(3) Thirdly, the portions allotted respectively to the paternal and maternal sides as stated in sub-section (2) above are divided amongst the members of each group 'per stirpes' in accordance with the following rules:—

(a) When the members of either side comprise both ancestors and brothers and sisters (or the descendants of brothers and sisters), then as regards the share that the maternal grandfathers and grandmothers take out of the allotment to their side, they stand on the same footing as uterine brothers and sisters; and paternal grandfathers and grandmothers stand on the same footing as full or consanguine brothers and sisters.

(b) When the members of either side include the ascendants of grandparents, or the descendants of sisters and brothers, the former take the share that would have been allotted respectively to the grandparents or brothers or sisters through whom they are related to deceased.

(c) In the division of any portion of the estate allotted to a group of persons (i) the cognates (*i.e.* maternal grandparents and uterine brothers and sisters or their descendants), in each generation<sup>2</sup> share males and females unequal portions;<sup>3</sup> and (ii) the

<sup>1</sup> As to the full sister there is no difference of opinion: Ball. II, 382 (*il.* 16-18). See s. 644, *il.* (3), (14). The full sister when there are no brothers, ranks in the first instance as a sharer, one taking  $\frac{1}{2}$  and two or more  $\frac{2}{3}$ , but as the full sisters take the residue if any is left, and bear the deficit if the husband or wife survives, they are practically residuaries, and it has seemed best not to encumber the section with an unnecessary distinction, see s. 644, *il.* (2), (17).

<sup>2</sup> *I.e.*, (F=father, or father's; and M=mother or mother's) the first divisions are (a) the maternal side's portion is allotted to MF and MM (together with the uterine brothers and sisters (even though MF, MM be dead, and the

actual claimants be the ascendants of MF and MM—and similarly though the uterine brothers and sisters be dead, and the actual claimants be their descendants); (b) the paternal side's portion is to be divided amongst FF and FM together with full or consanguine brothers or sisters.

<sup>3</sup> Ball. II, 387, 388 (*par.* 2). See s. 644, *il.* (3). The rule that as soon as the relationship becomes cognate (*i.e.*, a female link intervenes between the claimant and the propositus), the males and females should share in like portions, prevails amongst ancestors and collaterals; some doctors extend it even to descendants: Ball. I, 387.



agnatic<sup>1</sup> grandparents and full or consanguine brothers and sisters or their descendant share so that in each generation each male gets twice as large a portion as each female.

The principles of division in the second and third classes are similar, and the illustrations relating to both follow s. 644; the first illustrations refer to the second class of heirs. See also the table on p. 648, below.

(c) *Distribution amongst Heirs of the Third Class.*

**644.** In the absence of any heir of the first or second class,<sup>2</sup> the estate devolves upon the nearest heirs of the third class, i.e., upon (a) the uncles or aunts of the deceased, or (b) their descendants, or (c) the uncles or aunts of an ancestor of the deceased, or (d) the descendants of such uncles or aunts,—and is distributed amongst them, after giving to the husband or wife his or her share under s. 641, above, (and subject to 645, below) in accordance with the following principles of division,—

(1) In the first instance  $\frac{1}{3}$  of the whole estate is allotted to the uncles and aunts on the maternal side, or their descendants, and the residue (consisting of  $\frac{2}{3}$  of the whole estate, minus the share of the husband or wife, if any) to the uncles or aunts on the paternal side, or their descendants.<sup>3</sup>

(2) Secondly, the said  $\frac{1}{3}$  and the residue, respectively, allotted to the maternal and paternal sides are then apportioned as follows,—

(a) The uterine relations on each side, take out of the portion allotted to that side, the shares mentioned below viz,—(i) if there is only one uterine relation on any side he or she takes  $\frac{1}{6}$  of the said portion, (ii) if there are

THIRD CLASS  
of heirs. Uncle  
and aunts  
and their  
descendants.

Husband or wife.  
 $\frac{1}{3}$  to maternal  
side and  $\frac{2}{3}$  to  
paternal side.

1. Maternal side  
and uterines  
take equally.  
2. Paternal side  
divide on  
principle of  
males taking  
a double  
portion.  
3. Grand-parent-  
who are  
cognates take  
equally.

<sup>1</sup> Bail. II. 386-387; so that, as soon as a female intervenes between the deceased and a grandparent, the males and females in that generation take equal portions. This will be clear by referring to *id.* (12) to s. 644, where it will be observed that F, M, FF, FM, FFF and FFM are agnates, and the distribution amongst them is unequal at each stage: but

all the rest including FMF, and FMM are cognates, and so share equally at each stage.

<sup>2</sup> *I.e.*, where there is neither any descendant nor ascendant, nor brother nor sister, nor the descendants of any brother or sister.

<sup>3</sup> The maternal side taking the share of the mother, and the paternal side of the father,

SECTION 644. two or more, (the descendants of one uterine relation being for this purpose reckoned as a single claimant) they take  $\frac{1}{3}$  of the said portion;

(b) The full blood, or in their absence, the consanguine relations on the maternal and paternal sides respectively, take the residue of the portion allotted to their own side, after the uterine relations on their own side have taken, as the case may be, their  $\frac{1}{6}$  or  $\frac{1}{3}$  referred to in clause (a) above; and

(c) the said  $\frac{1}{6}$  or  $\frac{1}{3}$  referred to in clause (a) above, and the residue referred to in clause (b) above, are divided respectively amongst the members of the respective groups 'per stirpes,' but so that (i) on the paternal side where the relations are full or consanguine the division is made in such proportions that at each stage each male is allotted twice the share of each female, and (ii) where the claimants on the paternal side are uterine, or where the claimants are relations on the maternal side, the distribution is 'per stirpes,' and so that males and females share in like portions.<sup>1</sup>

*Illustrations.*

*N.B.*—The persons mentioned in each illustration below, being the claimants, the portion of the estate taken by each is indicated in fractions.

(1) If there is only one full (or consanguine) brother, and no other claimant, he takes the estate by himself; two or more divide it equally. If there are any full (or consanguine) sisters with the brothers, the estate is so divided amongst them, that each male gets twice as large a portion as each female.<sup>2</sup>

(2) If there is only a single full (or consanguine)<sup>3</sup> sister, she takes  $\frac{1}{2}$  of the estate as her share, and the other  $\frac{1}{2}$  reverts to her.<sup>4</sup> If

<sup>1</sup> *I.e.*, in the case of the heirs of the third class, the distribution is without distinction of sex, except as amongst the full blood and consanguine relations on the paternal side; in the case of the uterine relations on the paternal side and of all relations on the maternal side the distribution is such that the males and females share in the same proportion, in each generation.

<sup>2</sup> *Bail. II.* 280, 392-393.

<sup>3</sup> But see *id.* (14), below, with reference to the rights of the consanguine sister.

<sup>4</sup> The distinction between what they take as sharers, and what reverts to them as residue, may be of significance where there are other sharers like the husband or wife, and grand parents, the latter of whom are entitled to share in the residue.

there are two or more they take  $2/3$  as sharers, and the  $1/3$  reverts to SECTION 644; them.<sup>1</sup>

*Illustrations.*

(3) One uterine brother, one full (or consanguine)<sup>2</sup> sister.—  
The former takes  $1/6$ , the latter  $1/2$  as sharers, and the residue or surplus (i.e.,  $1/3$ ) reverts to the full (or consanguine) sister,<sup>3</sup> (who ultimately takes  $5/6$ ).<sup>4</sup> If there were two or more uterine brothers or sisters, or a uterine brother and a uterine sister, they would take  $1/3$  (dividing it equally amongst themselves, males and females sharing alike) and the full (or consanguine)<sup>5</sup> sister would take  $1/2$  as sharer, and the residual  $1/6$  would revert to her. Again if there were two or more full (or consanguine)<sup>6</sup> sisters, they would take  $2/3$  as sharers, and then  $1/6$  would revert to them<sup>7</sup> and they would divide the portion amongst themselves equally (being all females).<sup>8</sup>

(4) Three uterine sisters,  $1/3$ ; three consanguine brothers,  $2/3$ ; i.e., each sister takes  $1/9$ , and each brother  $2/9$ .<sup>9</sup>

(5) Two uterine brothers or sisters,  $1/3$ ; two full (or consanguine) sisters,  $2/3$ .<sup>6</sup>

(6) Husband,  $1/2$ ; consanguine half sister,  $1/2$ .<sup>6</sup>

(7) Husband,  $1/2$ ; uterine brothers and sisters,  $1/2$ ; full (or consanguine) brother (or sister), residual,  $1/6$ . If there is only one uterine brother or sister, he or she takes  $1/6$ , leaving  $1/3$  for the full or consanguine.<sup>7</sup>

(8) Husband,  $1/2$ ; grandfather,  $1/2$ .<sup>8</sup>

(9) Husband,  $1/2$ ; two (full or consanguine) sisters,  $1/2$ ; the share of the latter is  $2/3$ , but the whole deficit falls on them.<sup>9</sup>

(10) Husband,  $1/2$ ; uterine sister,  $1/6$ ; full or consanguine sister,  $1/3$ .<sup>10</sup>

(11) Mother's father <sup>11</sup>	} 1/3 {	1/2 of 1/3 = 1/6	Father's father	} 2/3 {	2/3 of 2/3 = 4/9
Mother's mother		1/2 of 1/3 = 1/6	Father's mother <sup>11</sup>		1/3 of 2/3 = 2/9
(12) Mother's father <sup>11</sup>	} 1/3 {	1/3 of 1/3 = 1/9	Father's father	} 2/3 {	1/2 of 2/3 = 1/3
Uterine brother		1/3 of 1/3 = 1/9	Father's mother		1/4 of 2/3 = 1/6
Uterine sister		1/3 of 1/3 = 1/9	Full sister <sup>12</sup>		1/4 of 2/3 = 1/6

<sup>1</sup> Bail. II. 280, 392-393.

<sup>2</sup> But see *id.* (14) below.

<sup>3</sup> See p. 228 n. 4.

<sup>4</sup> Bail. II. 280 (par. 2), 314 (*id.* 35-39), 315 (*id.* 7-15, 31-39), 318 (*id.* 9-10), 335 (*id.* 16-33). In SUNNI LAW the full, and similarly the consanguine, sister would take only  $1/3$ , leaving the other half to the male agnates, unless there co-exists a daughter or daughters.

<sup>5</sup> Bail. II. 254 (*id.* 1-7), 388 (last 4 lines) 389, (*id.* 1-11).

<sup>6</sup> Bail. II. 263 (par. 2), 395 (*id.* 24-30).

<sup>7</sup> Bail. II. 244 (*id.* 23-25), 390 (par. 2).

<sup>8</sup> Bail. II. 388 (*id.* 18-20).

<sup>9</sup> Bail. II. 396 (*id.* 5-10, 33-36).

<sup>10</sup> Bail. II. 396 (*id.* 12-16, 36-39).

<sup>11</sup> Bail. II. 281 (par. 3). Note that the mother's parents divide their  $1/3$  equally; whereas the father's parents divide their  $2/3$  in the proportion of a double share to a male. In SUNNI LAW the father's mother and the mother's mother (as true grandmothers) would take  $1/6$  between them, i.e.,  $1/12$  each, and the father's father would take the residual  $5/6$ , the mother's father being excluded as a false grandfather.

<sup>12</sup> Bail. II. 281 (par. 4). In SUNNI LAW

SECTION 644. (13) Only one of the following,—  
*Illustrations.*

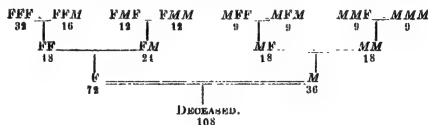
Only one of the following,—		One or more of the following,—
Mother's father, or Mother's mother, or Uterine brother, or Uterine sister.	1/6	Father's father. Father's mother. Full sister, Full brother.

$$\left. \begin{array}{l} 2/3 + 1/6 \\ = 5/6 \end{array} \right\} \begin{array}{l} 1/3 \text{ of } 5/6 = 5/18 \\ 1/6 \text{ of } 5/6 = 5/36 \\ 1/6 \text{ of } 5/6 = 5/36 \\ 1/3 \text{ of } 5/6 = 5/18 \end{array}$$

Here, after giving  $1/6$  to the maternal side, and  $2/3$  to the paternal side, there is a surplus of  $1/6$ , which surplus is taken by the father's father and the rest on the paternal side in the proportion of 2 : 1; so that ultimately  $1/6$  is taken by the single claimant on the mother's side, and  $5/6$  by the claimants on the father's side.<sup>1</sup>

(14) Husband,  $1/2$ ; uterine sister or brother,  $1/6$ ; full (or consanguine) sister,  $1/2$ , reduced to residual  $1/3$ . Here the full (or consanguine) sister's share alone bears the deficit, and instead of getting  $1/2$  she gets  $1/3$ .<sup>2</sup> On the other hand, if there were no husband, the full sister would have taken  $5/6$ ; there are two opinions as to whether the consanguine sister would, in the absence of the husband, (a) have taken the whole  $5/6$ , or whether (b) the residual (1 minus  $1/6$  minus  $1/2 =$ )  $1/3$  would have been divided between the consanguine and uterine sisters in the proportion of  $1/6$  to  $1/2$ , i.e., 1 to 3. The second opinion, i.e., (b) above, is preferred in the 'Sharaya'-ul-Islam.<sup>3</sup> But the former, i.e., (a) above, is supported in the 'Kafi.'

(15) F="father" or "father's"; M="mother" or "mother's." All the eight grandparents are living, and there are no other claimants; the



the mother's father would be excluded, being a "false" grandfather, and the uterine brother and sister would be excluded by the true grandfather; the father's mother and mother's mother would take  $1/6$  jointly; the full sister's rights would be subject to the operation of s. 620. See s. s. 643 (2) (a) and comment following the illustrations to s. 644.

<sup>1</sup> Bal. II. 281 (par 4). See page 929, n. 12.

<sup>2</sup> Bal. II. 282. In SUNNI LAW the full sister would not alone bear the deficit, but it would be borne proportionately by all the sharers. The residue would be taken by the nearest male agnate, and failing him, would be divided proportionately amongst all the

sharers except the husband.

<sup>3</sup> Bal. II. 336: "A person related by the father's side only supplies the place of a full kinsman, upon failure of the latter in all cases, and therefore excludes those related by the mother's side from all residuary title, in like manner as the former. This is agreeable to the doctrine of *Sudook*, and most of our lawyers, because the full kinsman and he by the father's side only, on failure of the former, suffering alike the loss or deficiency, they ought in justice to have a similar exclusive title to the *residue* or surplus. Besides there is a positive judgment to this effect of the Imam *Mohammed Bakir*." Cf. s. 403.

claimants are shown in the tree above. If the estate consists of 108, the SECTION 644. shares and the mode of division at each stage are indicated by figures.<sup>1</sup> *Illustrations.*

(16) If, in the last illustration, there were also (a) full or consanguine brothers or sisters (or their descendants), they would participate in the 72 allotted to the paternal side, which would be first divided as though the claimants were not only FF, and FM but also the full or consanguine brothers or sisters.—males taking a double share; (b) similarly, if there were on the maternal side also uterine brothers or sisters or their descendants, the 36 allotted to the maternal side would be divided between them together with MF and MM, but in this case males and females would take equally—so that suppose in the last illustration there were also one full brother FB (or his descendants,) then F's 72 would be divided into the following shares, viz., FF, 144/5; FM, 72/5; FB, 144/5. If there were a full sister, Fs, then F's 72 would be divided as follows: FF, 36; FM, 18; Fs, 18.

(17) Children<sup>2</sup> of uterine brothers and sisters, 1/3; children of full brothers and sisters, 2/3; (children of consanguine brothers and sisters being excluded by the children of the full).<sup>3</sup> If there is a husband or wife with these, the full brothers' and sisters' children's total portion diminishes to the extent of the share of the husband or wife (i.e., it becomes 2/3 minus 1/2, if there is a husband, and 2/3 minus 1/4, if a wife); and if there is only one uterine brother's or sister's child or children, then the share of the full or consanguine is enhanced by 1/6 (because the uterine side takes only 1/6).<sup>3</sup> If there are grandparents they rank equally with brothers and sisters, the maternal grandparents ranking like the uterine brothers and sisters, or their children; and the paternal grandparents like the full or consanguine brothers and sisters, or their children.<sup>4</sup>

(18) Husband, 1/2; 2 uterine brothers or sisters, 1/3; 2 consanguine (or full) sisters, 1/6: The full shares are 1/2, 1/3, 2/3; the first two take their full shares, and the consanguine (or full) sisters take the 1/6 which is the residue.<sup>5</sup>

(19) P dies leaving her husband, 2 uterine brothers, 2 consanguine brothers. Before partition the husband dies, leaving a son and two

<sup>1</sup> Ball. II. 283 (second). In SUNNI LAW, FFF would take 5/6, i.e. 90; and the 1/6 or 18 would be divided equally between the true grandmothers, i.e., FFM, FMM, MMM.

<sup>2</sup> The uterine half brother excludes the son of the full brother; the former being nearer: Ball. II. 283 (*ibid*). Similarly any claimant in a higher generation excludes any claimant in a lower generation.

<sup>3</sup> Ball. II. 284.

<sup>4</sup> Ball. II. 285. In SUNNI LAW if there is

any son of a full or consanguine brother, he takes the whole as a male agnate. Similarly a "true grandfather" or a "true grandmother" would, after taking her 1/6, take the rest by return, unless there were a male agnate to compete with her.

<sup>5</sup> Ball. II. 275; 317 (II. 5-12). In SUNNI LAW the abatement would have to be borne by all the sharers proportionately in accordance with the rule of *awl* or increase of the common denominator.

**SECTION 644.** daughters. If the estate consists of 24, the husband takes (half or) 12, the uterine brothers (a third or) 4 each, and the consanguine brothers (the residue, i.e.,) 2 each. The husband's 12 are then re-divided between his son and daughter who take 8 and 4 respectively.<sup>1</sup>

*Illustrations.*

(20) The husband; 2 uterine brothers or sisters; and a consanguine brother, being the heirs of *P*, the husband dies before partition leaving two sons and a daughter. If the estate consists of 30, the husband originally takes 15, the uterine brothers 5 each, and the consanguine brother the residue, 5; the husband's 15 are then re-divided amongst his children so that each son gets 6; and the daughter, 3.

(21) Brother's son,  $1/2$ ; grandfather,  $1/2$ .<sup>2</sup>

(22) Six brothers and one grandfather (supposing them all to be on the paternal or maternal side respectively): each takes  $1/7$ .<sup>3</sup>

(23) One sister's daughter,  $1/3$ ; grandfather,  $2/3$ . This "decision obviously proceeds on the supposition that both sister and grandfather were related by the same side whence the distinction of male and female would have bestowed a double portion on the latter."<sup>4</sup>

(24) One uterine paternal uncle or aunt,  $1/6$ ; if two or more,  $1/3$ , sharing it equally, males and females alike;<sup>5</sup> the full or consanguine paternal uncle or aunt<sup>6</sup> takes the residue.<sup>6</sup>

(25) Aunt by the father's side,  $2/3$ ; aunt by the mother's side,  $1/3$ .<sup>7</sup>

(26) Paternal uncle's son, maternal aunt (or uncle). The latter takes the whole.<sup>8</sup>

(27) Paternal uncle,  $2/3$ ; paternal aunt,  $1/3$ .<sup>9</sup>

(28) Paternal uncle's son,  $2/3$ ; maternal aunt's son,  $1/3$ .<sup>9</sup>

(29) Full maternal aunt,  $1/3$ ; consanguine paternal uncle,  $2/3$ .<sup>10</sup>

(30) Consanguine maternal uncle,  $1/3$ ; full paternal uncle,  $2/3$ .<sup>10</sup>

(31) Husband,  $1/2$ ; maternal uncle,  $1/3$ ; paternal uncle,  $1/6$ . "The maternal uncle being also a sharer, receives his  $1/3$ , and the residue or  $1/6$ , only goes to the paternal uncle."<sup>11</sup> Similarly if there were, with the husband, the children of the maternal and paternal uncles.<sup>11</sup>

(32) The division between paternal and maternal uncles and aunts full (or consanguine) and uterine is as follows:<sup>12</sup>—

<sup>1</sup> Bail. II. 319 (*first*).

<sup>2</sup> Bail. II. 328 (*II.* 1-2).

<sup>3</sup> Bail. II. 391 (*par.* 3), as to SUNNI LAW see s. 620.

<sup>4</sup> Bail. II. 392 (*par.* 1). In SUNNI LAW the grandfather would take the whole.

<sup>5</sup> The relation might be paraphrased as that existing between the deceased and his father's full or consanguine or uterine brothers. Similarly with reference to his father's sisters, and to the relations of the mother, and of the

parents of the father and mother and other grandparents.

<sup>6</sup> Bail. II. 285 (*par.* 2).

<sup>7</sup> Bail. II. 330 (*II.* 12-15).

<sup>8</sup> Bail. II. 330 (*II.* 28-34). In SUNNI LAW the paternal uncle's son as an agnate would exclude the maternal aunt or uncle.

<sup>9</sup> Bail. II. 330 (*last 6 lines*), 388 (*II.* 26-28).

<sup>10</sup> Bail. II. 334 (*par.* 2).

<sup>11</sup> Bail. II. 394 (*II.* 9-14, 15-19), 395 (*II.* 1-6).

<sup>12</sup> Bail. II. 285, 296, 389.

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SECTION 644

Illustrations.

Maternal uncles and aunts, 1/3. <sup>1</sup>		Paternal uncles and aunts, 2/3. <sup>2</sup>	
Uterine, 1/3 of 1/3	Full or (falling them) consanguine, 2/3 of 1/3	Uterine, 1/3 of 2/3, dividing equally.	Full or (falling them) consanguine, 2/3 of 2/3, each male taking twice as much as each female. <sup>3</sup>
Males and females sharing equally.			
If there are no uterine, the full (or consanguine) take the whole 1/3 of the maternal side, and <i>vice versa</i> .		If there are no uterine, the full or consanguine take the whole 2/3 of the paternal side, and <i>vice versa</i> .	

If there are none on the maternal side the paternal side takes the whole, and *vice versa*.

(33) If all the eight uncles and aunts of the parents of the deceased are living, and his estate consists of 108--three divisions have to be made and the results of each are shown from right to left below, giving ultimately 32, 16, 12, 12, 9, 9, 9, 9, to the parties respectively.<sup>3</sup>

Father's paternal uncle	32	} 48	} 72	} 108	
" " aunt	16				
" maternal uncle	12				
" " aunt	12				
Mother's paternal uncle	9	} 18	} 36		
" " aunt	9				
" maternal uncle	9				
" " aunt	9				

The principle of division will appear from the following table F=father or fathers.. M=mother, mothers or maternal; P=paternal. U=uncle. A=aunt. Parentheses denote that the person is dead.

(FFF)			(FMF)			(MFF)			(MMF)		
[48]			[24]			[18]			[18]		
FPU	FPA	(FF)	(FM)	FPU	FPA	MPU	MPA	MF	MM	MMU	MMA
32	16	48	24	12	12	9	9	18	18	9	9
4/27	2/27	2/9	1/9	1/18	1/18	1/12	1/12	1/6	1/6	1/12	1/12
 (F) 72 2/3			 (M) 36 1/2			 (M) 36 1/2			 (M) 36 1/2		
(PROPOSITUS.)											
[108]											

<sup>1</sup> Instead of 1/3 there will be only 1/6 if there is only one in this division.

<sup>2</sup> Instead of 2/3 there will be 5/6 if there

is only one on the mother's side  
<sup>3</sup> Bail. II 286 (var. 3)

## SECTION 644.

*Illustrations.*

(34) If in *ill.* (33) some of the uncles and aunts were uterine and others full or consanguine, their respective portions (*i.e.*, 48, 24, 18, 18) would be first divided on the principle of  $1/6$  or  $1/3$  of that portion being given to the uterine uncles and aunts, and the residue of the said portion to the full or consanguine.<sup>1</sup> If there were descendants of the uncles and aunts, they would take the portions of their parents: on the full (or consanguine) paternal side alone the distribution would be on the principle of males sharing twice as much as females, whereas on the uterine-paternal and on the maternal sides, respectively, males and females would take equal portions.<sup>2</sup>

(35) Two<sup>3</sup> or more sons of one uterine paternal uncle,  $1/6$   
One or more sons of one full paternal uncle,  $5/6$ .

(36) Sons<sup>3</sup> of two or more uterine paternal uncles,  $1/3$   
Son or sons of one or more full paternal uncles,  $2/3$ .<sup>3</sup>

(37) A Shiah lady, Nurjehan Khanam, *alias* Fatma Khanam, died leaving heirs of only the 3rd class, *viz.*, the great grand-children of two full paternal uncles and of one full paternal aunt, (*i.e.*, great-grand-children of the full brothers and sister respectively of her father). The plaintiff was an uncle's son's son's daughter. Defendants 1 and 2 were an uncle's son's daughter's son and daughter, respectively. Defendant 3 was the aunt's daughter's son's daughter. The estate was divided in the first instance into 5 parts, 2 of which were taken by each of the uncles, and 1 by the aunt. Then the  $2/5$  share of the plaintiff's great grandfather was allotted to her, the  $2/5$  share of the great grandfather of Defendants 1 and 2 was divided between them, so that Defendant 1 got  $2/3$  of  $2/5$  (as a male), and Defendant 2,  $1/3$  of  $2/5$  (as a female), and Defendant 3 took the  $1/5$  share of her great-grandmother.<sup>4</sup>

(3) *Person bearing More Relationships than One.*

**645.** Where a person bears more relationships than one to the deceased, he inherits in respect of each such

Share allotted  
in respect of  
each  
relationship

<sup>1</sup> Bail. II. 380

<sup>2</sup> Bail. II. 380-390.

<sup>3</sup> Bail. II. 287 (*secundum*): "the same rule is applicable to sons of maternal uncles and aunts."

<sup>4</sup> *Aga Sher Ali v. Bai Kudsun Khanam* (1908) 32 Bom. 340. A great number of authorities are cited from Arabic texts, but, as the Court held, (p. 358), Baillie's translation of the *Shuratu-af-fahay* sufficiently covers

the point. In SUNNI LAW all the claimants would have been classed as "distant kindred," and the plaintiff, as an agnate, would have been preferred to the others, and taken the whole. Failing the plaintiff, the estate would have been distributed, according to Abu Yusuf giving to the 1st Defendant,  $1/2$ ; to the 2nd and 3rd Defendants  $1/4$  each, according to Imam Muhammad giving to 1st Defendant,  $4/9$ ; to 2nd Defendant,  $2/9$ ; 3rd Defendant  $3/9$ .



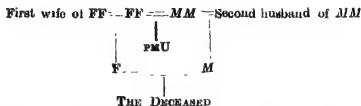
relationship;<sup>1</sup> provided first that each of 'the said relation- **SECTION 645.**  
ships is such as by itself entitles him to inherit under s. 640,  
above;<sup>2</sup> and secondly, that for the purposes of this section  
kinsmen of the full blood<sup>3</sup> rank only as bearing a single  
relation to the deceased: they do not rank as bearing one  
relation to the deceased through the father and another  
through the mother.

(1) A's father is both the consanguine paternal uncle, and the *Illustrations*, uterine maternal uncle of the deceased.<sup>1</sup> A can share twice, first as the son of a consanguine paternal uncle, and then as the son of a uterine maternal uncle.<sup>1</sup>

(2) One maternal uncle, mU, and one paternal uncle who is also uncle on the mother's side, pMU: The maternal side would be allotted  $\frac{1}{2}$ , and the paternal side,  $\frac{1}{2}$ ; that  $\frac{1}{2}$  would be taken by pMU as the only one on the paternal side; then the  $\frac{1}{2}$  of the maternal side would be divided between mU and pMU, each taking  $\frac{1}{4}$ ; so that ultimately mU gets  $\frac{1}{4}$  and pMU  $\frac{3}{4}$ .

The double relationship above referred to occurs in a case that is illustrated by the following table:

F and M represent father or father's and mother or mother's;  
The symbol=represents that the parties are married.



The circumstances indicated above, are as follows: FF has a son, F, by his first wife; after the death of that wife he marries MM, and MM bears to FF, a son FMU. Then FF dies, and MM marries a second husband, and gives birth to M by her second husband; then FMU is the consanguine half brother of F, and also the uterine half brother of M, i.e., the consanguine paternal, and the uterine maternal, uncle of the propositus.<sup>5</sup>

<sup>1</sup> Ball. II. 287 (*third*), 336 (par. 3). Similarly A may be the husband of the deceased, and also her paternal or maternal uncle's son.

<sup>2</sup> *Id.* So that if a person is both a brother, and the son of a paternal uncle, he inherits only as a brother, and shares only once as against other brothers. *Bail. II. 311 (par. 2).*

<sup>a</sup> When they compete with uterine relations who rank as relations through the mother only;

see n. to s. 643 (1). The uterine relations are given, a definite share, viz. of  $1/r$  if one, and  $1/3$  if more than one; cf. ss. 643, 644, above.

4 This happens if *MM* (mother's mother) is twice married, the second time to *FF* (father's father); then the son of *MM* and *FF* would bear the two relations mentioned above.

<sup>5</sup> Bond 11, 337.

## SECTION 646.

§ 5.—*The Successor by Contract.*

Successor  
by contract  
inherits in  
absence of all  
blood  
relations.

646. In the absence of all blood relations (subject to the right of the husband or widow to take  $\frac{1}{2}$  or  $\frac{1}{4}$  of the estate) it devolves upon the successor by contract, (if any), *i.e.*, the person whom the deceased has named as his heir in consideration of that person's promising to pay for the deceased any fine or ransom to which the deceased might become liable.<sup>1</sup>

§ 6.—*Return to the Husband.*

Husband  
(or wife ?)  
follows next.

647. In the absence of blood relations, and of the successor by contract, the whole of the estate of the deceased devolves upon the husband of the deceased is a female, but according to the Sharaya'-ul-Islam not upon the widow if the deceased is a male: <sup>2</sup> *sed quaere*.<sup>3</sup>

On the failure of all blood relations and the 'maula' or the successor by contract, the husband takes the whole of the estate; half of it as the Quranic sharer, and the other half reverts to him, thus preventing escheat to the State.<sup>3</sup> *Quaere*, whether the residue (or surplus), does not revert to the wife.<sup>1</sup> See comment to s. 633, above.

§ 7.—*Escheat to the State.*

Escheat to  
State.

648. In the absence of all blood relations and of the husband or widow, and of the successor<sup>4</sup> by contract, (subject to s. 579, above) the estate escheats to the State.<sup>5</sup>

<sup>1</sup> Ball. II. 296, 360. In accordance with strict Shiah law the emancipator of a slave, called the *maula* of manumission (*maula* means relation and *maula* means one having rule) has rights of inheritance prior to those of the successor by contract, Ball. II. 345-360. But those rules can have no application in British India: See s. 5B, above, and comment.

<sup>2</sup> Ball. II. 262 (par. 4), 265 (par. 1), 339, 367 (par. 2). Nor does the right devolve upon the heirs of the successor by contract. There is a difference of view whether the contract is absolutely binding, or may be dissolved by the contracting party, so long as the *maula* has not had to pay any fine by reason of the contract. After he has done so, the contract cannot be revoked or dissolved: Ball. II. 361-362.

<sup>3</sup> Ball. II. 262, (par. 4): "The surplus never reverts to a wife, and reverts to a husband only in the single case of there being no other heir than the *Imam*," *Id.* 339 (par. 1). But see *ib.* 272 (par. 1): "Upon this point, however, there are three different opinions: (a) . . . She takes the remainder by virtue of reverentary right; . . . (b) it never reverts to her . . . (c) it reverts to her on failure, that is during the absence, of the *Imam*, but not if he is present. The right doctrine however is that it never reverts to her."

<sup>4</sup> Ball. II. 362 (par. 3): "With the provisions and restrictions already quoted, respecting the latter," *i.e.*, the widow, cf. s. 647.

<sup>5</sup> Ball. II. 362, 363. See s. 637 above.

"A relation by blood however remote excludes an emancipator SECTION 648. and in like manner an emancipator or his representative in the inheritance of the freed-man, is preferred to the surety for offences, and the surety for offences preferred to the 'Imam'"<sup>1</sup>

TABLE OF HEIRS: SHIAH LAW OF INHERITANCE.

*Husband or Wife.*—The husband or wife's share varies only as provided in s. 641, above. Below are given only the hereditary blood relation. See also s. 640, above, and the comment thereon.

*First Class of Heirs.*

Sub-group.

- (1) Descendants, *and or*
- (2) Father and mother.

*Residue*:—(a) If there is any son (or his descendants) the residue is taken by the son (or his descendants) together with the daughter (or her descendants), in the proportion of a double share to a male 'per stirpes.'

- (b) If there is no son (nor his descendants), the residue is divided amongst the rest of the blood relations (i.e., the daughter or her descendants, and the father and mother) in the proportion of their respective shares.

*Deficit borne by daughter alone.* [There is no deficit (where the heirs of the first class succeed), unless there is a daughter; nor is there any deficit if there is a son, i.e., there is a deficit only where there is a daughter who ranks as a sharer.]

*Second Class of Heirs.*

- (1) Grandparent, how highsoever, *and/or*
- (2) Brothers *and/or* sisters; or, failing them, their descendants.

*Residue taken, or deficit borne, by full sister alone:* If there is no full sister, but consanguine sister the latter bears the deficit; it is doubtful whether she takes the whole of the residue, or divides it with the uterine relations proportionately to their respective shares.

*Third Class of Heirs.*

Uncles *and/or* aunts; or, failing them, their descendants.

The estate is divided on the basis shown in the table in *ill.* (32) to s. 644, above.

<sup>1</sup> Ball. II. 271 (par. 4); cf. *ib.*, 304 (par. 5).

## SECTION 648.

THE HANAFI AND SHIAH SYSTEMS OF INTERPRETING THE QURAN AND  
THEIR RESULTS COMPARED.

1. Under Shiah law not only women, but relations through women are placed on equality with the customary heir.

1. The most important reform by Islam referred to the rights of women. The general provisions of the Quran with reference to inheritance<sup>1</sup>—such as “For men there is a portion of what they earn, and for women a portion of what they earn,” “Men ought to have a part of what their parents and kindred leave; and women a part of what their parents and kindred leave”; have been interpreted by the Hanafis strictly, and as having reference to the pre-Islamic customs and have not been made to alter or affect the notions already existing in Arabia regarding the relative nearness of kinship. So that by the Hanafi interpretation of the law, those women alone compete with the customary heir in whose case the only bar to their recognition (under the customary law) was their sex, *i.e.*, female agnates. The Shiahs on the other hand, have, on the strength of such verses, removed the basic distinction between agnates and cognates. They interpret the verses as giving a right to those who are related through women, ‘*pari passu*’ with those related through men. The result is that with the Shiahs the agnates have no priority over the cognates, and proximity is reckoned merely by counting the connecting links, whether male or female.

2. Adoption by Shiahs of division ‘*per stirpes*.’

2. The verse that a male shall have as much as the share of two females<sup>2</sup> in combination with the verses referred to in the last paragraph, is interpreted by the Shiahs as changing the entire principle of distribution prevailing in the pre-Islamic times, and introducing a distribution ‘*per stirpes*’ instead of ‘*per capita*.’ For, it is clear that if those who are related through females are to succeed as well as those related through males, and if at the same time the males are to get twice as much as females, there must be a distribution at each stage where the sexes of the intermediate links differ, and the step from this to a distribution ‘*per stirpes*’ is an easy one.<sup>3</sup> There is an exception made in the case of the uterine relations, among whom the males and females share alike. This has been explained as a result of the interpretation of the verse of the Quran dealing with the rights of “mother’s children”:<sup>4</sup> “If . . . the deceased have a (uterine) brother or sister each of these two shall have a sixth, and if there are more than this, then let them share in a third,”—wherein no specific statement is made that the males should

<sup>1</sup> Quran IV. 9, 36, 37; VIII. 76; XXXIII. 6.  
These verses are cited in the comment to s. 604, above.

<sup>2</sup> See, however, ss. 629-631, for the Hanafi law according to Imam Muhammad.

<sup>4</sup> Quran IV., 15.

take twice the share of females. The underlying principle has already been indicated, why in this instance the rule giving to males twice as much as to females has not been applied, viz., that the males were given a larger share than the females only in those cases in which the males would have succeeded according to the old law, and the females were introduced for the first time by Islam. But it is evident that the uterine brother no less than the uterine sister, was excluded by the customary law, and that both of them were newly entitled heirs under Islam. There was no reason, therefore, to give to the uterine brother preferential treatment over the uterine sister—any more than there was to prefer the father over the mother in cases where there are descendants of the deceased.

3. The Quranic provision that the daughter is entitled to succeed with the son, is interpreted by the Shiahs as entitling all female descendants to succeed, and similarly the mention in the Quran of the full and consanguine sister, and of the uterine brothers and sisters, are taken to indicate that all collaterals whether male or female, whether of the full blood or of the half blood, rank with the customary heirs in their own line. Moreover, as the Quran provides that the nearest relation shall succeed, and no mention is made about agnates having priority, cognates and agnates in accordance with the Shiah interpretation of the law succeed 'pari passu.' So while the Hanafis give rights of inheritance to the sister (unless she comes into competition with a customary heir who is nearer than herself) but give no such rights to the niece of the deceased (except in default of all male agnates), the Shiahs, on the other hand, take the verse of the Quran as not restricted to the individual instances of the daughter and sister, but as adumbrating a principle that all female and uterine relations shall have rights of the same kind as are expressly stated with reference to the sisters and uterine brothers and sisters. So that a uterine sister's daughter is entitled (under Shiah law) to take the same rights in the estate in competition with a full brother's son, as a uterine sister takes in competition with a full brother.

In Shiah law rights of all females, however remote similar to those of daughter and sister.

4. The Hanafis leave the pre-existing rights of the 'asaba' or<sup>4</sup> agnates,—who were the customary heirs—intact, giving rights in the nature of charges on the estate to those mentioned in the Quran. It is, therefore, necessary for the Hanafi system to divide the heirs into three different classes: the Quranic sharers, the residuaries (consisting mainly of the 'asaba,' or agnates) and the distant kindred (cognates and female agnates). The Shiahs do not leave the old rules of law as they were,

Division of the heirs into three kinds under Hanafi law.

**SECTION 648.** but replace them by a set of rules consisting of a fusion of the customary law and the Islamic reforms, and thus, amongst the Shiah, the classification of heirs becomes important only when we have to deal with the question of the quantum of shares they take, and not for the purpose of considering which persons are entitled to succeed.

5. Under Shiah the principle that parents and descendants may succeed together, extended to ancestors and collaterals.
 

5. The verse about the relative proximity of parents and children, and the provision that the two should succeed concurrently, has received a slightly differing verbal interpretation by the two sects, but the results have been very far reaching. Here again the Hanafis have given to it the more literal meaning, and by their interpretation of it any ascendant how highsoever, shares in the estate with any descendant how low soever. The Shiah on the other hand extract a principle from the instance given. They argue that if F, the father of the propositus, is entitled to succeed with his own grandchildren (and failing them with their descendants), so F's father, FF (the grandfather of the propositus) should similarly be in the same rank with his grandchildren (i.e., the brothers and sisters of the propositus) and failing brothers and sisters, their descendants. On this point the Shafi'is and Malikis take the same view.<sup>1</sup>
6. The mother's right to take 1/3 of the estate not diminished in Shiah law.
 

6. The mother is given by the Quran 1/3 of the estate when the father is living. The Hanafis wishing to preserve the proportion between her share and that of the father, give her 1/3 of only the residue if the husband or wife are living. The Shiah let her take 1/3 of the whole, leaving only 1/6 to the father if there is a husband, and 5/12 if there is a widow of the propositus.

<sup>1</sup> This principle has apparently been restricted to the grandfather, and not followed in regard to the great grandfather, who is made to exclude and not to rank with the uncle.

But the rights of the great-grandfather being of little practical importance, are probably stated without much thought.

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